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ABOUT THE SEVENTH CIRCUIT REVIEW

Purpose

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

The SEVENTH CIRCUIT REVIEW Honors Seminar

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

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

This is an honors seminar. To enroll, students must meet one of the following criteria: (1) cumulative GPA in previous legal writing courses of 3.5 and class rank at the time of registration within top 50% of class, (2) recommendation of Legal Writing 1 and 2 professor and/or Legal Writing 4 professor, (3) Law Review membership, (4) Moot Court Honor Society membership, or (5) approval of the course instructor.
PLAIN ERROR REVIEW IS JUST PLAIN CONFUSING: HOW THE CONFUSED STATE OF PLAIN ERROR REVIEW LED THE SEVENTH CIRCUIT TO GET IT WRONG

APRIL RAMIREZ*


INTRODUCTION

David Resnick was accused of sexually abusing two young boys, among other charges.¹ FBI special agents twice asked Resnick to submit to a polygraph examination, and twice he refused.² In his first refusal, Resnick asserted that he would have to speak to his lawyer before submitting to the polygraph test, noting that polygraph tests were unreliable.³ At trial the prosecution introduced testimony about Resnick’s refusal to take a polygraph test and argued it was evidence of his guilt during closing arguments.⁴ After a four-day trial, the jury

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¹ United States v. Resnick, 823 F.3d 888, 891 (7th Cir. 2016), reh’g en banc denied, 835 F.3d 658, 660 (7th Cir. 2016).
² Id. at 900 (Bauer, J., dissenting)
³ Id.
⁴ Id.
convicted Resnick on all four counts\(^5\) and he was sentenced to life imprisonment.\(^6\)

In *United States v. Resnick*, since the defense did not object to the prosecution’s adversarial use of Resnick’s refusal to take a polygraph test at trial, the Seventh Circuit applied plain error review to assess whether Resnick’s conviction should be reversed.\(^7\) After applying plain error analysis, the majority held that even though the prosecution *might* have violated Resnick’s Fifth Amendment right against self-incrimination, the violation nonetheless failed to rise to the level of plain error.\(^8\)

Plain error analysis is the type of appellate review applied when a party fails to object to an error at the moment it happens during trial.\(^9\) Because of the interest in the finality of judgments, parties are encouraged to make timely objections.\(^10\) To incentivize timely objections, Rule 30 of the Federal Rules of Criminal Procedure prescribes that a party loses its right to appeal an error if an objection to it is not contemporaneously made.\(^11\) However, cases from the early twentieth century held that the public interest required that courts correct errors that harmed the integrity of the judicial system, even when such errors were not timely objected to.\(^12\)

In the last thirty years, the plain error doctrine has changed substantially both in principle and in form. Interpretations by the United States Supreme Court have vastly departed from its original

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\(^5\) The counts included aggravated sexual abuse of a minor, interstate transportation of child pornography, brandishing a firearm in furtherance of a crime, and being a felon in possession of a firearm. *Id.* at 892.

\(^6\) *Id.* In addition to the life sentence, Resnick received a consecutive seven-year sentence.

\(^7\) *Id.* at 896.

\(^8\) *Id.* at 898.


\(^10\) *See Frady*, 456 U.S. at 163.

\(^11\) *Id.* at 162.

articulation. Rather than serving as a protection for both the accused and the whole of society, its current rigidity provides restitution for only those lucky enough to be able to prove their innocence, with little regard for the public’s faith in the fairness of our justice system. The principles in which plain error review is grounded must be revisited and the standard revised.

Part I of this article examines the Supreme Court’s interpretation of the plain error doctrine within the last thirty years and the resultant inconsistent applications by the Court and the Seventh Circuit. Part II of this article analyzes and critiques Resnick’s holding. Finally, Part III proposes a revised version of plain error review more closely aligned with the spirit of the original standard.

PLAIN ERROR REVIEW

A. Background

Federal Rule of Criminal Procedure 52(b) is a codification of the plain error review standard set forth in United States v. Atkinson.\footnote{13} Rule 52(b) provides that “[a] plain error that affects substantial rights may be considered even though it was not brought to the court’s attention.”\footnote{14}

In Atkinson,\footnote{15} the Supreme Court acknowledged that a verdict would not ordinarily be set aside for an error not objected to at trial.\footnote{16}

\footnote{13} United States v. Young, 470 U.S. 1, 7 (1985).
\footnote{14} Fed. R. Crim. P. 52(b).
\footnote{15} 297 U.S. 157 (1936). Atkinson involved a civil action brought against the United States by a plaintiff seeking payment from war risk insurance. He claimed that under the policy, loss of hearing in both ears constituted a total disability. The district court found against the government. On appeal, the government claimed that the jury instruction erroneously stated that the jury could find for the plaintiff on the theory that the plaintiff’s loss of hearing in both years, if permanent, was a permanent disability as defined by the policy. The Fifth Circuit affirmed the district’s court’s holding. The Supreme Court, noting that the government had failed to make a timely objection to the jury instruction, held that any potential error presented by the government was not exceptional enough to correct. Id. at 158-60.
\footnote{16} Id. at 160.
The Court, however, conceded that an appellate court could, under special circumstances, make an exception to this rule. The Court went on to explain when this exception might be appropriate:

In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings.

This came to be known as the original plain review standard. This standard focused on the obviousness of the error and its effect on judicial fairness, reputation, and integrity. In other words, an error was reversible if it was so palpable that not addressing it would harm the integrity of the judicial system or if the error tarnished the judicial system in any other way. After the Atkinson standard was codified by Rule 52(b) in 1944, the type of analysis to determine whether there was an error in need of curing came to be known as “plain error review.” Today’s incarnation of this standard is very distinct from the original version. Rather than focusing on the effect of the error on

17 *Id.*  
18 *Id.* (emphasis added). *Johnson*, which *Atkinson* cited after laying down its standard, placed emphasis on the fact that the integrity and fairness of trials were of public concern and that this public imperative gave the court authority to correct trial errors even when objections were not timely made. “The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict uninfluenced by the appeals of counsel to passion or prejudice. Where such paramount considerations are involved, the failure of counsel to particularize an exception will not preclude this Court from correcting the error.” *Johnson*, 279 U.S. at 318-19 (citing Brasfield v. United States, 272 U.S. 448, 450 (1926)).  
19 *See* United States v. Young, 470 U.S. 1, 7 (1985).  
20 *See Atkinson*, 297 U.S. at 160.  
21 *See id.; Johnson*, 279 U.S. at 318-19.  
22 *See* Fed. R. Crim. P. 52(b).  
the public’s faith in the judicial system, the standard now narrowly centers on the outcome of the particular case.  

B. Inconsistent Application of Plain Error Review by the Supreme Court

In the last thirty years, the Supreme Court has interpreted the plain error review standard inconsistently in different cases, leading to confusion about the standard’s proper application. This inconsistency is evidenced by the Court’s decisions in United States v. Young, United States v. Olano, Johnson v. United States, and United States v. Dominguez Benitez.

In Young, the Court deviated from the Atkinson paradigm and added an additional variable to plain error analysis—the weight of the evidence against the accused. This deviation laid the foundation for the current version of plain error review in which the error is looked at side-by-side with the evidence against the defendant. The addition of this variable initiated the Court’s shift away from the Atkinson framework toward a standard more closely resembling the cause and actual prejudice standard used in collateral review.

24 See id.; Young, 470 U.S. at 19-20.
29 See Young, 470 U.S. at 19-20.
30 See id.
31 A collateral challenge is an appellate request when no timely objection was made at trial and after the time allotted to file an appeal has expired. Because of this, collateral attacks present a higher hurdle to claimants. The type of review applied to this type of appeal is called the cause and actual prejudice standard. Under this standard a convicted defendant must show both (1) a good reason why he failed to make a timely objection and a timely appeal and (2) that the error caused him actual prejudice. This standard is more stringent than plain error review and requires a heightened showing of prejudice. See United States v. Frady, 456 U.S. 152, 165-68 (1982).
The *Young* Court summarized the plain error standard as a rule to be “used sparingly, solely under those circumstances in which a miscarriage of justice would otherwise result.”

Importantly, in its description of the plain error standard, the Court included the second disjunctive prong of the Atkinson standard (serious effect on “the fairness, integrity or public reputation of judicial proceedings”) while omitting the first (“if the errors are obvious”).

The Court proceeded to explain that plain error analysis must also involve evaluating the error against the entire trial record.

The Court concluded that a prosecutor’s remarks expressing his personal belief as to the defendant’s guilt, and admonitions to the jury to “do their job” and convict the defendant, although improper, did not unfairly sway the jury. The majority found that the prosecutorial remarks did not undermine “the fairness of the trial and contribute to a miscarriage of justice” because the weight of the other evidence against the defendant was substantial enough for the jury to hang its hat on. The Court pointed to the fact that not a single witness had supported the defense and that the substantial and uncontradicted evidence indicated, beyond any doubt, the defendant’s deliberateness to defraud a customer.

In his dissent, Justice Brennan, joined by Justice Marshall and Justice Blackmun, cited to *Atkinson* and expressed that a plain error requires reversal of a conviction if the error may be said “either (1) to

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33 See id. at 15; United States v. *Atkinson*, 297 U.S. 157, 160 (1936) (“In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.”) (emphasis added).
34 *Young*, 470 U.S. at 16.
35 *Id*. at 18.
36 *Id*. at 19.
37 *Id*. (“Finally, the overwhelming evidence of respondent’s intent to defraud Apco and submit false oil certifications to the Government eliminates any lingering doubt that the prosecutor’s remarks unfairly prejudiced the jury’s deliberations or exploited the Government’s prestige in the eyes of the jury.”).
have created an unacceptable danger of prejudicial influence on the jury’s verdict, or (2) to have ‘seriously [affected] the … integrity or public reputation of [the] judicial proceedings.’”\(^{38}\) Notably, Justice Brennan kept the standard as a disjunctive test, with either the first or second prong satisfying the standard.\(^{39}\) After concluding that, contrary to the majority’s opinion, there were facts to establish that the prosecutor’s remarks led to “possible prejudice”\(^{40}\) to the defendant, Justice Brennan noted that the majority failed to consider the second disjunctive \textit{Atkinson} prong - whether the prosecutor’s misconduct “seriously [affected] the … integrity or public reputation of [the] judicial proceedings.”\(^{41}\) Justice Brennan expressed concern that prosecutorial improprieties such as the one in this case might present a recurring problem thus endangering the integrity and public reputation of the judicial system.\(^{42}\) Similar to Justice Brennan, Justice Stevens, in a separate dissent, also highlighted the effect of the error on the integrity of the judicial system as an important plain error review factor.\(^{43}\)

In \textit{United States v. Robinson}, 485 U.S. 25 (1988), three years after \textit{Young} was decided, Justice Blackmun acknowledged that the \textit{Young} Court had essentially broken down the \textit{Atkinson} plain error standard into a two-part conjunctive inquiry: \(^{44}\) “whether the error ‘seriously

\(^{38}\) \textit{Id.} at 30 (Brennan, J., dissenting) (emphasis added).

\(^{39}\) \textit{Id.}

\(^{40}\) It is important to note that the term “possible prejudice” is contrary to the majority’s belief that the error, when looked at against the evidence, must show that prejudice existed, not just that it was possible. Justice Brennan’s use of the term “prejudicial impact” further alludes to his belief that a showing of actual prejudice is not required. \textit{See id.} at 31-32.

\(^{41}\) \textit{Id.} at 33 (Brennan, J., dissenting).

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

\(^{43}\) \textit{See id.} at 37 (Stevens, J., dissenting) (“I do not understand how anyone could dispute the proposition that the prosecutor’s comments were obviously prejudicial. Instead, the question is whether the degree of prejudice buttressed by the legitimate interest in deterring prosecutorial misconduct, is sufficient to warrant reversal.”).

\(^{44}\) \textit{See} United States v. Robinson, 485 U.S. 25, 35 (1988) (Blackmun, J., concurring in part, dissenting in part). It is important to note that the original plain
affected substantial rights,’ and whether the error ‘had an unfair prejudicial impact on the jury’s deliberations.’ Although Justice Blackmun agreed that plain error analysis required some form of prejudicial impact inquiry, he expressed that the Young majority’s failure to define the prejudice prong did more harm than good. Justice Blackmun proposed that to clear the confusion, the Court should either formulate a plain error test articulating the prejudice standard, or it should embrace plain error’s lack of rigidity and assert that its language in Young should not be interpreted as a test. He then suggested that a less rigid application of plain error review would be more faithful to the purpose of the plain error doctrine.

Seven years after Young was decided, the Supreme Court in United States v. Olano took the former of Justice Blackmun’s suggestions by creating a more rigid application of plain error review and positing a four-part inquiry focusing heavily on the issue of prejudice. The issue considered in Olano was whether it was plain error for the district court to have allowed an alternate juror to be present during deliberations without obtaining individual waivers from all seven defendants.

In applying Young’s two-part plain error error standard (Atkinson standard) was a disjunctive inquiry—plain error could be found if “the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.” United States v. Atkinson, 297 U.S. 157, 160 (1936) (emphasis added).

45 Robinson, 485 U.S. at 35 (emphasis added). Can’t use id- previous cite has two citations.

46 Id. (“While any application of the plain-error doctrine necessarily includes some form of prejudice inquiry, the Court’s attempt to isolate that inquiry without giving it any substantive definition may have produced more mischief than clarity.”).

47 See id. at 36-37.

48 See id. (quoting Atkinson, 297 U.S. at 160) (suggesting that appellate courts should have more discretion to consider circumstances in which allowing a “conviction to stand would severely undermine ‘the fairness integrity or public reputation of judicial proceedings.’”).


51 Id. at 729-30. Federal Rule of Criminal Procedure 24(c) prohibits the presence of alternate jurors during final jury deliberations: “… An alternate juror
analysis, the Ninth Circuit Court of Appeals first held that the district court erred in allowing the alternate juror’s presence during deliberations. The Ninth Circuit explained that although the juror did not vocally participate in the deliberations, it was possible that the alternate juror conveyed his or her attitudes through body language, therefore having some effect on the other jurors’ decision. Next, the Ninth Circuit answered the two-part plain error inquiry by concluding that the violation was in plain error “because the violation was inherently prejudicial and because it infring[ed] upon a substantial right of the defendants.”

The Ninth Circuit’s application of plain error review prompted the Supreme Court to grant certiorari for the purpose of clarifying the standard. Attempting to unpack the broad language of Rule 52(b), the Court broke down plain error review into four distinct elements.

First, there must be an error. Any deviation from a legal rule is an “error” unless the defendant intentionally waived that rule.

Second, the error must be plain. In order for an error to be “plain,” the legal rule must be clear or obvious under current law.

who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.” Id. at 730 (quoting Fed R. Crim. P. 24(c)).

52 Id. at 730.
53 Id. at 730-31.
54 Id. at 731 (emphasis added).
55 See id.
56 See id. at 732-37.
57 Id. at 732-33.
58 Id. at 733-34 (“If a legal rule was violated during the district court proceedings, and if the defendant did not waive the rule, then there has been an “error” within the meaning of Rule 52(b) despite the absence of a timely objection.”). As an example of intentional waiver, the court explained that a defendant who knowingly and voluntarily pleads guilty cannot then have his conviction overturned by an appellate court on the ground that the trial court erred in not granting him a trial. Id. at 733.
59 Id. at 734.
60 Id.
Third, the error must affect substantial rights. The Court equated “substantial rights” with prejudice and interpreted it to mean that the plain error must have affected the outcome of the district court proceedings. In other words, the error must have been prejudicial to the defendant. In its attempt to articulate what “prejudice” meant in the context of plain error review, the Court explained that appellate courts must determine whether the error “had a prejudicial impact on the jury’s deliberations.” The Court emphasized that normally the defendant must make a specific showing of prejudice to satisfy the “affecting substantial rights” prong. Fourth, plain error may only be noticed to prevent a miscarriage of justice. The Court explained that although an appellate court may correct a plain error that affected a defendant’s substantial rights, it is not obligated to do so unless it would result in a “miscarriage of justice.” Specifically, the Court asserted that a plain error affecting substantial rights should only be corrected if, after satisfying the preceding three prongs, the error also

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61 *Id.*
62 The Court later proclaimed that it need not decide whether “affecting substantial rights” is always synonymous with “prejudicial.” *Id.* at 735.
63 *Id.* at 734.
64 *Id.*
65 *Id.* (quoting United States v. Young, 470 U.S. 1 at 17, n. 14). The Court differentiated harmless error review from plain error review and explained that although the two share the same basic inquiry, was the error prejudicial, in plain error review it is the defendant, and not the prosecution, that bears the burden to persuade the court that he or she was prejudiced by the error. *Id.*
66 *Id.* at 735. The Court also stated that there might be a special category of forfeited errors that could be corrected regardless of their impact on the outcome of the case, as well as cases in which the errors should be presumed to be prejudicial and require no proof from the defendant. *See id.* Unfortunately, the Court declined to explain when those special circumstances would apply.
67 *Id.* at 736.
68 *Id.* (noting that in the collateral review context, “the term ‘miscarriage of justice’ means that the defendant is actually innocent,” but that Rule 52(b) is not a remedy only for cases in which the defendant is actually innocent).
“seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.”

After applying this four-part inquiry to the facts of the case, the majority concluded that although allowing the alternate juror to be present during the jury deliberations was plain error, the error did not affect the defendants’ substantial rights. The Court explained that the ultimate question in its application of the third prong, was whether the error affected the jury’s deliberations and verdict either specifically or presumptively. In holding that there was no prejudicial effect, therefore no substantial rights violation, the Court pointed to the fact that the record contained no direct evidence that the alternate juror’s presence influenced the verdict. Specifically, the Court explained that the defendants failed to show that the alternate juror either participated in the deliberation or produced a chilling effect on the regular jurors with his or her body language. The Court also declined to presume that the error was inherently prejudicial, as the Ninth Circuit had done. The Court reasoned that because the alternate juror was instructed by the judge not to participate in the deliberations, the Ninth Circuit should not have presumed that this instruction had been disregarded. Because the third prong of the Court’s plain error test was not satisfied, the Court did not consider the fourth—whether the error “seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.”

Contrary to the majority, the three dissenters in Olano, led by Justice Stevens, concluded that the defendants’ substantial rights had

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69 Id. 736-37 (“a plain error affecting substantial rights does not, without more, satisfy the Atkinson standard …”).

70 Id. at 737-38.

71 Id. at 739.

72 Id.

73 Id.

74 Id. at 740.

75 See id. (“[I]t is] the almost invariable assumption of the law that jurors follow their instructions.”) (quoting Richardson v. Marsh, 481 U.S. 200, 206 (1987)).

76 Id. at 741.
been violated.\textsuperscript{77} Justice Stevens de-emphasized the importance of prejudicial impact in plain error review and instead stressed the importance of preventing injury to the integrity of the judicial system.\textsuperscript{78} Some defects affecting the jury’s deliberative function, he explained, are subject to reversal regardless of whether the defendant can show prejudice, “not only because it is so difficult to measure their effects on a jury’s decision, but also because such defects ‘undermine the structural integrity of the criminal tribunal itself.’”\textsuperscript{79}

The opinions in \textit{Johnson v. United States}\textsuperscript{80} and \textit{United States v. Dominguez Benitez}\textsuperscript{81} reflect how difficult \textit{Olano} made plain error analysis to apply. In \textit{Johnson}, the petitioner argued that the district court had committed plain error in deciding the element of materiality in a perjury case instead of submitting that issue to the jury.\textsuperscript{82} After determining that the current law stated that the jury must decide the question of materiality in a perjury case, the Court determined that the lower court had committed an error and the error was plain.\textsuperscript{83} The Court then decided that because the defendant failed to meet the fourth prong of the \textit{Olano} test, it need not decide the third.\textsuperscript{84}

As in \textit{Olano}, the Court in \textit{Johnson} focused heavily on the prejudice component—the error’s effect on the outcome of the defendant’s case.\textsuperscript{85} However, instead of applying the prejudice inquiry to the third prong of the \textit{Olano} test, the Court applied it to the fourth

\textsuperscript{77} \textit{Id.} at 743 (Stevens, J., dissenting).
\textsuperscript{78} \textit{See id.} at 743-44 (Stevens, J., dissenting) (returning to the original \textit{Atkinson} standard where plain error may be found “if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings”) (emphasis added).
\textsuperscript{79} \textit{Id.} at 743 (quoting Vasquez v. Hillery, 474 U.S. 254, 263-64 (1986)).
\textsuperscript{80} 520 U.S. 461 (1997)
\textsuperscript{81} 542 U.S. 74 (2004).
\textsuperscript{82} \textit{Johnson}, 520 U.S. at 463.
\textsuperscript{83} \textit{Id.} at 467.
\textsuperscript{84} \textit{Id.} at 469 (explaining that even assuming the error did affect substantial rights of the defendant, there was no plain error because the defendant was not able to meet the fourth \textit{Olano} prong).
\textsuperscript{85} \textit{See id.} at 469-70
(whether not noticing the error would result in a miscarriage of justice). The Court concluded that the fourth prong was not met because the defendant had failed to show that the error had prejudiced the outcome of his case. It explained that the evidence supporting the materiality of the false statement was overwhelming and uncontroversial at trial. Therefore, the Court continued, whether the issue of materiality would have gone to the jury instead of mistakenly going to the judge made no difference in the outcome of the trial; the jury, like the judge, would have also decided that the false statement was material. By applying a prejudice inquiry to the fourth prong, the Johnson Court expanded the weight to be given to prejudice, creating a higher hurdle for plain error appellants and shifting the focus of plain error review further away from the original Atkinson standard.

In Dominguez Benitez, the Court asserted a standard of measurement for determining whether the degree of prejudice was enough to satisfy Olano’s substantial rights prong. The Court followed United States v. Bagley, in invoking a reasonable probability standard—a requirement that a defendant show “a reasonable probability that, but for [the error claimed], the result of the proceeding would have been different.” The Court explained that a court may notice a plain error if after reviewing the entire record, the

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86 See id.
87 See id.
88 Id. at 470.
89 See id.
90 Recall that the original standard in Atkinson was more broadly focused on the error’s effect on the integrity of the court and the public’s faith in it. See United States v. Atkinson, 297 U.S. 157, 160; see also New York C.R. Co. v. Johnson, 279 U.S. 310, 318-319 (emphasizing that trials are never purely just about the litigants involved and the public’s interests must be served).
93 Dominguez Benitez, 542 U.S. at 82-83.
probability of a different result is “sufficient to undermine confidence in the outcome of the proceeding.”

In his concurrence, Justice Scalia drew attention to the confused state of prejudice standards. He pointed out that the Court at the time had adopted at least four different standards for assessing prejudice. Among these were: (a) the harmless beyond a reasonable doubt standard for use on direct review of a constitutional error and conviction; (b) the substantial and injurious effect or influence standard for use on collateral review; (c) the reasonable probability standard such as the one used by the majority in the present case; and (d) the less-defendant friendly more likely than not standard for use on claims of newly discovered evidence after conviction. Noting the difficulty of applying different gradations of prejudice to hypothesized outcomes, he concluded that the traditional “beyond a reasonable doubt” and “more likely than not” standards were the only workable standards for plain error prejudice analysis.

94 Id. at 83.
95 See id. at 86-87 (Scalia, J., concurring).
96 Id. at 86.
100 See Strickland, 466 U.S. at 693-94.
101 See Dominguez Benitez, 542 U.S. at 86 (“Such ineffable gradations of probability seem to me quite beyond the ability of the judicial mind (or any mind) to grasp, and thus harmful rather than helpful to the consistency and rationality of judicial decisionmaking.”).
102 Id. at 87 (“I would hold that, where a defendant has failed to object at trial, and thus has the burden of proving that a mistake he failed to prevent had an effect on his substantial rights, he must show that effect to be probable, that is, more likely than not.”).
C. Inconsistent Application of Plain Error Review by the Seventh Circuit

The confusion as to the correct application of plain error analysis has led the Seventh Circuit to produce inconsistent holdings. In *United States v. Paladino*, the Seventh Circuit Court acknowledged this confusion as it struggled to differentiate the “substantial rights” prong from the “fairness and integrity” prong of *Olano*. It suggested two different sets of interpretations for both of these prongs.

The first, more rigid, interpretation was that the third element, “substantial rights,” required a showing of prejudice—but for the error, the verdict might have been different. The fourth element, “fairness, integrity, or public reputation” required a showing that, absent intervention by an appellate court, there would be a miscarriage of justice—the result would be intolerable (such as the conviction of an innocent person).

The second, more lenient, interpretation suggested by the Seventh Circuit was that the showing of prejudice should be applied to the fourth prong, not the third. The court proposed that in this second interpretation, “substantial rights” referred to an important right, rather than a mere technical right, and that to satisfy the fourth prong, a defendant must show prejudice—the likelihood that the verdict “was actually affected by the error.”

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103 Compare *United States v. Tucker*, 714 F.3d 1006 (7th Cir. 2013); *United States v. Hills*, 618 F.3d 619 (7th Cir. 2010); *United States v. Ochoa-Zarate*, 540 F.3d 613 (7th Cir. 2008); *United States v. Paladino*, 401 F.3d 471 (7th Cir. 2005) with *United States v. Resnick*, 823 F.3d 888, 891 (7th Cir. 2016), *reh’g en banc denied*, 835 F.3d 658 (7th Cir. 2016).
104 401 F.3d 471 (7th Cir. 2005).
105 See id. at 481 (“[T]he difference between the ‘substantial rights’ and ‘fairness, integrity, or public reputation’ elements of the plain error standard is not entirely clear.”).
106 Id.
107 Id.
108 Id.
109 Id. at 482 (emphasis added).
Even though the majority declined to express which interpretation the court should adopt, it proceeded to explain plain error review in terms of requiring a showing of probable prejudice and of innocence. In his dissent, Judge Ripple, joined by Judge Kanne, acknowledged that the majority had implicitly adopted the more stringent plain error interpretation, and he rejected this rigid interpretation.

Similar to the error in Resnick, the alleged error in United States v. Hills involved a Fifth Amendment violation. In Hills, a defendant who had been convicted of conspiracy and filing false tax returns, alleged that the prosecution had committed misconduct when it made negative remarks in its closing argument about invoking the Fifth Amendment right not to testify. Since the defense had failed to object to the prosecutor’s comments at trial, the court began its analysis by iterating the Olano four-part plain error review test.

The court first determined that the prosecution’s comments were made in error because it cast the defendant’s invocation of her constitutional right in a negative light, which the court explained was the very thing the right against self-incrimination sought to protect.

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110 See id. (reasoning that since there was plain error under the more rigid test, the court need not pick which of the two interpretations should be applied).
111 See id. (“If an error is committed and the defendant is convicted, the appellate court has only to consider whether the defendant would probably have been acquitted had the error not occurred. If so—if the error may well have precipitated a miscarriage of justice (which the conviction of an innocent person is)—it is plain error and the defendant is entitled to a new trial.”). Importantly, the challenged error in this case happened during the sentencing phase as opposed to the guilt determination phase. See id.
112 See id. at 486 (Ripple, J., dissenting).
113 618 F.3d 619, 639 (7th Cir. 2010).
114 Id. The prosecution made the following remarks: “And you don’t really need to worry about the Fifth Amendment protection unless you’re worried that you’re [d]oing something illegal;” “They’re using the Fifth Amendment not as a shield to protect themselves from incrimination, but as a sword to prevent the IRS from getting the information that they are entitled to.” Id. at 640.
115 Id. at 639-40.
116 Id. at 641.
Next, the court held that the district court’s allowance of the prosecutorial statements was plain error for two reasons. First, the court explained that the district judge had expressly warned the prosecution to refrain from referring to the Fifth Amendment, and yet the prosecution proceeded to reference the Fifth Amendment anyway. Second, and most importantly, the court applied the prejudice test to the second prong. The court honed in on the egregiousness of the error itself explaining that there was more than a “nontrivial possibility” that the references might have determined the outcome of the case. In applying the crucial prejudice test to the error itself, the court shifted the focus of the analysis to the gravity of the error itself, away from the determinative influence of other evidence.

After establishing that the prosecutorial remarks were plain error, the court moved on to the third Olano inquiry—whether the error affected the defendant’s substantial rights. The analysis the court employed in determining this third prong consisted of a consideration of five harmless error factors: “(1) the intensity and frequency of the references, (2) which party elected to pursue the line of questioning, (3) the use to which the prosecution put the silence, (4) the trial judge’s opportunity to grant a motion for a mistrial or give a curative instruction, and (5) the quantum of other evidence indicative of guilt.”

117 Id.
118 Id.
119 Id.
120 Id.
121 Id.
122 Harmless error, codified as Federal Rule of Criminal Procedure 52(a), is another type of direct appellate review where there is a “consideration of error raised by a defendant’s timely objection, but subject to an opportunity on the Government’s part to carry the burden of showing that any error was harmless, as having no effect on the defendant’s substantial rights.” United States v. Vonn, 535 U.S. 55, 62 (2002).
123 Hills, 618 F.3d at 641.
Subsequent to applying these five factors, the Seventh Circuit held that the prosecutorial remarks had affected the defendant’s substantial rights. The court explained that despite the judge’s explicit warning to refrain from doing so, the prosecution twice made reference to the Fifth Amendment, the judge did not procure any curative measures to prevent the jury from making improper use of the remarks, and all of the evidence against the defendant was circumstantial.

Finally, in concluding that the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings, the court reasoned that if it failed to correct this error, the government would feel entitled to intrude on defendants’ Fifth Amendment rights in future cases. The Seventh Circuit explained that this would disenfranchise the public from their constitutional right, thereby injuring the integrity of the judicial system and the respect for constitutional rule of law.

**United States v. Resnick**

**A. Resnick Opinion**

The Resnick majority, consisting of Judge Wood and Judge Sykes, held that the prosecution’s incriminating use of Resnick’s refusal to take a polygraph exam did not rise to the level of plain error. Justice

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124 Id.
125 Id. at 641-42. Curiously, earlier in the opinion, the court had rejected another appeal made by the defendant in which she claimed that the evidence introduced against her at trial had not been sufficient to support both of her convictions. In addressing this claim, the court concluded there was strong enough circumstantial evidence for her conspiracy conviction, and that “there was more than enough circumstantial evidence to establish that she was guilty of filing false tax returns. Id. at 638-39.
126 Id. at 642.
127 Id.
128 United States v. Resnick, 823 F.3d 888, 898 (7th Cir. 2016), reh’g en banc denied, 835 F.3d 658 (7th Cir. 2016).
Bauer dissented.\textsuperscript{129} After applying the \textit{Olano} four-pronged test for plain error, the court reasoned that any error by the prosecution was not plain and did not affect Resnick’s substantial rights in light of the whole record.\textsuperscript{130}

1. Plain Error

The court explained that it had no need to answer the first \textit{Olano} question of whether the prosecution’s introduction of Resnick’s silence was erroneous.\textsuperscript{131} It reasoned that because any error was not plain, there was no need to decide this preliminary inquiry.\textsuperscript{132} In considering whether the prosecution’s actions were \textit{plain} error, the court discussed two potential types of error the prosecution might have committed—evidentiary and constitutional.\textsuperscript{133}

First, the court considered whether the district court violated any evidentiary rules by admitting Resnick’s refusal to take a polygraph test into evidence.\textsuperscript{134} The Seventh Circuit began by agreeing with Resnick about the dubiousness of polygraph exams and the risk of unfair prejudice.\textsuperscript{135} It noted that while the judicial and scientific communities were well aware of the criticism polygraph tests face, lay people still assigned the polygraph an “aura of infallibility,” which could cause jurors to heavily rely on polygraph evidence to assess credibility and guilt.\textsuperscript{136} After asserting a litany of cases across different jurisdictions that rejected polygraph evidence, either through dicta or

\textsuperscript{129} \textit{Id.} at 890.
\textsuperscript{130} \textit{See id.} at 898.
\textsuperscript{131} \textit{Id.}
\textsuperscript{132} \textit{Id.}
\textsuperscript{133} \textit{Id.} at 896-98.
\textsuperscript{134} \textit{Id.} at 896-97
\textsuperscript{135} \textit{Id.}
\textsuperscript{136} \textit{Id.} at 897.
per se rules, the Seventh Circuit averred that its own precedent pointed only towards the exclusion of polygraph evidence.\textsuperscript{137}

However, the court also stated that, unlike other circuits, it had never established a blanket rule excluding the use of polygraph evidence.\textsuperscript{138} Instead, the court continued, the Seventh Circuit had given district courts substantial discretion on the issue.\textsuperscript{139} The court concluded by stating that because the law on polygraph evidence was not settled and the case against Resnick was “airtight,” it could not definitively say that admitting the refusal to submit to a polygraph was plain error.\textsuperscript{140}

Next, the court turned to the issue of whether Resnick suffered a Fifth Amendment violation by having his right to silence used against him.\textsuperscript{141} The court began by acknowledging that a polygraph examination is almost always a custodial interrogation triggering \textit{Miranda} rights.\textsuperscript{142} Therefore, the court continued, “absent a waiver of [F]ifth [A]mendment rights, a person may not be compelled to submit to a polygraph examination.”\textsuperscript{143} The court then recognized that the “natural corollary” to that rule is that a defendant’s refusal to submit to a polygraph cannot be used against him as evidence.\textsuperscript{144} It nonetheless reasoned that because the Seventh Circuit had never explicitly held that the refusal to take a polygraph violated the Fifth Amendment, any error committed by the district court was not plain.\textsuperscript{145} Finally, the court added that any prejudice to Resnick was

\textsuperscript{137} \textit{Id.} at 896-97 (“It is no surprise that our own decisions have, in practice, pointed in only one direction: affirming the exclusion of polygraph evidence.”).
\textsuperscript{138} \textit{Id.} at 897.
\textsuperscript{139} \textit{Id.}
\textsuperscript{140} \textit{Id.}
\textsuperscript{141} \textit{Id.}
\textsuperscript{142} \textit{Id.} Miranda rights include the right to remain silent and the right to an attorney. \textit{Miranda v. Arizona}, 384 U.S. 436, 478-79 (1966). A custodial interrogation is any type of police questioning while an individual is deprived of his freedom in any significant way. \textit{Id.} at 478.
\textsuperscript{143} \textit{Resnick}, 823 F.3d at 897.
\textsuperscript{144} \textit{Id.}
\textsuperscript{145} \textit{Id.} at 898.
minimal, as his refusal to take a polygraph was mentioned only once by each side during closing, the other evidence against him was strong, and his credibility could not have been impaired since he did not testify at trial.\footnote{Id. at 898.}

2. Substantial Rights

The court concluded by noting that Resnick failed to make a specific showing of prejudice in order to satisfy the substantial rights prong of the \textit{Olano} test.\footnote{Id.} It argued that because the record as a whole pointed towards Resnick’s guilt, any error committed during his trial had no effect on his substantial rights.\footnote{Id.}

\textbf{B. Justice Bauer’s Dissent}

Contrary to the majority, Justice Bauer argued that the district court had committed reversible plain error.\footnote{Id. (Bauer, J., dissenting).} He asserted that the district court’s errors were both constitutional and evidentiary in nature.\footnote{Id. at 901 (Bauer, J., dissenting).} In addition to noting that precedent concerning evidentiary rules clearly established that polygraph evidence should be excluded, Justice Bauer explained that precedent also clearly and obviously established that the Fifth Amendment prohibited a defendant’s right to silence being used against him.\footnote{Id. at 899 (Bauer, J., dissenting) (“[T]he constitutional privilege against self-incrimination … grant[s] … an absolute right.”) (quoting Greene v. Finley, 749 F.2d 467, 472 (7th Cir. 1984)). Judge Bauer further noted that “the government is ‘prohibit[ed] … from treat[ing] a defendant’s exercise of his right to remain silent at trial as substantive evidence of guilt.’” \textit{Id.} (citing United States v. Ochoa-Zarate, 540 F.3d 613, 617 (7th Cir. 2008)). Additionally, “[i]f a defendant refuses to testify or invokes his \textit{Miranda} rights, the prosecutor cannot comment on this refusal to the jury.” \textit{Id.} (citing Miranda v. Arizona, 384 U.S. 436, 468 (1966)).} He asserted that the district court
had violated a bedrock principle of the criminal justice system by imposing a penalty on a defendant for his exercising of a constitutional privilege.\textsuperscript{152}

Justice Bauer was also disturbed by the majority’s use of other evidence against Resnick in its plain error analysis.\textsuperscript{153} He explained that the majority’s reasoning implied that a court could ignore a defendant’s rights if the evidence against him was strong enough.\textsuperscript{154} He continued by asserting that the majority had misunderstood \textit{Olano}’s fourth prong, and thereby was misinterpreting plain error review by implying that a defendant must prove his innocence in order for a plain error correction to be warranted.\textsuperscript{155} The only issue on appeal, Justice Bauer argued, was whether Resnick received a fair trial, and the gravity of the district court’s error indicated that he had not.\textsuperscript{156}

\textbf{THE SEVENTH CIRCUIT WRONGLY DECIDED RESNICK}

The Seventh Circuit erred in its Resnick decision in four ways: (1) it failed to recognize that evidence incriminating a defendant for refusing to take a polygraph clearly violates the Fifth Amendment; (2) it ignored the gravity of the error; (3) it placed too much emphasis on the other evidence against Resnick; and (4) it ignored the error’s injurious effect to the integrity of the judicial system. The Seventh Circuit’s wrongful holding in \textit{Resnick} is not surprising, however, given the disarrayed state of the plain error doctrine.

\textsuperscript{152} \textit{Resnick}, 823 F.3d at 901 (Bauer, J., dissenting).
\textsuperscript{153} \textit{Id.} at 902 (Bauer, J., dissenting).
\textsuperscript{154} \textit{Id.}
\textsuperscript{155} \textit{Id.} (“[T]he Supreme Court noted in \textit{Olano} that ‘we have never held that’ remand for plain error ‘is only warranted in cases of actual innocence.’ This court has reaffirmed that a defendant need not ‘establish actual innocence’ under \textit{Olano} plain error review to trigger remand.” (citing United States v. Driver, 242 F.3d 767, 771 (7th Cir. 2001)).
\textsuperscript{156} \textit{Id.}
A. The Seventh Circuit Failed to Appropriately Regard a Well-Recognized Constitutional Protection

The *Resnick* majority asserted that because the Seventh Circuit had never before explicitly held that the refusal to take a polygraph test implicated the Fifth Amendment, the prosecution’s use of Resnick’s refusal to take such a test was not plain error. However, the court’s reasoning for such a conclusion was acutely unsound and contradictory.

The majority spent a considerable amount of time explaining why polygraph examinations trigger Fifth Amendment protections. The court not only contended that polygraph examinations elicit Fifth Amendment protections, but also that generally, that a defendant’s refusal to submit to a polygraph may not be used as incriminating evidence. To support this contention, the court cited to other circuit court opinions which have explicitly held that a defendant’s refusal to submit to a polygraph examination cannot be used against him. The court noted that a polygraph examination is almost always a custodial interrogation, which triggers *Miranda* rights, particularly the right to silence. Therefore, the court asserted, a person may not be compelled to submit to a polygraph test, assuming the individual has not waived his right.

Perplexingly, after acknowledging that using a defendant’s refusal to submit to a polygraph violated the Fifth Amendment, the majority concluded that the prosecution’s use of Resnick’s refusal was not a plain error, as it had “never before held that the refusal to take a polygraph implicate[d] the Fifth Amendment.” This implied that in

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157 *Id.* at 898.
158 *Id.* at 897-98
159 *Id.* at 897.
160 *Id.* at 897-98 (citing Garmon v. Lumpkin Cnty., Ga., 878 F.2d 1406, 1410 (11th Cir. 1989) and United States v. St. Clair, 855 F.2d 518, 523 (8th Cir. 1988)).
161 *Id.* at 897.
162 *Id.*
163 *Id.* at 898.
order for a rule to be “clear,” the Seventh Circuit must have previously ruled explicitly on a specific matter.

However, a rule, law, or precedent need not specify every type of circumstance which would fall under its purview. For example, an ordinance that prohibits motor vehicles from travelling in excess of thirty-five miles per hour on a roadway need not specify all modes of transportation qualifying as “motor vehicles.” Perhaps the first thing that comes to mind is a car, but it would be illogical to reason that because the ordinance didn’t specifically state that it also applied to motorcycles, motorcycles somehow fell out of the ordinance’s ambit; a motorcycle is a type of motor vehicle after all.

Likewise, just because the Seventh Circuit has never explicitly ruled that a polygraph examination triggers the Fifth Amendment right to silence, it does not mean that a polygraph exam doesn’t fall under the Fifth Amendment ambit. Just like in the motor vehicle example above, a polygraph examination is a type of custodial interrogation, which the Supreme Court has clearly stated triggers the Fifth Amendment right to silence and to not have that silence used against the accused.164

B. The Seventh Circuit Ignored the Gravity of the Error

The court failed to notice how the credibility of Resnick’s case might have been undermined by the prosecution’s comments about his refusal to submit to a polygraph. The court itself acknowledged that polygraph evidence entails a substantial possibility of prejudice because “the aura of infallibility attending polygraph evidence can lead jurors to abandon their duty to assess credibility and guilt.”165 This misguided reliance, the court continued, had the possibility of leading jurors to believe that a person who refuses to take a polygraph

has something to hide. The court acknowledged that because of this reason, Seventh Circuit decisions reflected the unanimous exclusion of polygraph evidence. However, the court dismissed the importance of the prosecution’s actions in this case, reasoning that the Seventh Circuit had never adopted a blanket rule excluding polygraph evidence.

In *Chapman v. California*, the Supreme Court acknowledged the egregiousness of introducing a defendant’s exercise of his constitutional right to silence as incriminating evidence. Although it refused to hold that any and all constitutional violations constituted reversible error, the Court equated the flagrancy of admitting a defendant’s constitutional silence as evidence with a coerced confession, and held that such an inference of guilt could not be considered a harmless error. “An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot, under *Fahy*, be conceived of as harmless.”

In his dissent, Judge Bauer also recognized the abhorrence of this type of error. Judge Bauer explained that the error committed by the district court in *Resnick*, violated a bedrock principle of the criminal justice system—imposing a penalty for exercising a constitutional right. He correctly pointed out that by admitting Resnick’s refusal to

166 Id. at 896.
167 Id. at 897.
168 Id.
169 See *Chapman v. California*, 386 U.S. 18, 26 (1967)
170 Id.
171 *Fahey v. Connecticut*, 375 U.S. 85, 86-87 (1963) (concluding that constitutional errors which had a reasonable possibility of contributing to the conviction should not be treated as harmless).
172 *Chapman*, 386 U.S. at 23-24; *id.* at 26 (explaining that “Petitioners [were] entitled to a trial free from the pressure of unconstitutional inferences.”).
take a polygraph as substantive evidence, it implicitly led the jury to believe that polygraph tests are reliable and probative.\textsuperscript{174} This misguided belief, he argued, tainted the entire case by inducing the jurors to place an undue amount of weight on Resnick’s refusal to take a polygraph, thereby undermining Resnick’s credibility.\textsuperscript{175}

Finally, the court failed to take the context in which the comments by the prosecution were made into account. The Supreme Court has held that a prosecutor’s wrongful comments must be looked at in context to determine their egregiousness.\textsuperscript{176} In \textit{Young}, the Court held that the prosecution’s comments about its personal beliefs as to the defendant’s guilt\textsuperscript{177} were not plain error.\textsuperscript{178} The Court reasoned that because the prosecution’s comments came as a response to the defense counsel’s insinuation that not even the prosecution believed in the defendant’s guilt, the prosecution was merely defending his personal impression since defense counsel had asked for it.\textsuperscript{179} The Court explained that any potential harm from the prosecutor’s remark was mitigated by the fact that the jury understood that the comments were only made to defend an insinuation.\textsuperscript{180} The Court concluded that although the prosecution’s comments were wrongful, they did not compromise the jury’s deliberations.\textsuperscript{181}

Similar to the Supreme Court, the Seventh Circuit has held that prosecutorial comments referencing a defendant’s constitutional rights must be viewed in context of whether (1) the prosecutor manifestly

\textsuperscript{174}Resnick, 823 F.3d at 901-02 (Bauer, J., dissenting).
\textsuperscript{175}Id. (Bauer, J., dissenting).
\textsuperscript{176}See United States v. Young, 470 U.S. 1, 10-11, 13-14 (1985); Robinson, 485 U.S. at 33 (explaining that a prosecutorial comment as to a defendant’s silence must be looked at in the context under which the comment was made).
\textsuperscript{177}A prosecutor may not comment as to his or her own personal belief as to the defendant’s guilt because “the prosecutor’s opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government’s judgment rather than its own view of the evidence.” \textit{Young}, 470 U.S. at 18-19.
\textsuperscript{178}Id. at 20.
\textsuperscript{179}Id. at 17-18.
\textsuperscript{180}Id.
\textsuperscript{181}Id. at 18.
intended to use the defendant’s exercise of his right as evidence of guilt, or (2) the character of the remark would lead a jury to naturally and necessarily treat it as evidence of defendant’s guilt.\textsuperscript{182} In \textit{Resnick},\textsuperscript{183} the prosecution very clearly intended to use Resnick’s refusal to submit to a polygraph as substantive evidence of his guilt. First, the prosecution used Resnick’s refusal in its case in chief.\textsuperscript{184} During direct examination, one of the FBI agents who searched Resnick’s home testified that Resnick had declined to take a polygraph without speaking to his counsel first and that, to his knowledge, Resnick never did end up taking one.\textsuperscript{185} Moreover, during its closing argument, the prosecution told the jury it wanted to leave them with defendant’s lies.\textsuperscript{186} It proceeded to publish a demonstrative exhibit listing Resnick’s answers to interview questions and noted that Resnick had refused to take a polygraph.\textsuperscript{187} The prosecution then asserted that this refusal, coupled with his other denials, evidenced Resnick’s consciousness of guilt.\textsuperscript{188} Both of these instances, especially when coupled together, are an explicit, barefaced use of Resnick’s exercise of his right to silence as substantive evidence of guilt. Furthermore, it is indisputable that these overtly incriminating remarks would be very likely to lead a jury to treat them as such.

\textbf{C. The Seventh Circuit Placed an Inordinate Amount of Emphasis on the Other Evidence Against Resnick When Evaluating Prejudice}

By focusing on the “overwhelming” evidence against Resnick to ultimately conclude that Resnick’s substantial rights were not affected,

\textsuperscript{182} United States v. Ochoa-Zarate, 540 F.3d 613, 618 (7th Cir. 2008).
\textsuperscript{183} United States v. Resnick, 823 F.3d 888 (7th Circ. 2016), \textit{reh’g en banc} \textit{denied}, 835 F.3d 658 (7th Cir. 2016).
\textsuperscript{184} \textit{Id.} at 892.
\textsuperscript{185} \textit{Id.}
\textsuperscript{186} \textit{Id.} at 900 (Bauer, J., dissenting).
\textsuperscript{187} \textit{Id.}
\textsuperscript{188} \textit{Id.}
the Seventh Circuit turned plain error analysis into an inquiry over Resnick’s guilt or innocence—a question not at issue under plain error analysis. Most disturbingly, as Judge Bauer pointed out in his dissent, the court’s holding implied that a court may ignore egregious violations of a defendant’s constitutional rights if the evidence against him is strong enough. Because jurors are not mandated to give the reasons for their decisions, in most cases it would be impossible for a defendant to show that an error influenced the jurors’ decision. As Judge Bauer pointed out in his dissent in Resnick, only a defendant who could show he was innocent would be able to make a showing that he suffered actual prejudice at the hands of an error. For these reasons, instead of considering the “overwhelming evidence” against Resnick as the dispositive factor, the Seventh Circuit should have followed the precedent set by Hills to determine whether Resnick’s substantial rights were affected.

Notwithstanding the fact that neither the Atkinson standard nor the language of Rule 52(b) implicate the weight of evidence against the accused as part of plain error analysis, Judge Bauer, in his dissent on petition for rehearing en banc, aptly noted that “[t]here is no evidentiary demarcation line that when traversed with enough damning evidence of guilt permits the government and the court to deny a criminal defendant the right to a fair jury trial.”

189 See id. at 902 (Bauer, J., dissenting) (“Resnick’s guilt is not at issue on appeal; we only review whether he received a fair trial.”).
190 See id.
191 See United States v. Olano, 507 U.S. 725, 743 (1993) (Stevens, J., dissenting) (explaining that some errors bearing on the jury’s deliberations are subject to reversal partly because it is very difficult to measure the errors’ effect on the jury’s decision).
192 See Resnick, 823 F.3d at 902 (Bauer, J., dissenting).
193 The court in Hills applied a five-factor harmless error analysis to determine whether a defendant’s substantial rights were affected. United States v. Hills, 618 F.3d 619, 641 (7th Cir. 2010).
194 Judge Posner, Judge Flaum, and Judge Kanne joined in the dissent.
195 United States v. Resnick, 835 F.3d 658, 660 (7th Cir. 2016) (dissent from denial of rehearing en banc).
D. The Court Ignored the Injurious Effect of the Error to the Integrity of the Judicial System.

As explained earlier, the Atkinson Court was concerned with an error’s broad effect on the integrity of the judicial system.\textsuperscript{196} However, the Seventh Circuit made no mention of this principle in its Resnick decision. As Judge Bauer recognized, the gravity of the district court’s error affected the integrity of judicial proceedings.\textsuperscript{197} The implications of allowing this type of error undermine the authority of the Constitution and give the government a carte blanche to violate a defendant’s rights at trial. As long as there is enough evidence against the accused, the prosecution may feel free to use a defendant’s constitutional privileges against him. Just as the Seventh Circuit should have followed its decision in Hills to determine whether Resnick’s substantial rights had been affected, it should have also turned to Hills in its analysis of Olano’s fourth prong. In Hills, the court embraced Atkinson’s principle—the court looked beyond the effect of the error to just the defendant.\textsuperscript{198} Instead, the court accounted for the error’s injury to the integrity of the judicial system and for the demoralization of the Constitution.\textsuperscript{199} I think you need a concluding thought here to tie this section up.

How Plain Error Review Should Be Corrected

Given the confusion created by the complexity of the Olano four-part inquiry it is not surprising that the Seventh Circuit wrongly decided Resnick. This confusion is patently apparent in the discrepancy between the Hills decision and the Resnick opinion despite the similarity of the facts. Today’s version of plain error

\textsuperscript{197} Resnick, 823 F.3d at 902 (Bauer, J., dissenting).
\textsuperscript{198} See Hills, 618 F.3d at 642.
\textsuperscript{199} Id.
analysis has strayed too far from the principles supporting Atkinson. Instead of focusing on the gravity of an error or its effect on the integrity of the court, today’s standard narrowly focuses on the effect of the error on the particular outcome of a case. This is evidenced by Olano’s requirement of a showing of actual prejudice by a defendant. As discussed earlier in this Comment, this is not a part of the plain error doctrine. Instead, this extremely high hurdle is more reminiscent of the more stringent cause and actual prejudice standard as explained in United States v. Frady. For all practical purposes, a showing of actual prejudice essentially requires that a defendant show that he is innocent because of the extreme difficulty of showing that a jury would have decided differently had the error not been introduced.

This required showing of prejudice is at the heart of the problem with today’s plain error doctrine. No court has been able to quantify exactly how much prejudice must be shown in plain error analysis. Adding to the confusion is Olano’s failure to unpack what it meant by asserting that plain error must be found only in cases where failure to correct the error would result in a “miscarriage of justice.” The Olano Court explained that in collateral review jurisprudence, the term “miscarriage of justice” meant that the defendant was actually innocent, and while the court asserted that this would suffice to satisfy the fourth prong of its test, a showing of innocence was not necessary. The problem, however, is that the Court failed to indicate what else besides a showing of innocence qualified as a miscarriage of justice under plain error review.

In order to repair the plain error doctrine, courts must return to the principle in which the doctrine was grounded—namely the need for public faith in the integrity of the judicial system. This requires that courts return to focusing plain error analysis on the egregiousness of the error and its effect on the public’s confidence in the fairness of

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201 See United States v. Olano, 507 U.S. 725, 736-37 (1993). Recall that Olano equated miscarriage of justice with its fourth prong of “seriously affecting the fairness, integrity or public reputation of judicial proceedings.” Id.
202 Id. at 736.
judicial proceedings. In interpreting Rule 52(b), courts must be cognizant of these principles. The Hills decision provides a good working standard for application of the complicated “substantial rights” inquiry. The five factors the Hills court applied to determine whether the defendant’s substantial rights had been imposed on are in keeping with Rule 52(b)’s language, which only requires that the error affect substantial rights. Importantly, by applying the five factors used in Hills, other evidence weighing on the defendant’s guilt is relegated to being just one of five factors to be weighed, rather than being dispositive.

Plain error review would be best served if the Olano test was retained but altered to reflect the spirit of Atkinson. First, the first and second prongs should be retained to determine the gravity of the error, with constitutional violations studied more scrupulously. Second, the test should include the factors in Hills to determine whether a defendant’s substantial rights were violated. Finally, an appellate court should consider whether the judicial system would be harmed in light of the egregiousness of the error. Under this plain error analysis, Resnick’s conviction would have more than likely been vacated and the case remanded for further proceedings, which would have been the correct result.

CONCLUSION

Plain error review was grounded in the principle that courts should correct errors that, if left unrectified, could undermine the

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203 These five factors are: (1) the intensity and frequency of the wrongful prosecutorial remarks; (2) which party elected to pursue the line of questioning; (3) the use to which the prosecution put the defendant’s Fifth Amendment silence; (4) the trial judge’s opportunity to grant a motion for mistrial or give a curative instruction; and (5) the quantum of other evidence indicative of guilt. Hills, 618 F.3d at 641.

204 Id.
integrity of the judicial system. The Atkinson plain error standard embodied this principle. The United States Supreme Court, however, has over time strayed from this original standard by focusing more narrowly on the outcome of a particular trial. The complexity and vagueness of the current doctrine has created confusion and inconsistency of decisions, including within the Seventh Circuit. The doctrine must be revised to look beyond any damage an uncorrected error may cause to a single individual. Instead, plain error analysis must also account for something greater—the public’s faith in our judicial system.

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MARRIED ON SATURDAY, FIRED ON MONDAY: 
THE SEVENTH CIRCUIT ATTEMPTS TO 
NAVIGATE LGBT RIGHTS AFTER OBERGEFELL

SYMONE D. SHINTON*


INTRODUCTION

Non-heterosexual persons¹ have suffered and continue to suffer significant oppression in the United States. Nearly two-thirds of LGBT Americans have reported experiencing discrimination in their personal lives, outside of the workplace.² Nearly half have reported

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² Brandon Lorenz, New HRC Poll Shows Overwhelming Support for Federal LGBT Non-Discrimination Bill, HUMAN RIGHTS CAMPAIGN (Mar. 17, 2015),
experiencing discrimination in the workplace. \(^3\) And one in ten reported being fired from a job because of their sexual orientation. \(^4\) This oppression not only impacts LGBT individuals’ social well-being\(^5\) but their legal rights as citizens.\(^6\)

The gay rights movement formally began on July 27, 1969 at the Stonewall Inn in New York to protest this inequality.\(^7\) Some of the major goals of the movement were the decriminalization of homosexual acts, the dissemination of accurate information about homosexuality, and, ultimately, equal rights under the laws that protect heterosexuals.\(^8\) The movement has achieved monumental accomplishments. In 1973, the American Psychiatric Association


\(^4\) Id.


declassified homosexuality as a mental disorder. In 1982, the first state enacted legislation outlawing discrimination on the basis of sexual orientation. In 2003, the Supreme Court prohibited laws that criminalize private, consensual sex between homosexuals. In 2004, the first state, Massachusetts, legalized gay marriage. In 2010, Congress repealed “Don’t Ask Don’t Tell.” And in 2015, the Supreme Court declared the right to marry to be a fundamental constitutional right in Obergefell v. Hodges, effectively permitting same-sex couples to legally marry nation-wide.

But Obergefell did not mark the end of the LGBT community’s “liberation struggle.” In the wake of Obergefell, conservatives and religious groups alike celebrated Rowan County, Kentucky, Clerk Kim Davis’ outright defiance to comply with the law by refusing to issue licenses. 

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9 Obergefell v. Hodges, 135 S. Ct. 2584, 2596 (2015) (“Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable.”).


11 Lawrence, 539 U.S. at 558.


13 “Don’t Ask Don’t Tell,” a military policy enacted by President Clinton, prohibited the participation of openly gay or lesbian members in the military. “Closeted” individuals were permitted to participate, so long as they were not “outed.” Jesse Lee, The President Signs Repeal of “Don’t Ask Don’t Tell”, WHITEHOUSE.GOV (Dec. 22, 2010, 12:35pm), https://www.whitehouse.gov/blog/2010/12/22/president-signs-repeal-dont-ask-dont-tell-out-many-we-are-one.

14 Obergefell, 135 S. Ct. at 2584.

15 “My gay and lesbian friends have no illusions that Obergefell marks the end of what one with whom I partied at a gay pride event in Brooklyn last night called their ‘liberation struggle.’” Michael Dorf, Symposium: In Defense of Justice Kennedy’s Soaring Language, SCOTUSBLOG (June 27, 2015 5:08 pm), http://www.scotusblog.com/2015/06/symposium-in-defense-of-justice-kennedys-soaring-language/.
marriage licenses to gay couples. Private business owners raised religious exercise and free speech defenses to support their refusals to comply with state Anti-Discrimination Acts that protect homosexuals. And Title VII still permits employers to lawfully discriminate against non-heterosexual employees.

This Comment will explore the decades of precedent that forced the hand of the Seventh Circuit in *Hively v. Ivy Tech Community College* to conclude that Title VII still does not prohibit employers from discriminating against employees based on their sexual orientation. After discussing the backdrop of Title VII, this Comment will review Congress’s historical inaction to intervene on behalf of the LGBT community and protect their status. Finally, this Comment will discuss solutions to the conundrum: the LGBT community is free to get married on Saturday but risk losing their jobs on Monday for the very realization of that right.

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18 Title VII defines “employer” as a person “engaged in an industry affecting commerce who has [twenty-five] or more employees for each working day in each of twenty or more calendar weeks in the current or proceeding calendar year, and any agent of such person” excluding the United States, a corporation wholly owned by the United States government, an Indian tribe, any department or agency of the District of Columbia subject by statute to procedures of the competitive service, bona fide private membership clubs that are exempt from taxation under section 501(c) of Title 26. 42 U.S.C. §2000e(b) (2012).


21 *Hively*, 830 F.3d at 714. (“The cases as they stand do, however, create a paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act. For although federal law now guarantees anyone the right to marry another person of the same gender, Title VII, to the extent it does
scheduled to be reheard en banc, there is hope that the Seventh Circuit will revisit its conclusions. Nonetheless, courts are justifiably uncomfortable solving this problem, as most traditional tools of statutory interpretation work against extending protections to the LGBT community. This Comment concludes that although the best solution for protecting the LGBT community in the workplace is not piece-meal through the courts, but long-lasting, sweeping change from Congress, the Seventh Circuit should find that discrimination on the basis of sexual orientation is prohibited by Title VII. It should do so on the theory that discrimination on the basis of sexual orientation is discriminating on the basis of one’s failure to live up to their gender norms and stereotypes. Regardless of the Seventh Circuit’s holding, Congress must address this inequality and act by passing The Equality Act. Until Congress does so, LGBT discrimination in the workplace will operate as the modern day “Don’t Ask, Don’t Tell.”

I. TITLE VII JURISPRUDENCE

Title VII of the Civil Rights Act of 1964 prohibits “discrimination on the basis of . . . sex.” Decades of precedent relying in part on the legislative intent of Title VII have by and large answered that question “no.” While largely uncontroversial in the past, this answer is now difficult to reconcile with Obergefell. The political momentum of treating the LGBT community with full equality under the law has placed this once taken for granted result in great tension.

not reach sexual orientation discrimination, also allows employers to fire that employee for doing so.”).  
So how did we get here? Federal courts agree that “sex” discrimination is not “sexual orientation” discrimination, and an employee may legally be discriminated against on the basis of their sexual orientation. But early Supreme Court precedent paved the way for a potential, narrow exception to protect LGBT rights: framing the claim in “gender stereotype” terms. A “gender stereotype” claim is simple in theory: an employee has a claim for “sex” discrimination when they are fired for failing to conform to the stereotypes associated with their sex. For example, a woman who is fired for behaving masculine or a man that is fired for behaving effeminately may state a gender stereotype claim for sex discrimination under Title VII.

But this analysis is complicated when sexual orientation enters the picture. A gay may be protected if he is fired for acting flamboyant or effeminate—contrary to stereotypical male behavior—but not if he is fired for being gay. With support of the EEOC, some district courts have refused to follow what they believe is a meaningless distinction. The Seventh Circuit in *Hively*, however, continued to attempt to separate the two claims, protecting those based on gender stereotypes but not those based upon sexual identity.

A. Supreme Court Precedent

In 1989, the Supreme Court decided *Price Waterhouse v. Hopkins*, which held that discriminating against an employee for failing to conform to a gender stereotype is sex discrimination prohibited by Title VII. Of course, *Price Waterhouse* had nothing to do with sexual orientation. The Plaintiff, Ann Hopkins, brought suit after she was refused admission as partner at an accounting firm essentially because she was not feminine enough.

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27 *Id.*
Even though she had recently secured a $25 million contract for the firm and was recommended as performing “virtually at the partner level” already, her superiors were concerned by her “abrasive” and “brusque” personality that was “difficult to work with.” Of course, by “abrasive” her superiors actually meant “macho,” “overcompensated for being a woman,” unladylike, and in need of “a course at charm school.” Indeed, one supervisor advised Ann to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry” if she wanted to improve her chances of partnership in the future.

Stating that under the plain language of Title VII “gender must be irrelevant to employment decisions,” the Court found that discriminating against Ms. Hopkins for failing to conform to stereotypes of what a woman should be squarely falls within the prohibitions of Title VII. In other words, employers cannot discriminate against men for being feminine or women for being masculine. Finding that Ms. Hopkins proved her gender played a motivating part in her employment decision, the Court remanded to determine whether the employer was still not liable because they would have made that decision anyway, irrespective of gender.

In *Price Waterhouse*, the Court affirmed that Congress’s purpose in enacting Title VII was broad and aimed to “strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” While seeking to preserve employer freedom and choice, Congress hoped to drive employers to focus on employee qualifications rather than on the individual’s identity and immutable

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28 Id. at 234–235.
29 Id. at 235.
30 Id.
31 Id. at 240.
32 Id. at 258. The Court established that after a Title VII plaintiff proves gender played a role, an employer may still evade liability if it can prove by a preponderance of the evidence that it would have made the same decision regardless of gender.
33 Id. at 251 (quoting Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 707, n. 13 (1978)) (emphasis added).
characteristics. The Court stated that as a society we were “beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”

Later, in Oncale v. Sundowner Offshore Services, Inc., the Supreme Court held that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII. Writing for a unanimous court, Justice Scalia acknowledged that same-sex sexual harassment was “assuredly not the principal evil Congress was concerned with when it enacted Title VII.” Even so, “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.” In other words, Title VII need not be limited to apply only to the exact concerns addressed by its enacting legislators. It should be extended to cover “reasonably comparable evils” that fit within the letter of the law.

This lends credence to the argument that “sexual orientation” is “sex” and therefore a protected class. But this argument has still not been accepted. Under the current prevailing view of Title VII, employees can bring discrimination claims based on gender stereotyping but not sexual orientation. In other words, if the homosexual employee looks or acts “sufficiently flamboyant (if male) or butch (if female),” they will receive Title VII protection whereas the homosexual employee that does not openly violate traditional gender

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34 Id. at 243.
35 Id. at 251
37 Id. at 79.
38 Id. (emphasis added).
40 Id.
norms will not. The Supreme Court has not directly addressed the specific issue of whether Title VII protections extend to the LGBT community.

B. Federal Court Decisions and the EEOC

1. Seventh Circuit Precedent and Beyond: Protecting “Sex” But Not “Sexual Orientation”

The Seventh Circuit has always excluded the LGBT community from Title VII’s reach. Indeed, it has expressly stated that not only did Congress intend for “sex” to have a “narrow, traditional interpretation” but that Congress even intended to “exclude homosexuals from Title VII coverage.” Time and time again, the Seventh Circuit has made clear that “sex” only encompasses the biological male and female.

In Hamner v. St Vincent Hospital and Health Care Center, Gary Hamner, a male nurse, sued his former employer, a hospital, alleging that he was unlawfully terminated under Title VII in retaliation for submitting a sexual harassment grievance. Mr. Hamner alleged that a coworker refused to communicate with him even when necessary for patient care, screamed at him, and openly mocked him by lisping,
flipping his wrists, and making jokes about homosexuals.\textsuperscript{46} On direct examination at trial, Mr. Hamner’s testimony damned his claim: “[i]t was merely the fact that because I am gay, because that is just who I am, he was opposed to that and he absolutely could not handle that. And, so, it was constant harassment because of my sexual orientation.”\textsuperscript{47}

The court found that the employer’s grievance alleged only sexual orientation harassment which is not protected by Title VII, stating “Congress intended the term ‘sex’ to mean ‘biological male or biological female,’ and not one’s sexuality or sexual orientation.”\textsuperscript{48}

Similarly, in \textit{Spearman v. Ford Motor Company}, Edison Spearman sued his current employer, Ford Motor Company, alleging that Ford subjected him to a hostile work environment of sexual harassment.\textsuperscript{49} Amongst other things, Mr. Spearman’s coworker called him a “little bitch,” that he hated his “gay ass” and threatened to go to his residence and “f--- his gay faggot ass up.”\textsuperscript{50} A coworker wrote graffiti on a bulletin board at work that stated: “Aids kills faggots dead . . . RuPaul, RuSpearman.”\textsuperscript{51} But despite the “vulgar and sexually explicit insults” that Mr. Spearman suffered at work, and testimony that Ford indeed embodied a “masculine environment,” Mr. Spearman had no relief under Title VII because his “co-workers maligned him because of his apparent homosexuality, and not because of his sex.”\textsuperscript{52}

Relying on this precedent, the next sixteen years of Seventh Circuit precedent consistently refused to extend Title VII protections to the LGBT community.\textsuperscript{53} Indeed, every federal court to consider the

\begin{itemize}
\item \textsuperscript{46} Id.
\item \textsuperscript{47} Id. at 705.
\item \textsuperscript{48} Id. at 704 (quoting \textit{Ulane}, 742 F.2d at 1085).
\item \textsuperscript{49} \textit{Spearman v. Ford Motor Co.}, 231 F.3d 1080, 1082 (7th Cir. 2000).
\item \textsuperscript{50} Id. at 705.
\item \textsuperscript{51} Id. at 1083.
\item \textsuperscript{52} Id. at 1085.
\item \textsuperscript{53} Muhammad v. Caterpillar, Inc., 767 F.3d 694, 697 (7th Cir. 2014); Hamm v. Weyauwega Milk Products, Inc., 332 F.3d 1058, 1062 (7th Cir. 2003) (“The protections of Title VII have not been extended, however, to permit claims of harassment based on an individual’s sexual orientation.”); \textit{Schroeder v. Hamilton}...
\end{itemize}
matter has found unequivocally found that sexual orientation is not a protected class under Title VII.\(^{54}\) Although courts agree that “[h]arassment on the basis of sexual orientation has no place in our society” they refuse to extend such protections to the LGBT community because “Congress has not yet seen fit [] to provide protection against such harassment.”\(^{55}\)

2. The EEOC’s Evolved Stance: Sexual Orientation Discrimination Is Sex Discrimination

The EEOC recently began pursuing sexual orientation discrimination claims on the theory that sexual orientation discrimination is sex discrimination. Dating back fifty years, the EEOC’s stance previously excluded sexual orientation from claims protected by Title VII.\(^{56}\) But in July 2015, the EEOC in Baldwin v. Foxx declared that “sexual orientation is inherently a ‘sex-based

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consideration”” protected by Title VII. The decision is an administrative ruling that is not binding on federal courts but is entitled to some level of consideration and deference.

The complainant, David Baldwin, worked as a Supervisory Air Traffic Control Specialist for the Department of Transportation in Miami, Florida. He alleged that he was not selected for a permanent management position because of his status as a gay man. A supervisor with promoting power made several negative comments about his sexual orientation, such as “[w]e don’t need to hear about that gay stuff” in reference to Mr. Baldwin’s mentioning his vacation with his male partner as well as calling Mr. Baldwin “a distraction in the radar room” when Mr. Baldwin discussed his male partner.

Interpreting Price Waterhouse broadly, the EEOC stated that Title VII’s prohibition of sex discrimination “means that employers may not rely upon sex-based considerations” when making employment decisions. This protection, the EEOC stated, applies equally to claims brought by lesbians, gays, and bisexuals. Acknowledging but dismissing decades of precedent to the contrary, the EEOC quoted Oncale: “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”

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60 Baldwin, 2015 WL 4397641, at *2.
61 Baldwin, 2015 WL 4397641, at *2.
VII does not explicitly include protections for sexual orientation claimants, the EEOC stated:

[T]he question is not whether sexual orientation is explicitly listed in Title VII as a prohibited basis for employment actions. It is not. Rather, the question for purposes of Title VII coverage of a sexual orientation claim is the same as any other Title VII case involving allegations of sex discrimination—whether the agency has “relied on sex-based considerations” or “taken gender into account” when taking the challenged employment action.65

In other words, sexual orientation cannot be separated from sex. A man is labeled gay and a woman is labeled lesbian because he or she prefers to romantically associate with the same sex.66 Sexual orientation discrimination, then, is inextricably linked to sex and based on sexual stereotypes, assumptions, expectations, and norms. Moreover, sexual orientation discrimination itself is inextricably linked to the employee’s sex. If a business fires a gay man “because of his sexual activities with [another man], while this action would not have been taken against [a woman] if she did exactly the same things with [another man], then [the gay man] is being discriminated against because of his sex.”67 Under this text-based and purposive analysis, claimants need not frame their experiences in Price Waterhouse gender-stereotype norms to be protected by Title VII.

The EEOC called out the Seventh Circuit’s Title VII jurisprudence, amongst others, directly criticizing its failure to apply

66 American Psychological Ass’n, Definition of Terms: Sex, Gender, Gender Identity, Sexual Orientation (Feb. 2011), http://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf (“Sexual orientation refers to the sex of those to whom one is sexually and romantically attracted.”).
Title VII to include protections against sexual orientation discrimination. The source of its criticism was founded on the Seventh Circuit “simply cit[ing] earlier and dated decisions without any additional analysis” even in light of relevant, intervening Supreme Court law.

3. Dissenting District Courts: Protecting Sexual Orientation Claims

District courts, as “front line experimenters in the laboratories of difficult legal questions,” have also finagled their way into applying Title VII to the LGBT community. In response to the new EEOC decision, one court has bluntly declared that the lines between sex discrimination and sexual orientation discrimination are not merely blurry, but are, in fact, un-definable. Other courts have joined in dissent.

Of the district courts that have found Title VII protects sexual orientation claims, most have followed the EEOC’s reasoning that sexual orientation discrimination is discrimination on the basis of “sex.” For example, although the court ultimately granted summary

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68 *Baldwin*, 2015 WL 4397641, at *8 n.11.
69 *Id.*
70 *Hively v. Ivy Tech Community College*, 830 F.3d 698, 703 (7th Cir. 2016).
71 *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1160 (C.D. Cal. 2015) (“Simply put, the line between sex discrimination and sexual orientation discrimination is ‘difficult to draw’ because that line does not exist, save as a lingering and faulty judicial construct.”).
judgment against the employee for failing to demonstrate the employer’s retaliation was the but-for cause of his termination, a district court in Alabama expressly agreed with the EEOC finding that “sexual orientation-based discrimination [is] cognizable under Title VII.” In another case, a California district court found that two lesbian basketball players stated a “straightforward claim for sex discrimination” by alleging university staff members told them their lesbianism would not be tolerated on the team. Applying the same logic as the EEOC, the court reasoned that sexual orientation discrimination is necessarily sex discrimination because “if Plaintiffs had been males dating females, instead of females dating females, they would not have been subjected to the alleged different treatment.” Sexual orientation discrimination is therefore sex discrimination. The District of Connecticut boldly reached the same conclusion based on the same logic, explicitly disagreeing with the Seventh Circuit’s result in *Hively* and Second Circuit precedent to the contrary.

But not all courts protecting the LGBT community have adopted the EEOC’s sexual orientation is sex position, though, and some continue to frame the claims in gender stereotype terms. Recently, a district court in Florida ruled that discrimination based on perceived sexual orientation was actionable under Title VII. Plaintiffs, Susan Winstead and Deborah Langford, alleged, amongst other things, that coworkers at the Lafayette County Board contacted residents served by plaintiffs and encouraged them to register false complaints against plaintiffs. The coworkers allegedly then harassed the plaintiffs on Facebook, other online forums, and even on radio and television.

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73 Isaacs, 143 F. Supp. 3d at 1193–94 (“This court agrees with the view of the [EEOC]. . .”).
74 Videckis, 150 F. Supp. 3d at 1161.
75 Id.
77 Winstead v. Lafayette County Board of County Commissioners, No. 1:16CV00054-MW-GRJ, 2016 WL 3946922 (N.D. Fl. June 20, 2016).
78 Id. at *1.
79 Id.
The court rejected the EEOC’s position that sexual orientation discrimination is necessarily sex discrimination.\textsuperscript{80} Rather, the Florida court found that sexual orientation discrimination fits neatly under \textit{Price Waterhouse}’s gender stereotype claim.\textsuperscript{81} The court recognized that the Plaintiffs had stated a claim under gender stereotype theory even if they had not acted “butch.”\textsuperscript{82} To arbitrarily reject claims of homosexuals who otherwise conformed to gender norms would be to “misapprehend the nature of animus towards people based on their sexual orientation.”\textsuperscript{83} That animus is based on disapproval of behaviors that are disapproved of “precisely because they are deemed to be “inappropriate” for members of a certain sex or gender.”\textsuperscript{84}

\textbf{C. Congress’s Inaction and State Anti-Discrimination Statutes}

Congress’s inaction has significantly influenced courts’ failure to read Title VII in a manner that protects the LGBT community.\textsuperscript{85} Congress is not unaware of the plight of the LGBT community to obtain protection under Title VII. On the contrary, it has considered and rejected amending the Civil Rights Act to add “sexual orientation” innumerable times, dating back as early as 1974.\textsuperscript{86} The 1974 Equality Act

\textsuperscript{80} \textit{Id.} at *6–7 (citing Baldwin v. Foxx, Appeal No. 0120133080, 2015 WL 4397641, at *5 (EEOC July 15, 2015)).
\textsuperscript{81} \textit{Id.} at *7.
\textsuperscript{82} \textit{See} Soucek, \textit{supra} note 40.
\textsuperscript{83} Winstead v. Lafayette County Board of County Commissioners, No. 1:16CV00054-MW-GRJ, 2016 WL 3946922, at *8 (N.D. Fl. June 20, 2016).
\textsuperscript{84} \textit{Id.}
\textsuperscript{85} Kiley v. American Soc. For Prevention of Cruelty to Animals, 296 Fed. Appx. 107, 109 (2d Cir. 2008) (concluding based on the numerous bills that have attempted to extend Title VII protection to sexual orientation that Congress did not intend to include sexual orientation protections in Title VII’s current form); Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1086 (7th Cir. 1984) (saying that Congress’s failure to amend Title VII “strongly indicates . . . sex should be given a . . . traditional interpretation” that does not encompass sexual orientation).
Act was broadly drafted to protect the LGBT community in all arenas of public life beyond employment.\textsuperscript{87} Due to a variety of social and political factors, it never earned enough support to make it out of the House Committee on Judiciary.\textsuperscript{88} Lawmakers went silent on the issue for about twenty years.

The silence was broken in 1994 with the introduction of the Employment Non-Discrimination Act (ENDA).\textsuperscript{89} ENDA was narrowly focused on prohibiting discrimination in the workplace based on actual or perceived sexual orientation.\textsuperscript{90} But the law failed to pass.\textsuperscript{91} Since ENDA’s introduction, Congress has considered some version of the Act every single session but one.\textsuperscript{92} Congress is currently considering The Equality Act.\textsuperscript{93} Introduced in 2015, it has more congressional support than any of its predecessors.\textsuperscript{94} The Act differs from its predecessors in that it would directly amend The Civil Rights Act to add sexual orientation and gender identity as protected classes.\textsuperscript{95} But the bill has been stuck in the House Subcommittee on the Constitution and Civil Justice since September 8\textsuperscript{th}, 2015.\textsuperscript{96}

\textsuperscript{87} Hunt, \textit{supra} note 86.
\textsuperscript{89} Hunt, \textit{supra} note 86.
\textsuperscript{90} \textit{Id.}
\textsuperscript{91} \textit{Id.}
\textsuperscript{92} \textit{Id.}
\textsuperscript{93} H.R. 3185, 114th Cong. (2015-2016).
\textsuperscript{94} \textit{The Equality Act}, \textsc{Human Rights Campaign} (last updated Aug. 1, 2016), http://www.hrc.org/resources/the-equality-act.
\textsuperscript{95} \textit{Id.}
Despite vast misconceptions that sexual orientation discrimination is already illegal, the federal government has not prohibited it, and the majority of states lack local anti-discrimination statutes that provide protections for LGBT persons in the workplace. Only twenty-one states currently prohibit discrimination on the basis of sexual orientation, and only eighteen protect transgendered persons. According to the Human Rights Campaign, thirty-two states lack clear and fully inclusive anti-discrimination laws for the LGBT community.

With this legislative background and jurisprudence in mind, we turn to the Seventh Circuit’s decision in 

II. Hively v. Ivy Tech Community College

Kimberly Hively worked as an adjunct instructor in mathematics at Ivy Tech Community College in Indiana from 2000 to 2013. She excelled in her position, winning the “Adjunct Faculty Award for Excellence in Instruction” on the South Bend campus. Over the course of her five years, she applied repeatedly for permanent positions at the college for which she was qualified. Ivy Tech first rejected her applications before finally refusing to continue her employment.

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97 One poll reported that 87% of Americans believe it is already illegal to discriminate against gay people. Steinmetz, supra note 4.
98 Lorenz, supra note 2.
99 Steinmetz, supra note 4.
contract as an adjunct. She connected the dots between her sexuality and her rejections when she overheard administrators commenting to others about her being in a relationship with another woman.

Ms. Hively filed a bare-bones pro se charge with the Equal Employment Opportunity Commission (EEOC) claiming she was discriminated against because of her sexual orientation. After exhausting procedural requirements in the EEOC, she filed a pro se complaint against the school in the district court of Indiana. Fatal to her complaint, Ms. Hively alleged that she was “denied fulltime employment and promotions based on sexual orientation” in violation of Title VII of the Civil Rights Act. Ivy Tech filed a motion to dismiss for failure to state a claim because sexual orientation is not recognized as a protected class under Title VII. Although the court empathized with Ms. Hively’s pro se status and her arguments, the court stated it was “bound by Seventh Circuit precedent” and had no choice but to dismiss the complaint with prejudice.

On appeal, the Seventh Circuit’s opinion reads like one long exhale. Judge Rovner authored the opinion joined in part by Judge Ripple. Judge Bauer did not join the judgment. The court began by noting it could “make short shrift of its task” and simply affirm the district court’s opinion based on clear Seventh Circuit precedent. Indeed, two cases decided in 2000 made clear that Title VII does not protect claims based on a person’s sexual preference or orientation:

104 Id.
105 Jaschik, supra note 101.
106 Hively v. Ivy Tech Community College, 830 F.3d 698, 698 (7th Cir. 2016).
107 Id.
109 Id.
110 Id. at *3.
111 Hively, 830 F.3d at 698.
112 Id.
113 Id.
Hamner and Spearman. Precedent was unequivocally stacked against Ms. Hively. So, despite compelling policy concerns to find to the contrary, the Seventh Circuit was “presumptively bound by [its] own precedent.”

But case law was not the only factor that forced the court’s hand. The court was also persuaded by Congress’s utter inaction to correct decades of court’s interpretation of Title VII, despite a consistent trend in public opinion and courts calling for change. The court chimed in with the slew of other federal courts that have called discrimination on the basis of sexual orientation a “reprehensible,” and “noxious practice, deserving of censure.” The court acknowledged the EEOC’s recent shift towards applying Title VII to prohibit sexual orientation discrimination. But without more, this “writing on the wall” was not enough.

The court thoroughly described the struggles amongst federal courts to deal with the seemingly unworkable standards of evaluating sexual orientation claims under Price Waterhouse. But no matter how difficult to disentangle gender discrimination from sexual orientation discrimination, the court refused to conclude it was

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115 Hively, 830 F.3d at 701.
116 Id. (“Our holdings and those of other courts reflect the fact that despite multiple efforts, Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation.”).
120 Id. at 718.
121 Id. at 704–708.
“impossible.” Bluntly, the court stated it could not do so “unless or until either the legislature or the Supreme Court says it is so.”

The court was fully aware of the unjust result that followed from adhering to this line of precedent, calling it “an odd state of affairs” in which Title VII only protects gays, lesbians, and bisexual persons that blatantly, outwardly express their sexuality. The effeminate man is protected while the gay man who otherwise conforms to traditional masculine stereotypes is not. Nonetheless, the court exasperatedly concluded that this was not its call to make.

The *Hively* opinion has been vacated and scheduled for rehearing en banc. In the Seventh Circuit’s own words, it usually only rehears cases en banc to address an intra-circuit split, not involved here, or a “question of exceptional importance.” On rehearing, the court will face the same handful of options. The court can again follow the overwhelming precedent that, based on Congress’ original intent and current inaction, Title VII simply does not prohibit sexual orientation discrimination. But the court can find for Ms. Hively without disregarding the law by following the EEOC’s recent interpretation that sexual orientation discrimination is necessarily “sex” discrimination. More likely, the court could be the first court to definitively interpret sexual orientation claims under the gender stereotype framework set out in *Price Waterhouse*.

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122 *Id.* at 709.
123 *Id.*
124 *Id.* at 714.
125 *Id.*
127 Easley v. Reuss, 532 F.3d 592, 594 (7th Cir. 2008).
128 Jones, *supra* note 126.
men, Ms. Hively was discriminated against on the basis of her sex when Ivy Tech discriminated against her for romantically associating with women. This option seems most likely given the panel’s questions at the en banc hearing. Indeed, counsel for Lambda Legal Defense, Ms. Hively’s representative, based his arguments in *Price Waterhouse* terms, analogizing that discriminating against a woman because she drives a Harley or has football season tickets is in precisely the same vein as discriminating against her for her attraction to women. The court’s holding will greatly impact current LGBT rights litigation, extending into the Title IX gender identity bathroom litigation as well.

The Seventh Circuit also has the opportunity to address this issue in a similar sexual orientation discrimination claim that was dismissed in the Northern District of Illinois in the wake of *Hively: Matavka v. Board of Education*. The court initially stayed the case pending the *Hively* decision, apparently hopeful that the EEOC’s change of position might persuade the Seventh Circuit. The Plaintiff, Lubomir Matavka alleged that while employed at Morton High School his coworkers and supervisors verbally taunted him for his sexual orientation, even hacking into his Facebook account to publicly out him as “interested in ‘boys and men.’”

In dismissing the Complaint, the court called the defendants’ conduct “disgusting” and “appalling” but nonetheless not

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131 Jones, *supra* note 126.
132 *Id.*
133 *See, e.g.,* Students v. United States Dep’t of Educ., No. 16-cv-4945 2016 WL 6134121, at *17 (N.D. Ill. Oct. 18, 2016) (“Whether or not the court of appeals does so, however, its en banc decision could have an important impact on Plaintiffs’ argument about the meaning of the term “sex” in Title VII and, by implication, in Title IX.”).
135 *Id.* at *4.
136 *Id.* at *3.
137 *Id.*
138 *Id.* at *1.
prohibited by Title VII under *Hively*. The court discussed the Seventh Circuit’s perhaps misplaced adherence to stare decisis, noting that *Brown v. Board of Education*, too, required the Court to go against decades of precedent.\(^{139}\) Even so, the court noted that uprooting an unjust manner of judicially interpreting the Constitution was “a matter quite different” from changing the established judicial interpretation of “a word contained in congressional legislation.”\(^{140}\) Matavka has filed an appeal.\(^{141}\)

Courts’ struggle to apply Title VII inclusively begs the question of whether they are the appropriate branch of government to resolve this issue. From where should we expect change? And from where is change best suited for long-lasting protection for the LGBT community? What branch will remedy the incongruence that “[w]e allow two women or two men to marry, but allow employers to terminate them for doing so[?]”\(^{142}\) Ideally, Congress is best suited to resolve this issue. But this solution seems less and less viable as Congress becomes even more partisan, gridlocked, and conservative.\(^{143}\)

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\(^{139}\) Id. at *2* (citing *Brown v. Bd of Educ.*, 347 U.S. 483 (1954)) (“Stare decisis is not however immutable—perhaps the most noteworthy example of our time has been the unanimous decision of the Supreme Court in [Brown v. Board of Education].”).

\(^{140}\) Id.


\(^{142}\) *Hively v. Ivy Tech Community College*, 830 F.3d 698, 717 (7th Cir. 2016)

III. IMPLICATIONS OF HIVELY: CONGRESS MUST ACT

The court in *Hively* noted that the Supreme Court has consistently expounded on LGBT rights. But even though this “informed” the legal landscape of Title VII, it had “no direct bearing” on the outcome of the case. Even though “the writing is on the wall,” that writing must come from the Supreme Court or Congress. The Panel’s now vacated opinion seemed to emphasize the impossibility of a judicial remedy for expanding LGBT rights under Title VII. Part of this struggle stems from the traditional tools of statutory interpretation, most of which naturally lead to the exclusion of sexual orientation discrimination.

Merriam-Webster defines “sex” in biological terms as “the state of being male or female.” From a traditionally textualist perspective, then, discrimination on the basis of ‘sex’ is the classic scenario of refusing to hire a woman because she is a woman. But even an approach based on legislative intent does not provide protections for LGBT community. While it is possible to grab juicy quotes from the legislative history and argue they encompass LGBT rights, it is undisputed that Congress was not concerned with sexual orientation discrimination when it enacted the Civil Rights Act. On the

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144 *Hively*, 830 F.3d at 713 (reviewing the Court’s decisions in *Romer v. Evans*, 517 U.S. 620 (1996), *Lawrence v. Texas*, 539 U.S. 558 (2003), United States v. Windsor, 133 S. Ct. 2675 (2013), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)). The court noted that the Court had the opportunity to address sexual orientation discrimination in *Obergefell* but declined to do so.

145 *Id.*

146 *Id.* at 718.


148 *Oncale v. Sundowner Offshore Serv’s, Inc.*, 523 U.S. 75, 79 (1998) (sexual orientation discrimination “was assuredly not the principal evil Congress was concerned with when it enacted Title VII.”). Indeed, because “sex” was added through House floor amendment, the Committee Report says nothing about “sex” discrimination. There is a dearth of legislative history that even speaks to traditional instances of sex discrimination. Leonard, *supra* note 56.
contrary, it is widely known that the word “sex” was added to the Bill in the hopes of destroying its chances of being passed.\footnote{Leonard, supra note 56 (explaining that southern representative Howard Smith of Virginia included the word “sex” in the hopes of sinking the bill).}

Nonetheless, a court could still resolve the issue either by embracing the EEOC’s allegedly text-based position that “sexual orientation is sex” or by following the purposive based theory that swallows sexual orientation claims into gender stereotype claims under \textit{Price Waterhouse}. As Judge Posner noted at the en banc hearing, the meaning of the statute is not “frozen on the day of enactment,” and it is common if not appropriate to interpret a statute differently as times change.\footnote{Jones, supra note 131.} Significant scholarship has been dedicated to encouraging courts to fully embrace sexual orientation discrimination claims under the latter approach.\footnote{See, e.g., Cody Perkins, Comment, \textit{Sex & Sexual Orientation: Title VII After Macy v. Holder}, 65 ADMIN. L. REV. 427, 442 (2013) (“Just as the impermissible discrimination in \textit{Price Waterhouse} was directed at the plaintiff for being a woman who transgressed gender norms by acting masculinely [sic], a gay woman who is discriminated against for being a woman who acts masculinely [sic] by having the traditionally male trait of being attracted to women is being discriminated against on the basis of a sex stereotype.”).} The argument that “gay people, simply by identifying themselves as gay, are violating the ultimate gender stereotype—heterosexual attraction” is compelling.\footnote{Anthony E. Varona & Jeffrey M. Monks, \textit{En/Gendering Equality: Seeking Relief Under Title VII Against Employment Discrimination Based on Sexual Orientation,} 7 WM. & MARY J. WOMEN & L. 67, 84 (2000).} Indeed, Judge Rovner explicitly identified this stereotype in the now vacated opinion.\footnote{Hively, 830 F.3d at 709.}

But there is no guarantee a trip to the Supreme Court would result in a favorable outcome for the LGBT community. Although Justice Kennedy joined the “liberals” in \textit{Obergefell}, \textit{Obergefell} dealt with fundamental constitutional rights under the Equal Protection Clause—an area where Kennedy is known for his expansive, even ethereal,
beliefs. It is not certain he would expand LGBT rights so broadly when ruling on a question of settled statutory interpretation. Scholars have pointed out that Title VII litigation as a whole has stalled or regressed under the Roberts Court, evidencing a “skepticism about the persistence of intentional sex and race discrimination.” Now that present and future Supreme Court vacancies will likely be filled by a republican appointee, it is even less likely this avenue is a productive choice for the LGBT community. Indeed, though most scholars agree that the fundamental right to marry is likely secure, the LGBT agenda as a whole is certainly on shaky grounds. As of this Comment’s writing, every single cabinet member of President-elect Trump affirmatively opposes LGBT rights.

The Executive Branch under President Obama has done all it can do to protect the LGBT community in the near future. Long before Obergefell, President Obama received pressure to bar discrimination against LGBT persons in employment through executive order. In

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158 Chris Johnson, More Pressure on Obama to Bar Workplace Discrimination, WASHINGTON BLADE (Mar. 30, 2012 at 7:48 am EDT),
2014, President Obama signed an Executive Order prohibiting federal contractors from discriminating against LGBT members in the workplace. Obama correctly stated that the order would make the government “just a little bit fairer”— indeed, the President lacks the authority to impact the private sector. And it is doubtful that President Trump has LGBT rights on his agenda.

The root of the problem lies in Title VII itself. No branch is better suited to address incongruences within the Act than the creators. Congress must act and clarify whether or not sexual orientation is “sex discrimination” under Title VII. Even though Congress has failed to do so for over twenty years, there simply does not exist a better solution than a change in the legislation.

The opportunity has arisen again. Senator Jeff Merkley and Representative David Cicilline introduced The Equality Act in July of 2015. The Act would amend the Civil Rights Act of 1964 to include sexual orientation and gender identity among protected classes. More than 80 corporations have signed on in support of the bill, including big names like Amazon, American Airlines, Coca-Cola, Facebook, and Google. But, the bill is currently sitting before the

http://www.washingtonblade.com/2012/03/30/more-pressure-on-obama-to-bar-workplace-discrimination/.

David Hudson, President Obama Signs a New Executive Order to Protect LGBT Workers, WHITEHOUSE.GOV (July 21, 2014 at 3:00 PM ET), https://www.whitehouse.gov/blog/2014/07/21/president-obama-signs-new-executive-order-protect-lgbt-workers.

Id.


Cicilline became the fourth openly gay member of Congress in 2010.

Steinmetz, supra note 4.


Subcommittee on the Constitution and Civil Justice, where it has remained for over a year.\(^{166}\)

The bill states explicitly that “discrimination can occur on the basis of the sex, sexual orientation, gender identity . . . of an individual.”\(^{167}\) The bill recognizes the history of discrimination against LGBT in the workplace: “Workers who are LGBT, or are perceived to be LGBT, have been subjected to a history and pattern of persistent, widespread, and pervasive discrimination on the bases of sexual orientation and gender identity by private sector employers and Federal, State, and local government employers.”\(^{168}\) Finally, the bill explicitly approves of the EEOC’s recent and “correct[]” interpretation of Title VII to protect LGBT persons and rejects conflicting case law that has refused to do so.\(^{169}\)

Polling indicates that federal protections for the LGBT is in large part a bipartisan issue.\(^{170}\) A 2015, pre-\textit{Obergefell} survey showed that voters across party lines support the bill by a margin of 69 to 27.\(^{171}\) Within these margins, even a majority of Republican citizens support the bill.\(^{172}\) Sixty-four percent of voters said they would be less likely to support their member of Congress if he or she opposed the bill.\(^{173}\) Congress has no excuse to sit on their hands or vote on party lines on this issue. In directly amending the Civil Rights Act itself, Congress members cannot object to the bill out of fear and speculation of what a new set of rights would mean for employers.\(^{174}\) Literally the exact same protections that have applied to race, religion, sex, ethnicity, and

\(^{167}\) H.R. 3185, 114th Cong. § (2)(1).
\(^{168}\) H.R. 3185, 114th Cong. § (2)(7).
\(^{169}\) H.R. 3185, 114th Cong. § (2)(8),(9).
\(^{170}\) Lorenz, \textit{supra} note 2.
\(^{171}\) Lorenz, \textit{supra} note 2.
\(^{172}\) Lorenz, \textit{supra} note 2 (51% in favor to 43% against).
\(^{173}\) Lorenz, \textit{supra} note 2.
\(^{174}\) Steinmetz, \textit{supra} note 4 (“. . . [T]he Equality Act will ‘literally be extending the exact same protections [in Title VII]’ [that] other classes already have.”).
national origin for over fifty years would be extended to the LGBT community. Similarly, the same religious exemptions would apply.

Regardless of how the Seventh Circuit rules in *Hively*, Congress must act to provide protections for LGBT employees against this invidious discrimination. This Comment remains hopeful that the Seventh Circuit is ready to step out as the first court to definitively interpret sexual orientation discrimination under the gender stereotype framework set forth by *Price Waterhouse*. Hopefully, this will set the tone for more federal circuits to break away from slavishly following old methods of interpreting Title VII. But until Congress provides this protection, LGBT employees may only hope to be lucky enough to live in a state that protects him or her through its local anti-discrimination law or a federal circuit that has decided to interpret Title VII expansively. This result simply cannot be squared with the norms and values largely embraced by society and recognized by the Supreme Court in *Obergefell v. Hodges*.

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175 *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015) ("The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity.").
REASONABLE RESPONSE: THE ACHILLES’ HEEL OF THE SEVENTH CIRCUIT’S “DELIBERATE INDIFFERENCE” ANALYSIS

MEAGHAN A. SWEENEY*


INTRODUCTION

United States penitentiaries housed 2,224,400 prisoners in 2014.¹ This prison population suffers from higher rates of mental illness, chronic medical conditions, and infectious diseases compared with the general United States population² due to factors such as substance and alcohol abuse, poverty, and poor preventative healthcare. More than eight in ten prisoners receive medical care after becoming incarcerated.³ The most recent data shows prison health care spending


totaling $7.7 billion in 2011, a reduction from previous years.\textsuperscript{4} Medically-related costs for guarding and transporting one inmate can exceed $2000 per day.\textsuperscript{5} The ever-growing prison population and increased risk of health complications has renewed national concern for the quality of prison healthcare.\textsuperscript{6}

A constitutional violation may arise under the Eighth Amendment if a prisoner’s medical treatment, or lack thereof, is found to constitute “cruel and unusual punishment.”\textsuperscript{7} However, claims of deficient medical care do not always constitute Eighth Amendment claims.\textsuperscript{8} Negligence in diagnosis or medical treatment, normally addressed in medical malpractice actions, does not become a constitutional violation simply because the victim is a prisoner.\textsuperscript{9}

The Supreme Court of the United States, in \textit{Estelle v. Gamble}, developed the “deliberate indifference” standard to analyze whether medical treatment of a prisoner rises to the level of an Eighth Amendment violation.\textsuperscript{10} To establish deliberate indifference, a court must first find that the plaintiff suffered from an objectively serious medical condition.\textsuperscript{11} Then, the court will analyze whether the


\textsuperscript{5} Id.


\textsuperscript{8} \textit{Estelle}, 429 U.S. at 97.

\textsuperscript{9} Id.

\textsuperscript{10} Id.

defendant knew of and disregarded a substantial risk to the prisoner’s health. To show this, the defendant must: 1) have been aware of facts from which she could infer the existence of a substantial risk of serious harm and 2) have actually drawn that inference. Even objective recklessness—failing to act in the face of an unjustifiably high risk that is so obvious that it should be known—is insufficient to support an Eighth Amendment violation.

Circuits are split on exactly what physician behavior constitutes deliberate indifference. In Petties v. Carter, Tyrone Petties, a prisoner, argued that Dr. Imhotep Carter was deliberately indifferent when he failed to give Petties a foot splint and promptly arrange an appointment with a specialist. In not prescribing a splint, Petties argued, Dr. Carter exacerbated the injury. Dr. Carter, on the other hand, argued that although he was aware that the protocol for treating a ruptured Achilles tendon recommended use of a splint, he used his professional judgment in deciding to immobilize Petties’ foot through use of crutches while also approving lay-in meals and a lower bunk assignment. In a 6-3 decision, following a rehearing en banc, the United States Court of Appeals for the Seventh Circuit reversed the district court’s grant of summary judgment to the defendants. The majority reasoned that even if Dr. Carter denied knowing that he was exposing Petties to a substantial risk of serious harm, there was sufficient evidence from which a reasonable jury could infer that Dr. Carter knew he was providing deficient treatment and, consequently, summary judgment was not appropriate. The dissent argued that a decision to provide palliative medical treatment suffices under Eighth Amendment standards even if the treatment was not ideal and,

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12 Id.
13 Id. at 837.
15 Estelle, 429 U.S. at n. 14.
16 Lay-in meals enabled Petties to eat his meals in his cell, as opposed to risking further injury by walking to and from the cafeteria. Petties, 836 F.3d at 726.
17 Id.
therefore, Petties should pursue any claim of deficient medical
treatment under state medical malpractice law.\textsuperscript{18}

This article will analyze the soundness of the Seventh Circuit’s
decision in light of precedent and public policy. Part I contains the
legal standards applicable to claims of insufficient medical care
brought under 42 U.S.C. §1983 and the legal differences between
these claims and state-law medical malpractice claims. Part II
discusses the factual and procedural background of \textit{Petties v. Carter}.
Part III argues that physicians who show a reasonable response to risk
should be shielded from liability at the summary judgment stage. It
further argues that public policy reasons support respect for case-
specific decisions by medical professionals, and concludes that
standard claims of deficient medical care should be addressed under
state medical malpractice law.

\textbf{BACKGROUND AND STANDARDS}

The Supreme Court has found that the government has a duty
to provide medical care for those it is punishing through
incarceration.\textsuperscript{19} 42 U.S.C. § 1983 provides a cause of action for
prisoners allegedly subjected to cruel and unusual punishment in
violation of the Eighth Amendment, made applicable to the States
by the Fourteenth Amendment.\textsuperscript{20}

\textbf{A. 42 U.S.C. § 1983 and Medical Malpractice}

A prisoner’s claim of inadequate medical care does not
always constitute an Eighth Amendment claim.\textsuperscript{21} Medical
malpractice claims alleging negligence in diagnosis or treatment
of a medical condition are not transformed into Eighth

\textsuperscript{18} \textit{Petties}, 836 F.3d at 734 (Easterbrook, J., dissenting).
\textsuperscript{19} \textit{Estelle}, 429 U.S. at 103.
\textsuperscript{21} \textit{Estelle}, 429 U.S. at 105.
Amendment claims simply because the victim is a prisoner.\textsuperscript{22} Courts agree that mere allegations of malpractice do not support an Eighth Amendment violation. However, the exact distinction between medical malpractice law and Eighth Amendment violations in the medical context is less clear.

State law medical malpractice is designed to assess a claim of professional negligence through a peer-reviewed evidentiary standard.\textsuperscript{23} In most jurisdictions, a claim for medical malpractice must be supported by the opinion of an expert licensed in the same field of medicine.\textsuperscript{24} This opinion must set out the standard of care required, the care actually provided, how the standard of care was violated, and how the violation damaged the plaintiff.\textsuperscript{25}

In addition to state law medical malpractice claims, physicians treating prisoners are vulnerable to Eighth Amendment claims brought under 42 U.S.C. §1983.\textsuperscript{26} The practical differences between these two types of claims are considerable. An Eighth Amendment claim does not require the support of an expert, thus avoiding significant costs at the pleading stage.\textsuperscript{27} Further, whereas in most states medical malpractice claims impose a cap on damages and prohibit punitive damages, Eighth Amendment claims have no such cap or prohibition.\textsuperscript{28} In fact, a successful Eighth Amendment claim entitles the plaintiff to recover

\begin{itemize}
\item \textsuperscript{22} Id. at 106.
\item \textsuperscript{24} See B. Sonny Bal, The Expert Witness in Medical Malpractice Litigation, CLIN. ORTHOP. RELAT RES. 467(2): 383-391.
\item \textsuperscript{25} See e.g., Chapman Law Group, The Difference Between a Medical Malpractice Claim and a Deliberate Indifference (42 § USC 1983 Civil Rights) Claim, CHAPMAN LAW GROUP BLOG (Jan. 23, 2015) http://chapmanlawgroup.com/medicalmalpractice_1983civilrights/.
\item \textsuperscript{26} 42 U.S.C. §1983.
\item \textsuperscript{27} See Joel H. Thompson, Today's Deliberate Indifference: Providing Attention Without Providing Treatment to Prisoners with Serious Medical Needs, 45 HARV. C.R.-C.L. L. REV. 635, 651-52 (2010).
\item \textsuperscript{28} See Chapman Law Group, supra note 25.
\end{itemize}
attorneys’ fees in addition to compensatory damages.\textsuperscript{29} Finally, some medical malpractice insurance policies and contracts between prisons and private healthcare groups do not cover liability or indemnification for willful, wanton, or intentional acts, and thus will not cover a judgment against a physician under 42 U.S.C. §1983.\textsuperscript{30}

Decreased litigation costs and the prospect of uncapped damages create an attractive incentive for prisoners to file under 42 U.S.C. §1983 rather than under medical malpractice law in state court. This hypothetically increases the number of lawsuits filed under 42 U.S.C. §1983 against prison physicians as compared to alternative actions under state medical malpractice law. The enhanced potential to be named in a civil suit coupled with personal liability for judgments under 42 U.S.C. §1983 creates a hazard for health professionals who provide services in prisons. Given this, the courts attempt to balance this disincentive by requiring a higher burden of proof for alleged Eighth Amendment violations.\textsuperscript{31} Plaintiffs filing under 42 U.S.C. §1983 must prove “deliberate indifference,” a significantly higher burden of proof than ordinary medical negligence.\textsuperscript{32}

\textbf{B. History of Cruel and Unusual Punishment}

In establishing the constitutional prohibition against “cruel and unusual punishment,” the primary concern of the drafters was to

\textsuperscript{32} 42 U.S.C. §1983.
prevent torture and other barbarous methods of punishment.\footnote{Estelle, 429 U.S. at 102; Stuart Klein, Prisoners’ Rights to Physical and Mental Health Care: A Modern Expansion of the Eighth Amendment’s Cruel and Unusual Punishment Clause, 7 FORDHAM URBAN L.J. 1, 3 (1978).} Initially, the Eighth Amendment ban on cruel and unusual punishment was limited to a strict interpretation of the phrase.\footnote{Estelle, 429 U.S. at 102; Klein, supra note 33.} Courts, for example, declined to extend Eighth Amendment claims to arguments that sentences were disproportionate to their crimes.\footnote{Estelle, 429 U.S. at 102; Klein, supra note 33.} However, in 1910, the Supreme Court extended Eighth Amendment protections beyond torture and barbarous acts, finding that the protection included excessive punishment.\footnote{Weems v. United States, 217 U.S. 349 (1910).} In extending the interpretation of the Eighth Amendment, the Court said, “a principle to be vital must be capable of wider application than the mischief which gave it birth.”\footnote{Id. at 373, Klein, supra note 33.} Thus, the Eighth Amendment has become a subject of progressive interpretation, closely linked to societal views on prison conditions, ethical punishment and human dignity.\footnote{Klein, supra note 33.}

Prison officials have a duty to provide medical treatment to a prisoner “who cannot, by reason of the deprivation of his liberty, care for himself.”\footnote{Id. at 104.} Punishment by imprisonment coupled with deprivation of medical care results in a punishment in excess of the sentence, and this may constitute cruel and unusual punishment.\footnote{Klein, supra note 33.} It is clear that the Eighth Amendment prevents affirmative punishment and lack of treatment which is “shocking to the conscience.”\footnote{Id.} Yet, it is unclear what level of medical care beyond a total deprivation of treatment is constitutionally required.

\footnote{Estelle, 429 U.S. at 102; Stuart Klein, Prisoners’ Rights to Physical and Mental Health Care: A Modern Expansion of the Eighth Amendment’s Cruel and Unusual Punishment Clause, 7 FORDHAM URBAN L.J. 1, 3 (1978).}
Courts began analyzing constitutionally permissible treatment in prisons in light of “evolving standards of decency.” Due to the vagueness of this guideline, different standards were proposed and adopted for analyzing claims of cruel and unusual punishment resulting from inadequate medical care. Proposed standards included “abuse of discretion,” “deprivation of basic elements of adequate medical treatment,” and “deliberate indifference.”

The Supreme Court, in Estelle v. Gamble, settled on the standard of “deliberate indifference.” The Court explicitly rejected the Fourth Circuit’s broader standard of “reasonable care.” Instead, the Estelle Court reasoned that “in order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend ‘evolving standards of decency’ in violation of the Eighth Amendment.”

Estelle involved a prisoner, J. W. Gamble, who was engaged in prison work when a bale of cotton fell on him. He experienced immediate and on-going pain, and was seen by a prison physician. The physician prescribed a pain reliever, a muscle relaxant, and in-cell meals. Gamble nevertheless continued to complain of pain. He was subject to administrative segregation for refusing to work due to the

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42 Klein, supra note 33.
43 Klein, supra note 33.
44 See Flint v. Wainwright, 433 F.2d 961 (5th Cir. 1970); Campbell v. Beto, 460 F.2d 765 (5th Cir. 1972); Klein, supra note 33.
46 Blanks v. Cunningham, 409 F.2d 220 (4th Cir. 1969); Klein, supra note 33.
47 Estelle, 429 U.S. at 106 (“A complaint must allege that medical treatment provided was not supported by any competent, recognized school of medical practice, and that the treatment was a denial of medical care. However, short of this, the prisoner is left to his state tort remedies.”).
48 See generally Estelle, 429 U.S. 97, 97-116.
49 Id. at 99-101.
50 Id.
51 Id.
pain.\textsuperscript{52} Gamble visited prison physicians seventeen times within a three-month period.\textsuperscript{53}

The District Court dismissed Gamble’s complaint for failure to state a claim upon which relief could be granted.\textsuperscript{54} The Court of Appeals, however, found that the alleged insufficiency of the medical treatment required reinstatement of the complaint.\textsuperscript{55} The Supreme Court resolved the dispute by finding that while deliberate indifference to a prisoner’s serious medical condition constitutes cruel and unusual punishment in violation of the Eighth Amendment, Gamble’s complaint was insufficient to state a cause of action.\textsuperscript{56}

Gamble contended that more should have been done for him by way of diagnosis and treatment—there were a number of medical treatment options that were not pursued.\textsuperscript{57} Yet, the Court held that the decision not to order additional diagnostic techniques or forms of treatment is a medical decision, and such a decision is not cruel and unusual punishment.\textsuperscript{58} Furthermore, inadvertent failure to provide adequate medical treatment does not constitute “unnecessary and wanton infliction” and is not “repugnant to the conscience of mankind.”\textsuperscript{59} The \textit{Estelle} Court made an effort to distinguish medical malpractice from Eighth Amendment violations by pointing out that claims of medical malpractice do not become a constitutional violation merely because the victim is a prisoner.\textsuperscript{60}

The Court revisited the deliberate indifference standard in \textit{Farmer v. Brennan}.\textsuperscript{61} In \textit{Farmer}, a transsexual inmate accused prison officials of being deliberately indifferent to the substantial risk of sexual

\textsuperscript{52} Id. at 100.
\textsuperscript{53} Id. at 107.
\textsuperscript{54} \textit{Estelle}, 429 U.S. 97, 98.
\textsuperscript{55} Id.
\textsuperscript{56} Id. at 104.
\textsuperscript{57} Id. at 107.
\textsuperscript{58} Id.
\textsuperscript{59} Id. at 105-6.
\textsuperscript{60} Id.
violence against him while in the penitentiary. Though this case did not involve medical treatment by a physician, the Court followed the same line of analysis. The Court clarified that a constitutional violation occurs only where the deprivation alleged is objectively serious, and the prison official has acted with “deliberate indifference” to inmate health or safety. Courts will therefore analyze the seriousness of the alleged deprivation objectively, but the Supreme Court expressly rejected an objective test for determining deliberate indifference. Instead, the Court clarified that an Eighth Amendment violation requires proof that an official was both aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and, in fact, drew that inference. Under this standard, an official’s failure to alleviate a significant risk that she should have perceived but failed to perceive is not an infliction of punishment. Importantly, an official who actually knew of a substantial risk to inmate health may be found free from liability if she responded reasonably to the risk, even if the harm was not ultimately averted.

Petties v. Carter

A. The Facts

In January 2012, Tyrone Petties was walking up the stairs in Stateville prison when he suffered a rupture in his Achilles tendon.

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62 Dee Farmer, biologically born a male, took several medical steps to transition but ultimately did not complete sex reassignment. Pronouns referencing Farmer correspond with those used by the Court in order to avoid confusion.

63 Id. at 829.

64 Id. at 834 (citing Wilson v. Seiter, 501 U.S. 294 (1991)).

65 Id.

66 Id. at 837.

67 Id.

68 Farmer, 511 U.S. at 838.

69 Id. at 844.

He had previously suffered a partial rupture in his Achilles tendon in 2010, which had not fully healed. A rupture in the Achilles tendon is a tear, which causes great pain and limits mobility. Walking on the ruptured tendon increases the tear, and thus exacerbates the injury and pain. Immobilization of the foot prevents further tearing and allows scar tissue to form.

Dr. Imhotep Carter was medical director of Stateville’s health clinic, though he was employed by Wexford Health Sources, a private contractor of medical services to correctional facilities. Dr. Carter’s role in Stateville’s health clinic was to implement Wexford’s medical policies and procedures. Wexford’s protocol for ruptured Achilles tendons specified that patients receive a splint, crutches, antibiotics if there were lacerations to the site of injury, and a follow-up with a specialist for further treatment.

Petties was first seen by a physician in the prison infirmary who noted tenderness and abnormal reflex in the left Achilles tendon. He observed that Petties could not bear weight on that foot. He prescribed Vicodin and crutches and authorized lay-in meals so that Petties did not have to walk to and from the cafeteria. Later that same day, Petties was seen by Dr. Carter, who opined that Petties had suffered an Achilles tendon rupture. He directed that Petties be scheduled for an MRI and examination by an orthopedist, noting that

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71 Id.
72 Id.
73 Id.
74 Id.
75 Id.
76 Petties, 836 F.3d at 726.
77 Id.
78 Petties v. Carter, 795 F.3d 688, 689 (7th Cir. 2015), reh’g granted, 836 F.3d 722 (7th Cir. 2016) (en banc).
79 Id.
80 Id.
81 Petties, 836 F.3d at 726.
these additional steps were “urgent.”

However, the appointment with the orthopedist did not take place for almost six weeks. Dr. Carter later alleged that the delay was due to security issues.

Despite Wexford’s protocol for ruptured Achilles tendons, Dr. Carter did not provide Petties with a splint. At a follow-up appointment, Petties complained of increased pain. Dr. Carter renewed prescriptions for crutches, pain medication, lay-in meals, and assignments to a lower bunk. Dr. Carter still did not prescribe a splint.

In March 2012, Petties had an MRI which confirmed the diagnosis of Achilles tendon rupture. A week later, he saw an orthopedic specialist, Dr. Anuj Puppala, who noted that the lack of a cast was potentially creating a gap at the tendon rupture site. He gave Petties an orthopedic boot to prevent further gapping and to alleviate pain. Due to the gapping, Dr. Puppala thought that surgery might be necessary. He referred Petties to an ankle specialist. Petties returned to Stateville where he was again seen by Dr. Carter. Dr. Carter authorized use of the boot, along with crutches, ice, and lower bunk assignment. Petties alleged that Dr. Carter said he would not order surgery because it was too costly.

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82 Petties v. Carter, 795 F.3d 688, 690 (7th Cir. 2015), reh'g granted, 836 F.3d 722 (7th Cir. 2016) (en banc). [CAN SHORT CITE SINCE CITE TO THIS CASE IS LESS THAN 5 CITES AGO]
83 Petties, 836 F.3d at 726.
84 Id. at 733.
85 Id.
86 Id.
87 Id.
88 Id. at 727.
89 Petties, 836 F.3d at 727.
90 Id.
91 Id.
92 Id.
93 Id.
94 Id.
95 Petties, 836 F.3d at 727.
In July 2012, Petties saw an ankle specialist, Dr. Samuel Chmell. Dr. Chmell prescribed a second MRI, physical therapy, stretching exercises, and follow-up treatment.

In August 2012, Dr. Carter was replaced by Wexford employee Dr. Saleh Obaisi. Dr. Obaisi approved the order for a second MRI. He did not authorize physical therapy. Petties alleged that Dr. Obaisi also said that surgery was too expensive.

In September 2012, Petties had his second MRI, which showed a partial tear in his tendon, but indicated some healing. Yet, Petties complained of continued pain. Dr. Obaisi prescribed Tylenol, a low bunk permit, and continued use of a boot. Dr. Obaisi renewed prescriptions for the low bunk permit and boot in November and the following June. Petties alleged that he experienced continued pain as late as March 2014.

**B. District Court Opinion**

In November 2012, Petties filed a lawsuit under 42 U.S.C. § 1983 against Dr. Carter and Dr. Obaisi. Petties alleged that Dr. Carter and Dr. Obaisi acted with deliberate indifference in violation of the Eighth Amendment. The district court granted summary judgment for both defendants. The court reasoned that Dr. Carter’s decision to wait...
eight weeks before prescribing a boot or splint could not have constituted deliberate indifference because the various physicians that Petties had seen in and out of the prison infirmary held different opinions about whether a boot or splint was necessary in Petties case.\textsuperscript{109} The court further found that a reasonable jury could not find that Dr. Obaisi’s rejection of recommendation for physical therapy constituted deliberate indifference because Petties had learned physical therapy exercises from his previous injury and could have performed those on his own.\textsuperscript{110}

\textbf{C. Appeal to Seventh Circuit}

The Court of Appeals for the Seventh Circuit, rehearing this case \textit{en banc}, reviewed the district court’s grant of summary judgment \textit{de novo}, “viewing the record in the light most favorable to Petties, and drawing all inferences in his favor.”\textsuperscript{111}

The majority considered “when a doctor’s rationale for his treatment decisions supports a triable issue as to whether that doctor acted with deliberate indifference under the Eighth Amendment.”\textsuperscript{112} They reversed the district court’s grant of summary judgment, concluding that, “even if a doctor denies knowing that he was exposing a plaintiff to a substantial risk of serious harm, evidence from which a reasonable jury could infer a doctor knew he was providing deficient treatment is sufficient to survive summary judgment.”\textsuperscript{113}

\textsuperscript{109} Petties v. Carter, 795 F.3d 688, 691 (7th Cir. 2015), \textit{reh'g granted}, 836 F.3d 722 (7th Cir. 2016) (en banc).
\textsuperscript{110} \textit{Id.}
\textsuperscript{111} \textit{Petties}, 836 F.3d at 727.
\textsuperscript{112} \textit{Id.} at 726.
\textsuperscript{113} \textit{Id.}
1. Judge Williams’ Majority Opinion

Reviewing the record in the light most favorable to Petties, the majority found that Petties produced sufficient evidence for a jury to conclude that the doctors knew the care they were providing was insufficient. Judge Williams quoted the Supreme Court’s decision in Farmer v. Brennan stating: “The Constitution does not mandate comfortable prisons, but neither does it permit inhumane ones.”

Judge Williams acknowledged that not all claims of inadequate medical treatment are Eighth Amendment claims. Citing Farmer, Judge Williams suggested that in determining Eighth Amendment violations in the “prison medical context,” the Court performs a two-step analysis. First, the Court examines whether a plaintiff suffered an objectively serious medical condition. Then, the Court determines whether the individual defendant was deliberately indifferent to that condition. Generally, litigation arises over the second line of analysis.

In analyzing the first step, the parties agreed that an Achilles tendon rupture was an objectively serious condition. Therefore, the Court was left to analyze whether the defendants acted with deliberate indifference. The Court began this analysis by looking to the defendant’s subjective state of mind. Judge Williams reiterated that mere negligence, and even objective recklessness, would not be enough. Further, the defendants in this case could successfully

\[114\] Id.
\[115\] Id. at 727.
\[116\] Id.
\[117\] Id.
\[118\] Petties, 836 F.3d at 728.
\[119\] Id.
\[120\] Id.
\[121\] Id.
\[122\] Id.
\[123\] Petties, 836 F.3d at 728.
avoid liability by proving they were unaware of even an obvious risk to Petties’ health or safety.\footnote{124}

Judge Williams pointed out that proof of actual knowledge in these cases is rare. Because of this, she suggested that a narrower question faced the court: How bad does an inmate’s care have to be to create a reasonable inference from circumstantial evidence that a doctor was aware of and disregarded a substantial risk of harm?\footnote{125}

Judge Williams concluded from precedent that deliberate indifference can be found where medical judgment is “such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such a judgment.”\footnote{126} This can be shown through proof that “no minimally competent professional would have so responded under those circumstances.”\footnote{127} Yet, evidence that merely some medical professionals would have chosen a different course of treatment is insufficient to make out a constitutional claim.\footnote{128}

Judge Williams acknowledged the difficulty in proving a substantial departure from accepted professional standards due to the nature of medical judgments being patient and fact-specific.\footnote{129} Because of this, it is hard to draw a line between poor medical judgment and deliberate indifference.\footnote{130} Judge Williams examined cases which have attempted to draw this line and pointed to a Tenth Circuit case finding deliberate indifference when a doctor fails to follow an existing protocol.\footnote{131} She concluded by finding that the following situations can amount to deliberate indifference: 1) a departure from minimally competent medical judgment where a prison

\begin{footnotes}
\footnotetext[124]{Id.}
\footnotetext[125]{Id.}
\footnotetext[126]{Id. at 729.}
\footnotetext[127]{Id.}
\footnotetext[128]{Id.}
\footnotetext[129]{Petties, 836 F.3d at 729 (citing Steele v. Choi, 82 F.3d 175, 179 (7th Cir. 1996)).}
\footnotetext[130]{Petties, 836 F.3d at 729.}
\footnotetext[131]{Id.}
\end{footnotes}
official persists in a course of treatment known to be ineffective, 2) where a prison doctor chooses an “easier and less efficacious treatment” without exercising professional judgment, 3) an inexplicable delay in treatment which serves no penological interest.\footnote{132}

In response to the dissent’s anticipated argument, Judge Williams asserted that the Court has repeatedly rejected the idea that simply providing some medical care means that the physician has met the basic requirements of the Eighth Amendment.\footnote{133} She argued that a jury is entitled to weigh a physician’s claim that he lacked knowledge that his treatment decisions could cause harm against clues that the doctor did in fact know.\footnote{134} Judge Williams suggested the policy consideration that allowing physicians’ claims of ignorance to immunize them from liability would allow a free pass to ignore prisoners’ medical needs.\footnote{135}

Specifically in regard to Petties’ case, Judge Williams found there to be sufficient evidence that Dr. Carter acted with deliberate indifference when he 1) failed to immobilize Petties’ ruptured tendon for six weeks, 2) delayed Petties’ appointment with a specialist, and 3) refused to order surgery to repair the tendon.\footnote{136} This finding was based on evidence including the deposition testimonies of Dr. Carter, Dr. Puppala and Dr. Chmell. Judge Williams concluded that this established a reasonable inference that Dr. Carter knew that failing to immobilize an Achilles rupture would result in further pain and injury to Petties.\footnote{137} Judge Williams acknowledged that some of Dr. Carter’s testimony suggested that he believed crutches served the same purpose as a boot.\footnote{138} Yet, ultimately she found this to be a triable issue where a jury could reasonably infer from conflicting testimony that Dr. Carter acted with deliberate indifference.\footnote{139}

\footnote{132} Id. at 729-30.
\footnote{133} Id. at 731.
\footnote{134} Id.
\footnote{135} Petties, 836 F.3d at 731.
\footnote{136} Id. at 731.
\footnote{137} Id. at 732.
\footnote{138} Id.
\footnote{139} Id. at 726, 732.
In addition to the immobilization issue, Petties asserted that Dr. Carter was responsible for the delay in treatment by a specialist.\textsuperscript{140} Judge Williams found this issue of whether the delay was the result of negligence or deliberate indifference to be a question for the jury.\textsuperscript{141} Further, Judge Williams found that if a jury were to believe that Dr. Carter cited cost as the reason for refusing treatment, a jury could similarly find deliberate indifference.\textsuperscript{142}

Regarding Dr. Obaisi, Judge Williams found that his testimony was at odds with the evidence in this case.\textsuperscript{143} She concluded that a jury was entitled to determine whether Dr. Obaisi was “deliberately indifferent, rather than simply incompetent.”\textsuperscript{144}

2. Judge Easterbrook’s Dissent

Judge Easterbrook began his dissent by characterizing his colleagues’ understanding as being that “the Constitution entitled Petties to an orthopedic boot” immediately after his injury.\textsuperscript{145} He argued that the appropriate analysis in this case should instead begin with the question: Was there a cruel and unusual punishment?\textsuperscript{146} Only after finding a cruel and unusual punishment should the courts analyze the defendant’s mental state.\textsuperscript{147} Judge Easterbrook pointed out that the Supreme Court’s only decision addressing palliative medical treatment under the Eighth Amendment is \textit{Estelle v. Gamble}.\textsuperscript{148} Judge Easterbrook defined palliative medical treatment to mean pain relief without an effort at cure.\textsuperscript{149}

\footnotesize{\textsuperscript{140} Id.  
\textsuperscript{141} Petties, 836 F.3d at 732-33.  
\textsuperscript{142} Id.  
\textsuperscript{143} Id. at 733.  
\textsuperscript{144} Id.  
\textsuperscript{145} Petties, 836 F.3d at 734 (Easterbrook, J., dissenting).  
\textsuperscript{146} Id.  
\textsuperscript{147} Id.  
\textsuperscript{148} Id.  
\textsuperscript{149} Id.}
Judge Easterbrook asserted that the Fifth Circuit in *Estelle*, prior to the Supreme Court’s decision, interpreted the constitution to require not only palliation, but also a medically competent effort to cure.\(^{150}\) The Supreme Court reversed that finding, instead holding that the plaintiff received care and thus there was no Eighth Amendment violation.\(^{151}\) Judge Easterbrook reiterated that despite the wretched care that the plaintiff received, Supreme Court precedent dictated that claims based on deficient care are to be addressed through state medical-malpractice law.\(^{152}\)

Finding support in *Estelle*, Judge Easterbrook therefore concluded that Petties was provided with medical care.\(^{153}\) Judge Easterbrook noted that Petties was provided with more, and better, care than Gamble received; and yet, even Gamble’s claim for deficient medical care was defeated at the summary judgment stage.\(^{154}\) Judge Easterbrook contended that *Farmer* stands for the proposition that a constitutional claim is supported when *no* response is provided for a serious medical condition, and the actors are deliberately indifferent.\(^{155}\) Beyond this, *Estelle* allows legal action for harmful interventions.\(^{156}\) However, Petties did not claim that he received no care, and did not claim that the care he received was harmful as compared with no care at all.\(^{157}\)

Judge Easterbrook suggested that one way to distinguish medical malpractice from a constitutional violation would be to determine whether the prison official exercised medical judgment.\(^{158}\) Again, citing *Estelle*, Judge Easterbrook argued that Petties did not deny that the defendants exercised medical judgment, but rather Petties asserted

\(^{150}\) *Id.* at 735.
\(^{151}\) *Petties*, 836 F.3d at 735 (Easterbrook, J., dissenting).
\(^{152}\) *Id.*
\(^{153}\) *Id.*
\(^{154}\) *Id.*
\(^{155}\) *Id.*
\(^{156}\) *Id.*
\(^{157}\) *Petties*, 836 F.3d at 735 (Easterbrook, J., dissenting).
\(^{158}\) *Id.*
that their judgment was poor.\textsuperscript{159} Since \textit{Estelle} held that poor medical care must fall under medical malpractice law, Judge Easterbrook contends that Petties’ claim must be addressed through a medical malpractice action.\textsuperscript{160}

Judge Easterbrook concluded by pointing to the circuit split on the issue of whether a prisoner received some treatment in contrast to the issue of whether the treatment was inferior.\textsuperscript{161} Finally, Judge Easterbrook urged that courts consider the implications of federalizing the law of medical malpractice before finding a “competent medical judgment” standard in the Constitution.\textsuperscript{162}

\textbf{ANALYSIS}

The Seventh Circuit majority opinion incorrectly decided \textit{Petties v. Carter} because it failed to appropriately consider a critical Supreme Court precedent finding that prison officials can avoid liability by demonstrating a reasonable response to risk.\textsuperscript{163} By failing to take into account evidence suggesting a reasonable medical response to Petties, the Seventh Circuit arrived at the wrong conclusion. Precedent and public policy demand an analysis of the totality of medical care when assessing whether an Eighth Amendment claim of deliberate indifference ought to survive summary judgment.

To survive summary judgment, a plaintiff pursuing an Eighth Amendment claim must allege an objectively serious medical condition.\textsuperscript{164} A plaintiff must also show facts from which a reasonable factfinder could conclude that the prison official knew of and disregarded a substantial risk to the prisoner’s health.\textsuperscript{165} Notwithstanding these allegations (taken in the light most favorable to

\begin{flushleft}
\textsuperscript{159} Id. at 735-36.
\textsuperscript{160} Id. at 736.
\textsuperscript{161} Id.
\textsuperscript{162} Id.
\textsuperscript{164} See id.
\textsuperscript{165} See id.
\end{flushleft}
the plaintiff), a defendant may be found free from liability if she responded reasonably to the risk, even if the harm was, in the end, not averted. It therefore follows that if there is no factual dispute that a defendant responded reasonably to the risk, despite the eventual harm, the defendant is entitled to judgment as a matter of law.

A. The Seventh Circuit Failed to Consider Physicians’ Reasonable Response to Risk

Petties’ objectively serious medical condition was the two-centimeter gap at the site of his already ruptured Achilles tendon. Wexford’s protocol for treating ruptured Achilles tendons was use of a splint, crutches, antibiotics if there were lacerations to the site of injury, and an appointment with a specialist. Dr. Carter approved the use of crutches, ice, and pain medication, and authorized lay-in meals, an assignment to a lower bunk and a referral to an orthopedist. Petties alleged that he did not receive a splint, and was not seen by the orthopedist in an adequate amount of time following his injury. The orthopedist opined that surgery might be necessary. Yet, Petties alleged that Dr. Carter and Dr. Obaisi would not authorize surgery for Petties due to cost concerns. The Seventh Circuit therefore concluded that there was sufficient evidence for a reasonable jury to conclude that the doctors knew the care that they were providing was insufficient. However, the Seventh Circuit cut their analysis short by failing to fully consider precedent set forth in Farmer v. Brennan,

166 See id.

167 Petties v. Carter, 795 F.3d 688, 690 (7th Cir. 2015), reh'g granted, 836 F.3d 722 (7th Cir. 2016) (en banc).

168 Petties, 836 F.3d at 726.

169 Id.

170 Id.

171 Id. at 727.

172 Id.

173 Id. at 726.
which demands consideration of the physician’s response to an alleged risk.\textsuperscript{174}

The Seventh Circuit is committed to examining the totality of an inmate’s medical care when considering whether that care reflects deliberate indifference to serious medical needs.\textsuperscript{175} Where a prisoner alleges a few isolated incidents of delay or neglect during a course of treatment, but it is clear that the defendant provided meaningful treatment throughout the inmate’s recovery and thus did not disregard a serious medical risk, the Seventh Circuit has held that the defendant has not acted with deliberate indifference.\textsuperscript{176} Proving disregard of a substantial risk requires showing that a medical professional’s treatment decisions are “such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible did not base the decision on such a judgment.”\textsuperscript{177} But mere disagreement with a doctor’s medical judgment is not enough to prove deliberate indifference.\textsuperscript{178} In upholding the commitment to examine the totality of an inmate’s medical care, this standard cannot be fairly examined without assessing the reasonableness of the physician’s response to the existing risk.

Considering the facts in the light most favorable to Petties, Wexford’s protocol for treatment of Achilles tendon ruptures was met by the defendant doctors except for use of a splint, and delay in

\textsuperscript{175} Cavalieri v. Shepard, 321 F.3d 616, 625–26 (7th Cir. 2003); Dunigan ex rel. Nyman v. Winnebago County, 165 F.3d 587, 591 (7th Cir. 1999). See also Gutierrez v. Peters, 111 F.3d 1364, 1375 (7th Cir. 1996) (holding that isolated instances of neglect “cannot support a finding of deliberate indifference”).
\textsuperscript{176} See Walker v. Peters, 233 F.3d 494, 501 (7th Cir. 2000); Dunigan ex rel. Nyman v. Winnebago Cnty., 165 F.3d 587, 591 (7th Cir. 1999); Gutierrez v. Peters, 111 F.3d 1364, 1375 (7th Cir. 1997).
\textsuperscript{177} Cole v. Fromm, 94 F.3d 254, 261-62 (7th Cir. 1996).
\textsuperscript{178} Berry v. Peterman, 604 F.3d 435, 441 (7th Cir.2010); Johnson v. Doughty, 433 F.3d 1001, 1013 (7th Cir. 2006); Norfleet v. Webster, 439 F.3d 392, 397 (7th Cir. 2006).
arranging an appointment with an orthopedist. The majority in Petties relied upon a Tenth Circuit decision in contending that Dr. Carter’s failure to follow protocol and immobilize Petties’ foot with a splint provided circumstantial evidence that he knew of a substantial risk of serious harm. Indeed, Dr. Carter did not contest the risk posed by failing to immobilize Petties’ foot. Yet, he contended that he addressed that risk in a way supported by Petties’ unique case and backed by Dr. Carter’s medical training and experience. Dr. Carter testified, on the basis of his professional opinion as well as on the basis of having been the treating physician for Petties’ specific injury, that crutches and other immobilization accommodations served the same purpose as a splint. Petties alleged that Dr. Carter failed to meet Wexford’s protocol for treating an Achilles tendon rupture, and thus exacerbated Petties’ injury. Yet, Dr. Carter went beyond the protocol to treat Petties’ individual case by authorizing lay-in meals and a lower bunk assignment.

Further, despite deeming it a jury question and finding it supportive of an Eighth Amendment claim, the Seventh Circuit’s opinion failed to identify any evidence suggesting that Dr. Carter was

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180 Id. at 729 (citing Mata v. Saiz, 427 F.3d 745 (10th Cir. 2005)).
181 Id. at 731 (“He explained the purpose of immobilization, stating, “in the acute phase of healing, you are generating an immune system response in the body,” and when asked if keeping the tendon in one place enables this healing process to go forward favorably, he replied, “Correct. And if you're continuously injuring it, it hinders that process.”). See id. at 732 (“Some of his testimony suggests that he believed crutches served the same purpose as a boot.”); Petties v. Carter, 795 F.3d 688, 692 (7th Cir. 2015), reh’g granted, 836 F.3d 722 (7th Cir. 2016) (en banc). (“Although Dr. Carter acknowledged that treatment for a complete Achilles tear typically includes immobilizing the ankle to minimize putting weight on the ankle, he also explained that he did not employ a splint initially because he believed that giving Petties crutches and minimizing his time on his feet was an effective treatment plan.”).
182 Id.
183 Petties, 836 F.3d at 726.
184 See id.
responsible for an intentional delay regarding Petties’ appointment with the orthopedist.\textsuperscript{186} On the contrary, Dr. Carter had directed, upon initially seeing Petties, that he be scheduled for an MRI and examination by an orthopedist, characterizing these orders as “urgent.”\textsuperscript{187} The majority found fault in Dr. Carter’s failure to issue an “emergency override” in Petties’ case. However, the majority failed to indicate a basis under which Petties, or any prisoner, is entitled to an “emergency override.”\textsuperscript{188} Consequently, the majority’s argument as to the delay in treatment by a specialist fell significantly short of establishing a basis for finding “cruel and unusual punishment.”

The issue facing the Seventh Circuit should have been whether Dr. Carter’s use of other immobilization methods – aside from a splint – constituted a reasonable response, even if exacerbation of the injury was, in the end, not avoided. Considering the totality of Petties’ care, it is hard to imagine a reasonable fact finder concluding that Dr. Carter’s treatment plan was so unreasonable that it amounted to cruel and unusual punishment.

\textbf{B. Public Policy Supports Respect for Case-Specific Medical Judgment, and Deferral to State Medical Malpractice Remedies}

Both the majority and dissent in \textit{Petties} reiterated the importance of case-specific medical judgment and availability of treatments.\textsuperscript{189} Further, the American College of Physicians Ethics Manual sets out ethical considerations for the care of prisoners, emphasizing a physician’s ultimate responsibility to care for the individual patient.\textsuperscript{190} This professional standard of care places significant weight on the

\begin{itemize}
\item \textsuperscript{186} \textit{See id.} at 733.
\item \textsuperscript{187} Petties v. Carter, 795 F.3d 688, 690 (7th Cir. 2015), \textit{reh’g granted}, 836 F.3d 722 (7th Cir. 2016) (en banc).
\item \textsuperscript{188} 20 Ill. Admin. Code § 415.30 (No discussion of policy of issuing emergency overrides).
\item \textsuperscript{189} Petties v. Carter, 836 F.3d 722, 729 (7th Cir. 2016), as amended (Aug. 25, 2016) (citing Roe v. Elyea, 631 F.3d 843 (7th Cir. 2011)).
\item \textsuperscript{190} \textit{AM. COLL. OF PHYSICIANS ETHICS MANUAL 6\textsuperscript{th} ED.}, www.acponline.org (last visited Nov. 21, 2016).
\end{itemize}
physician’s medical judgment in her capacity as a certified health care professional. Though professional judgment may vary from one physician to the next in treatment of the same patient, a physician’s ethical obligations are fulfilled by the honest commitment to treat the patient in the way she deems most medically beneficial to the patient. The law reflects this ethical standard by finding evidence that some medical professionals would have pursued a different course of treatment insufficient to support a claim of deliberate indifference. However, as interpreted by the Seventh Circuit in Petties v. Carter, the “deliberate indifference” standard in some cases might demand more than a physician’s ethical obligations.

Forgoing authorization for a splint in favor of other treatment options designed to immobilize the foot, such as crutches, lay-in meals, and lower bunk authorization, is a professional medical judgment. Yet, the majority in Petties suggested that Dr. Carter’s conscious, professional decision to exclude use of a splint, despite the variety of other treatments prescribed, could lead a reasonable jury to conclude that withholding the splint constituted “cruel and unusual punishment” and that Dr. Carter was deliberately indifferent to the pain of Petties’ ruptured Achilles tendon by doing so. But Supreme Court precedent is clear in stating: “the question whether an X-ray or additional diagnostic techniques or forms of treatment is indicated is a classic example of a matter for medical judgment. A medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment. At most it is medical malpractice, and as such the proper forum is the state court…”

Along those lines, a finding that Dr. Carter had a duty to prescribe a splint, but failed to do so, does not rise to the level of “cruel and

191 See id.
192 See id.
193 Steele v. Choi, 82 F.3d 175, 179 (7th Cir. 1996).
195 See generally id.
unusual punishment.” By extension, Dr. Carter admitting to this duty and breach still does not create an Eighth Amendment claim, as the Seventh Circuit has previously held that even admitted medical malpractice is not sufficient to show that a doctor acted with deliberate indifference. The majority attempted to offset this by further qualifying their finding with the suggestion that Dr. Carter’s medical decision “has no support in the medical community.” However, it would be illogical for a reasonable jury to find that Dr. Carter’s treatment decisions had no support in the medical community and were such that “no minimally competent professional would have so responded under those circumstances,” when the record contained evidence that several other physicians treating Petties similarly debated the necessity of a splint.

1. Consideration of Cost, as a Factor in Medical Decision-Making, is Not Necessarily Evidence of Deliberate Indifference

When deciding a course of treatment for any patient, a physician considers many factors including risks, benefits, and cost. Case-specific facts are applied to these factors, and interpreted to come up with an individualized plan of treatment. Consideration of cost is part

197 Cf. Purtill v. Hess, 489 N.E.2d 867, 872 (1986) (“In a negligence medical malpractice case, the burden is on the plaintiff to prove the following elements of a cause of action: the proper standard of care against which the defendant physician's conduct is measured; an unskilled or negligent failure to comply with the applicable standard; and a resulting injury proximately caused by the physician's want of skill or care.”).

198 McGee v. Adams, 721 F.3d 474, 481 (7th Cir. 2013); Norfleet v. Webster, 439 F.3d 392, 397 (7th Cir. 2006).

199 Petties, 836 F.3d at n. 2.

200 Petties v. Carter, 795 F.3d 688, 691 (7th Cir. 2015), reh'g granted, 836 F.3d 722 (7th Cir. 2016) (en banc). (“The district court granted the doctors' motion for summary judgment. Dr. Carter's decision to wait eight weeks before immobilizing Petties's ankle in a cast or boot could not have constituted deliberate indifference, the court reasoned, because Petties's several physicians in and out of prison held different opinions about whether a boot or cast had been necessary.”).
of professional decision-making, and is not necessarily evidence of deliberate indifference.

In fact, under the American Medical Association Code of Medical Ethics, physicians are ethically required to “choose the course of action that requires fewer resources when alternative courses of action offer similar likelihood and degree of anticipated benefit compared to anticipated harm for the individual patient but require different levels of resources.”

The Constitution does not entitle incarcerated individuals to all suggested or possible medical treatment for a specific diagnosis without cost consideration. Selecting a more cost-effective course of treatment is not in and of itself deliberate indifference. For instance, “ankle sprain” is the diagnosis used to describe a spectrum of symptoms and intensities experienced by different patients suffering from an ankle sprain. A patient with a mild sprain may be effectively treated with rest, ice, compression and elevation, while a patient with a more severe sprain might require a splint and physical therapy. It is surely more cost effective, and in fact the treating physician’s duty as a prudent steward of health care resources, to forgo the cost of a splint for the patient with a mild sprain who can be effectively treated through self-care.

Disincentivizing cost-conscious decision-making pits physicians’ ethical obligations against their desire to avoid professional liability. In practice, this might lead to overuse of tests and procedures, creating an inefficient healthcare model, with little gain in benefit accompanied by greatly increased costs.

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2. State Medical Malpractice Law is Better Suited to Address Claims of Deficient Medical Care

The Supreme Court, in Estelle, held that claims of substandard care belong in state medical malpractice lawsuits.\(^{204}\) Specific to this case, Petties did not allege that he received no care—he received crutches, ice, pain medication and living accommodations. Rather, he argued that he received poor care. This is a classic claim of medical malpractice.

In disputes concerning adequacy of treatment, “federal courts are generally reluctant to second guess medical judgments and to constitutionalize claims which sound in state tort law.”\(^{205}\) State medical malpractice laws are often better equipped to evaluate these claims by requiring the support of an expert familiar with the specialty.\(^{206}\) The policy underlying this requirement is that experts familiar with the field are able to testify that the defendant failed to conform to the applicable standard of care for that field.\(^{207}\) However, critics argue that retaining an expert may be prohibitively expensive for an inmate.\(^{208}\) If the inmate cannot retain an expert, she cannot file a medical malpractice action.\(^{209}\) The court is not authorized to offer financial assistance to hire expert witnesses for inmates, as they are not similarly authorized to do so for non-prisoners.\(^{210}\) Therefore, in


\(^{205}\) Westlake v. Lucas, 537 F.2d 857, 860 n. 5 (6th Cir. 1976); Laye v. Vinzant, 657 F.2d 468, 474 (1st Cir. 1981); United States ex rel. Walker v. Fayette County, 599 F.2d 573, 575 n. 2 (3d Cir. 1979); Harris v. Thigpen, 941 F.2d 1495, 1507 (11th Cir. 1991).

\(^{206}\) 735 ILCS 5/2-622.


\(^{208}\) See Chapman Law Group, supra note 25.

\(^{209}\) See 735 ILCS 5/2-622.

\(^{210}\) See 28 U.S.C.A. § 1915; Gaviria v. Reynolds, 476 F.3d 940, rehearing en banc denied, certiorari denied (2007) (District court did not abuse its discretion, in medical malpractice action brought against surgeons by patient/arrestee who had
pursuing a state medical malpractice action, prison inmates are left to pursue avenues such as contingency fee arrangements with plaintiffs’ attorneys.

There is no expert witness affidavit requirement for federal claims of deliberate indifference under 42 U.S.C. § 1983. Unfortunately, this leads to many frivolous and unwarranted lawsuits against prison health care workers that have no support in law or medicine. 211 Furthermore, prison physicians facing potential liability under the deliberate indifference standard risk being held personally financially accountable for the judgment, as insurers often do not cover deliberate or intentional acts. 212 The prospect of facing personal financial liability may, in turn, serve as a disincentive for competent physicians, seeking to protect themselves from liability, to avoid working in the prison health care system. In the long term, disincentivizing competent physicians from practicing in prisons may create lower quality and less efficient prison healthcare system.

CONCLUSION

The defendants in Petties v. Carter have filed a petition for writ of certiorari. Should the Supreme Court decide to hear argument on this case, it presumably will be mindful that an essential purpose of

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211 See Chapman Law Group, supra note 25.
212 See e.g., Chapman Law Group, supra note 25; Harris, supra note 30; AHC Media, Not all claims covered by med/mal policies, https://www.ahcmedia.com/articles/64652-not-all-claims-covered-by-med-mal-policies (last visited Nov. 29, 2016).
summary judgment is to provide a method by which defendants can
curtail meritless claims at a relatively early stage as a matter of law.
This avenue of relief should surely be available to defeat wrongful
claims of “cruel and unusual punishment” brought by prisoners
displeased with the particulars of the medical treatment they received.
Such prisoners can and should be able to pursue standard medical
malpractice claims based on allegedly negligent medical services;
however, the fact that they are prisoners does not automatically create
a legitimate constitutional issue. It should be quite difficult to elevate
such prisoner claims into constitutional violations and, properly
understood, the “deliberate indifference” standard was intended to
address that by establishing a high hurdle.

Courts considering alleged violations of constitutional rights
should therefore not easily discount or second-guess the decisions of
medical professionals who have reasonably responded in some way to
the medical problems of prisoners. An imperfect tactical decision by
such a physician is substantially different than “deliberate
indifference” leading to “cruel and unusual punishment,” and in such
cases, the physician should be entitled to a judgment as a matter of
law.
LEWIS’S SHIFTING CONCEPCIONS: THE SEVENTH CIRCUIT’S STRUGGLE IN APPLYING CLASS ACTION PREEMPTION IN EMPLOYMENT CONTRACTS

MATTHEW HAMIELEC*


INTRODUCTION

In 1973, Shyamala Rajender, a postdoctoral fellow at the University of Minnesota, filed a class action against the state college for sexual discrimination.¹ Her efforts culminated in a settlement that enjoined the University from discriminating against women on the basis of sex.² Three decades later, nine members of Abercrombie & Fitch’s salesforce sued the company, alleging employment discrimination on the basis of minority status and gender; the parties settled for a sum around $40 million.³ And in 2013, a class spearheaded by George McReynolds settled with Bank of America

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² Id.
after accusing the financial colossus of denying black employees equal pay and promotional opportunities in favor of white peers. After accusing the financial colossus of denying black employees equal pay and promotional opportunities in favor of white peers.

Each of the above-noted plaintiffs used the class action procedure to leverage their resources against opponents with plentiful litigation war chests. After all, plaintiffs’ capacity to pool resources— and prosecute a claim with the prospect of a fee shift under the common fund doctrine—acts as one justification for upholding the class mechanism’s effect on litigation. Class actions reduce the frequency of imbalanced, David-versus-Goliath lawsuits, where an individual sues a corporation and risks the litigation divesting her of time and money at the hands of a wealthier, immortal opponent.

Historically, the United States provided an accommodative environment for class filings. Yet, since the mid-2000s, the country’s jurisprudence warped from this supportive position, and has permitted individual arbitration provisions to whittle away at claimants’ access to group litigation. This gradual erosion of plaintiff classes’ rights culminated in the 2013 U.S. Supreme Court decision American Express Co. v. Italian Color Restaurant; there, a divided Court held that a federal statute’s mandate requiring enforcement of arbitration

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5 The McReynolds case, for example, featured over 1,000 plaintiffs in the purported class. Karen Weise, Judge Approves Merrill Lynch’s $160 Million Racial Bias Settlement, BLOOMBERG BUSINESSWEEK (Dec. 6, 2013), http://www.bloomberg.com/news/articles/2013-12-06/judge-approves-merrill-lynchs-160-million-racial-bias-settlement. The lawsuit brought by Ms. Rajender featured a class of all women at the University of Minnesota system that were subject to disparate promotional and hiring practices. Rajender, 563 F. Supp. at 402.
6 See RICHARD L. MARCUS, EDWARD F. SHERMAN & HOWARD M. ERICHSON, COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE 7 (5th ed. 2010).
7 West v. Randall, 29 F. Cas. 718, 721 (1820).
8 Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2313 (2013) (Kagan, J., dissenting) (“The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse. And here is the nutshell version of today's opinion, admirably flaunted rather than camouflaged: Too darn bad.”).
provisions had not been overridden by federal antitrust laws that had permitted class proceedings.\(^9\) The result functionally foreclosed a group of plaintiffs from pursuing valid but financially negligible claims on an individual basis.

*Italian Colors* and its precursors have been interpreted as curbing employees’, shareholders’, and consumers’ abilities to pursue certain statutorily granted rights as a group.\(^10\) In virtually every case, the Supreme Court considered these arbitration provisions’ validity, affirmed their enforceability despite their preclusive effects on class actions, and left the lower federal courts to administer its holdings in other statutory contexts.\(^11\)

This Note traces the Seventh Circuit’s application of Supreme Court jurisprudence on a contract requiring individual arbitration in *Lewis v. Epic Systems Corp.*; the case addresses Epic Systems Corporation’s (“Epic”) arbitration clauses in its employment agreements—clauses which contractually blunted a plaintiffs’ class from aggregating a cause of action under the National Labor Relations Act (“NLRA”).\(^12\) The Note first overviews the caselaw surrounding class actions and arbitration provisions. In Part II, I assess the *Lewis* decision for its impacts on class actions. I conclude that federal appellate courts normatively grapple between extending *Italian Colors*’ holding to statutes like the NLRA,\(^13\) and protecting plaintiffs’ access to a litigation mechanism that can provide them cogent redress.\(^14\) These difficult choices lead to a veritable tapestry of decisions concerning class arbitration that both uphold the practice in some cases, and fully prevent it in lieu of individual arbitration in others. Finally, this article calls on the Supreme Court to resolve the circuit split caused by *Lewis* by upholding the Seventh Circuit’s

\(^9\) *Italian Colors Rest.*, 133 S.Ct. at 2306.
\(^11\) *Italian Colors Rest.*, 133 S.Ct. at 2312; AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011).
\(^12\) *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016).
decision to abrogate the arbitration provision in the plaintiffs’ contract. Such a holding would memorialize the class action’s nadir at the hands of the Federal Arbitration Act, and perpetuate a spirit that preserves collective actions’ use in asserting statutory rights.

I. OVERVIEWING CLASS ACTIONS THROUGH THE FEDERAL ARBITRATION ACT AND CASE LAW

A. The Federal Arbitration Act

The point of greatest contention in class arbitration jurisprudence, the Federal Arbitration Act (“FAA”), does not directly address class actions in its verbiage, largely because such a proceeding did not formally exist until the recent adoption of Federal Rule of Civil Procedure 23.¹⁵ Yet, the Supreme Court and its subordinate brethren have used the FAA as a justifiable fulcrum for upholding individual arbitrations.¹⁶ Thus, an overview of the FAA might help some conceptualize the issues surrounding class actions and arbitration.

Congress enacted the FAA in the Roaring Twenties both to solidify alternative dispute resolution’s (“ADR”) growing presence alongside traditional litigation, and to ward off hostile judges trying to keep their dockets from shrinking.¹⁷ Courts have honed in on two of the statute’s sections—§ 2 and § 4—as a means of scrutinizing class arbitrations’ permissiveness in the ADR context.¹⁸ Section 2 states that contractual provisions between parties that bind those parties to arbitration for disputes arising from that contract “shall be valid,

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¹⁶ See Italian Colors Rest., 133 S.Ct. at 2312; Concepcion, 563 U.S. at 351 (2011).
¹⁷ Fitzpatrick, supra note 10 at 163 n.6 (citing Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219–20 n.6 (1985)) (“The House Report accompanying the [Federal Arbitration] Act makes clear that its purpose was to place an arbitration agreement ‘upon the same footing as other contracts, where it belongs’ . . . and to overrule the judiciary’s longstanding refusal to enforce agreements to arbitrate.”).
irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”19 By the same token, parties who have not contractually agreed to class arbitration cannot be bound to it; one case simplified the idea to a catchy phrase: “arbitration is a matter of consent, not coercion.”20 In turn, § 4 compels a district court to relegate parties to arbitration when one party to the contract tries to litigate an issue covered within the scope of that contract’s arbitration clause.21 The Supreme Court interprets these sections together to outline where it does and does not possess the power to review arbitral decisions.

B. Summarizing a History of Alternative Dispute Resolution

Like most American law, the class action mechanism sailed its way into Yankee courts on English winds. Ironically, just as the English Court of Chancery witnessed steeply declining filings of group actions in London, the Supreme Court of the United States upheld their domestic validity in *West v. Randall*.22 Despite class actions’ availability, many lawyers relegated this tool to an unused cupboard until the Federal Rules of Civil Procedure codified the modern class action in Rule 23.23 Since then, lawyers have used the class mechanism in a panoply of contexts, from settling aggregate tort liability in asbestos24 and Agent Orange cases,25 to compensating shareholders in securities suits against corporations,26 to aggregating

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19 *Id.* § 2 (2012).
21 9 U.S.C § 4 (A court that is “satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue . . . shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.”)
22 *West v. Randall*, 29 F. Cas. 718, 721 (1820).
23 *FED CIV. P.* 23.
25 *In re Agent Orange Prod. Liab. Litig. MDL No. 381, 818 F.2d 145, 148 (2d Cir. 1987).*
26 *Ludlow v. BP, P.L.C.*, 800 F3d. 674, 685 (5th Cir. 2015).
employee discrimination claims against businesses.\textsuperscript{27} Class actions’ popularity, in tandem with litigation’s soaring use and cost, continued to rise with each passing decade.\textsuperscript{28} In the 1980’s, though, traditional litigation found itself competing with a newer, private form of dispute resolution.

Alternative dispute resolution—both through its less formal iteration, mediation, and more formalized procedure, arbitration—began its prominent rise during the Reagan administration.\textsuperscript{29} Part of this growth stemmed from the Supreme Court’s shifting outlook on ADR; in that decade, the Court swayed from its once-held belief that private dispute resolution did not adjudicate parties’ legal rights, and instead called for greater use of arbitration.\textsuperscript{30} Whether that policy shift stemmed from judges realizing that the U.S. court system suffered from incurable backlog, or whether the Burger Court sought to reaffirm a then-necrotizing right to contract, is less relevant when compared to the meteoric rise in ADR’s popularity.\textsuperscript{31}

Individuals appreciated that ADR offered efficiency and economy.\textsuperscript{32} Litigants did not spend months bogged down in procedural minutia, and arbitration served as a temporal foil to the litigiously clogged courts, whose rulings on trivial pre-trial motions could fill a span of months; in contrast, an entire arbitration could go from opening arguments to a final award in a matter of days.\textsuperscript{33} If parties wished, they could contractually curb rules of civil procedure, and

\textsuperscript{27} Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1041 (2016).


\textsuperscript{29} Id.


\textsuperscript{31} Stipanowich, \textit{supra} note 28 at 872.

\textsuperscript{32} AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 348 (2011) (“In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.”).

\textsuperscript{33} See id.
limit the number of experts each side could call to testify. Mediation is even less formal; unless stated otherwise in a contract, if the parties in mediation do not resolve their disputes, a mediator’s recommendation binds neither party.

Many bought into this efficacious mantra. From the mid-1990’s to the early 2000s, demand for ADR services grew four-fold. Like sharks drawn to blood, the commercial world soon caught whiff of ADR’s benefits, added arbitration provisions into many of their contracts with suppliers, and, in time, expanded their use of these clauses by incorporating them into employee contracts, product packaging, and stock certificates.

Many businesses viewed pre-dispute arbitration clauses as a golden goose. For them, employees, consumers, and shareholders provided financial sustenance; if a businesses’ relationship with one of these groups dulled, both sides contractually bound themselves to arbitration.

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35 Some forms of arbitration also do not feature binding decisions, though many arbitration clauses in commercial and non-commercial settings do feature finality in judgments. Arbitration, AMERICAN ARBITRATION ASSOCIATION, https://www.adr.org/aaa/faces/services/disputeresolution/services/arbitration?_afrLoop=3038444056361043&_afrWindowMode=0&_afrWindowId=658kn0n0b_1&%40%3F_afrWindowId%3D658kn0n0b_1%26_afrLoop%3D3038444056361043%26_af rWindowMode%3D0%26_adf.ctrl-state%3D658kn0n0b_55 (last visited Dec. 1, 2016). Mediation infrequently requires the mediator to issue a decision, much less a binding one. Mediation vs. Arbitration vs. Litigation: What’s the Difference?, FINDLAW, http://adr.findlaw.com/mediation/mediation-vs-arbitration-vs-litigation-whats-the-difference.html (last visited Dec. 2, 2016).

36 Stipanowich, supra note 28, at 872.


agreements called for individual arbitration, meaning that the business only had to arbitrate against one employee, consumer, or shareholder at a time. However, aggrieved plaintiffs sought to bring the benefits of suing as a class into arbitration proceedings. They unconventionally combined the Rule 23 with the Federal Arbitration Act, and created a new type of proceeding: class arbitration, a class action conducted within an arbitration proceeding’s confines. Suddenly, the golden goose looked less like a judicially divined gift and more like a costly ugly duckling.

C. Preconceived Notions: The Supreme Court’s Jurisprudence on Class Arbitration Before Concepcion

After plaintiffs’ lawyers invented the class arbitration, the commercial sector quickly litigated against its validity; the first suit to make its way up to the Supreme Court was Green Tree Financial Corp. v. Bazzle. The case featured a class who sued a lender for a failure to disclose certain information about its mortgages. A state trial court both certified a class action and entered an order compelling arbitration. The justices faced a question of first impression: whether an arbitrator could interpret an arbitration clause silent on the matter of class arbitration as forbidding the practice, or whether such interpretations were relegated to courts.

A plurality of justices concluded that this question constituted a matter of “procedural arbitrability”—whose resolution rested with an arbitrator—as opposed to one of “substantive arbitrability”—whose resolution rested with a court. Thus, the arbitrator did not encroach on the state court’s power when he decided the class arbitration could

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40 Green Tree, 539 U.S. at 444.
41 Id.
42 Id. at 448-49.
43 Id. at 449.
44 Id. at 447.
45 Id. at 452–53.
go forward.\footnote{Id. at 455.} Green Tree, however, dodged the confounding issue of whether an arbitration clause’s silence on class proceedings permit the such actions, or whether silence forecloses on class arbitrations altogether.

The Court let this question fester for seven years until resolving it in \textit{Stolt-Nielsen v. AnimalFeeds International Corp.}\footnote{Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 666 (2010).} Writing for a majority, Justice Alito concluded that the FAA precluded a plaintiff’s class from dragooning a defendant into a class arbitration when the contract entered into by the parties was silent on the type of arbitral proceeding.\footnote{Id. at 687.} Alito reiterated a prior case’s central theme: arbitration “is a matter of consent, not coercion.”\footnote{Id. at 681 (quoting Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989)).}

The majority’s opinion shifted the \textit{Green Tree} inquiry in a slight but profound way. Whereas \textit{Green Tree} asked whether the arbitrator had erred in holding the parties intended to \textit{foreclose} the class mechanism in arbitration, \textit{Stole-Nielsen} required arbitrators to inquire whether parties had \textit{agreed} to arbitration. Thus, the Court moved the negotiating burden onto plaintiffs, who would now have to bargain for class arbitration rights in a pre-dispute contract with commercial entities.\footnote{This suggestion expects plaintiffs to, above all, understand that they have the class arbitration mechanism even available to them before they sign a contract, a fact which very few consumers know about. Moreover, because many of these contracts are contracts of adhesion, there is no possibility of negotiating favorable terms by individuals. See Press Release, Consumer Financial Protection Bureau, CFPB Study Finds that Arbitration Agreements Limit Relief for Consumers (Mar. 10, 2015), http://www.consumerfinance.gov/about-us/newsroom/cfpb-study-finds-that-arbitration-agreements-limit-relief-for-consumers/ (last visited Dec. 1, 2016).}
D. AT&T Mobility LLC v. Concepcion

One of the two most prominent class arbitration cases, AT&T Mobility v. Concepcion, assessed a direct confrontation between the FAA and state law addressing alternative dispute resolution.\(^{51}\) The case’s plaintiffs sought to certify a class in a federal district court alleging that AT&T had engaged in deceptive advertising for free cell phones.\(^{52}\) In response, the communications giant filed a motion to compel arbitration.\(^{53}\) Unlike Green Tree or Stolt-Nielsen—which featured arbitration clauses silent on the issue of class arbitration—the agreement signed by the case’s plaintiff’s featured a pre-dispute clause requiring individual arbitration.\(^{54}\) The contract also contained claimant-friendly terms.\(^{55}\)

A California district court held that AT&T’s arbitration provision violated the state’s unconscionability doctrine as interpreted by its Supreme Court in Discover Bank v. Superior Court. Under the “Discover Bank rule,” standard-form contracts that allowed a party to evade liability from “negative value” claims—claims whose cost to litigate individually exceed a claimant’s expected damages awards—were unconscionable.\(^{56}\)

The Supreme Court reversed in a splintered five-to-four vote.\(^{57}\) The majority concluded that the FAA’s § 2 preempted Discover Bank, and that, because the plaintiffs had not explicitly contracted for class arbitration in the proceeding-at-hand, they used state law to manufacture a mechanism that differed from the one agreed to by the parties.\(^{58}\) Justice Scalia bolstered his majority opinion with two policy points: arbitration’s informality, and its lack of appellate review.\(^{59}\)

\(^{52}\) Id. at 336–8.
\(^{53}\) Id. at 338.
\(^{54}\) Id. at 333.
\(^{55}\) Id. at 337.
\(^{56}\) Id. at 351–2.
\(^{57}\) Id. at 352.
\(^{58}\) Id.
\(^{59}\) Id. at 349.
First, he argued that class arbitration would morph ADR into procedurally laden proceedings, populated with an endless stream of experts and hefty attorneys’ fees.\(^{60}\) Both would hamper arbitration’s “lower costs, greater efficiency . . . [and] speed.”\(^ {61}\) Second, Scalia opined that courts’ allowance of class arbitrations would cause businesses to forego arbitration provisions in their contracts altogether.\(^ {62}\) The apparatus’s increased costs (stemming from accommodating a class arbitration) and narrow standards of appellate review—which, for example, come about only in cases of fraud or a lack of jurisdiction in matters of “substantive arbitrability”—would result in “defendants . . . be[ing] pressured into settling questionable claims.”\(^ {63}\) For these reasons, the majority concluded that the plaintiffs had to pursue their claims in individual arbitration.\(^ {64}\)

\textit{E. American Express Co. v. Italian Colors Restaurant}

While \textit{Concepcion} did not address a negative value suit brought under a federal statute, the Court considered such an issue in \textit{American Express Co. v. Italian Colors Restaurant}.\(^ {65}\) The case presented a fairly simple question: did the FAA permit “courts . . . to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal-law claim”?\(^ {66}\) A restauranteur alleged a negative value claim against American Express (“AmEx”); despite a class waiver and an arbitration clause in his contract, he filed an antitrust class action against the credit card colossus.\(^ {67}\)

Round one went to AmEx when a federal district court granted the company’s motion to compel arbitration,\(^ {68}\) but the Second Circuit reversed on the ground that individual arbitration’s trial costs for the

\(^{60}\) See id. at 348.
\(^{61}\) Id.
\(^{62}\) See id. at 350.
\(^{63}\) Id.
\(^{64}\) Id. at 352.
\(^{65}\) American Express Co. v. Italian Colors Restaurant, 133 S.Ct. 2304, 2308 (2013).
\(^{66}\) Id.
\(^{67}\) Id.
\(^{68}\) Id. at 2306.
plaintiffs blocked them from asserting Sherman Act claims individually.\textsuperscript{69} To the appellate court, class arbitration was a logical compromise that both preserved AmEx’s desire for private dispute resolution and permitted the plaintiff’s to pursue their cause of action without it costing them more than each claim was worth.\textsuperscript{70} Further, AmEx’s arbitration provision was less generous when compared to \textit{Concepcion}’s; these unfavorable terms made it easier for the plaintiff to assert that the contract he had entered into prevented him from litigating an allegedly valid claim against AmEx.\textsuperscript{71}

The Court analyzed whether the plaintiff’s argument that the contract weakened his ability to sue under the Sherman Act overrode the FAA’s § 2 mandate to interpret parties’ arbitration agreements by their terms.\textsuperscript{72} The plaintiff raised an exception in the FAA that invalidates arbitration clauses when they prevent the “effective vindication” of statutory rights; because each class member asserted a “negative value” claim, those members could not effectively bring their claims without the class action mechanism.\textsuperscript{73}

Justice Scalia disagreed. Delivering a knockout blow to the plaintiffs, the conservative jurist concluded that the Sherman Act does

\textsuperscript{69} Id.
\textsuperscript{70} Id. at 2309.
\textsuperscript{71} AmEx’s arbitration terms were far less generous than AT&T’s in \textit{Concepcion}. \textit{Compare} AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 336–7 (2011) (“In the event the parties proceed to arbitration, the agreement specifies that AT&T must pay all costs for non-frivolous claims; that arbitration must take place in the county in which the customer is billed; that, for claims of $10,000 or less, the customer may choose whether the arbitration proceeds in person, by telephone, or based only on submissions; that either party may bring a claim in small claims court in lieu of arbitration; and that the arbitrator may award any form of individual relief, including injunctions and presumably punitive damages.”) \textit{with} Brief for Respondent at 17, Am. Express Co. v. Italian Colors Rest., 133 S.Ct. 2304, (No. 12-133) (Moreover, the plaintiffs in \textit{Concepcion} . . . would be able to vindicate those claims. Under the distinctive pro-consumer features of AT&T Mobility’s arbitration clause, ‘aggrieved customers who filed claims would be ‘essentially guarantee[d]’ to be made whole,’ making the claims at issue ‘most unlikely to go unresolved.’”).
\textsuperscript{72} 9 U.S.C.A. § 2 (Westlaw through Pub. L. No. 114-244); \textit{Italian Colors Rest.}, 133 S.Ct. at 2309.
\textsuperscript{73} \textit{Italian Colors Rest.}, 133 S.Ct. at 2309.
not “guarantee an affordable procedural path to the vindication of every claim,” nor does it have any intent that waives class procedures; “the fact that it is not worth the expense involved in proving a statutory remedy . . . does not constitute the elimination of the right to pursue that remedy.” 74 Dissenting, Justice Kagan noted that enforcing the individual arbitration provisions would throw up insurmountable barriers to litigation, including expert witness costs that would outspend expected individual damages awards by double-digit multiples. 75 She opined that “[n]o rational actor would bring a claim worth tens of thousands of dollars if doing so meant incurring costs in the hundreds of thousands.” 76 Ultimately, the Justices factionalized along similar ideologies as they had in Concepcion, with the majority holding the FAA does not permit courts to invalidate individual arbitration clauses. 77


The same year the Supreme Court announced its decision in Italian Colors, the Fifth Circuit decided D.R. Horton, Inc. v. NLRB. 78 In D.R. Horton, a class of superintendents sought to initiate class arbitration proceedings alleging that their employer had “misclassified them as exempt from statutory overtime protections in violation of the Fair Labor Standards Act.” 79 Horton advised the claimants that they signed a “Mutual Arbitration Agreement” that required individual arbitration between each claimant and itself. 80 In response, the claimants filed an NLRA infraction with the National Labor Relations Board (“NLRB” or “Board”). 81 A Board administrative judge

74 Id.
75 Id. at 2316.
76 Id.
77 Id. at 2309–12.
78 737 F.3d 344 (5th Cir. 2013).
79 Id. at 349.
80 Id.
81 Id.
determined that Horton had indeed violated the NLRA by restraining the employees from engaging in a collective action guaranteed under § 7 of the Act.\textsuperscript{82} Horton appealed to the Fifth Circuit.\textsuperscript{83}

The appellate court reversed the NLRB’s decision in a two-to-one split.\textsuperscript{84} Writing for the majority, Judge Southwick reminded the Board that, while courts ordinarily give the agency’s adjudicatory arm judicial deference, such deference would be withheld where the Board has interpreted the NLRA to the ignorance of other “Congressional objectives.”\textsuperscript{85} No previous case had held class action waivers in arbitration agreements as violative of § 7.\textsuperscript{86} Judge Southwick understood that concerted actions brought by workers against employers served as a means of parlaying improved employment terms; however, he observed that preservation of the FAA’s modern interpretation merited a more compelling interest.\textsuperscript{87}

The majority opined that class action procedures are not a substantive right guaranteed to litigants.\textsuperscript{88} While the class action may help claimants receive some form of remedy through its procedures, the mechanism itself does not serve as that remedy.\textsuperscript{89} The Board claimed that the Mutual Arbitration Agreement violated § 7 of the Act, and thus triggered the FAA’s savings clause that did not require its enforcement.\textsuperscript{90} Yet, in mirroring the Supreme Court’s rationale in \textit{Concepcion} and arguing that the FAA required the enforcement of arbitration agreements, the Fifth Circuit majority concluded that the savings clause was not triggered.\textsuperscript{91} In rationalizing this conclusion, Judge Southwick reiterated Justice Scalia’s points on class arbitration proceedings: they are inefficient, they prevent multilayered review,

\textsuperscript{82} Id. at 355–56.
\textsuperscript{83} Id. at 348.
\textsuperscript{84} Id. at 364.
\textsuperscript{85} Id. at 366 (quoting Southern S.S. Co. v. NLRB, 316 U.S. 31, 47 (1942)).
\textsuperscript{86} See generally id.
\textsuperscript{87} See id. at 359–60.
\textsuperscript{88} Id. at 357.
\textsuperscript{89} See id.
\textsuperscript{90} Id. at 359.
\textsuperscript{91} Id. at 362.
and they would serve as a disincentive to businesses for including arbitration agreements in their contracts in the first place.\footnote{Id. at 539.}

Similarly, the majority failed to find a contrary congressional command, either express or implied, in the NLRA that showed a congressional will to circumvent the FAA and disallow arbitration clauses.\footnote{Id. at 360–61.} It then concluded that the Board’s ruling was improper, and that Horton’s arbitration agreement with its employees must be enforced.\footnote{Id. at 364.}

In dissent, Judge Graves agreed with the Board and that Horton’s contract violated the plaintiffs’ abilities to pursue a statutorily-granted and \textit{substantive} right to collective action.\footnote{Id.} Further, the jurist argued, while the FAA was intended to prevent an ongoing judicial crusade against private dispute resolution in the nineteenth and early twentieth centuries, “[t]o find that an [individual] arbitration agreement must yield to the NLRA is to treat it no worse than any other private contract that conflicts with Federal labor law.”\footnote{Id. at 365 (quoting D.R. Horton, Inc., 2012 WL 36274, at *11 (2012)).}

Graves’s opinion took some time to reverberate across the appellate courts, but eventually it struck a chord with Judge Wood when the Seventh Circuit considered \textit{Lewis}.\footnote{See generally Lewis v. Epic Systems Corp., 823 F.3d 1147 (7th Cir. 2016).} There, the plaintiff class’s employer, Epic Systems Corp. (“Epic”), emailed its employees an arbitration agreement that mandated individual arbitration for certain “covered claims,” such wage-and-hour disputes.\footnote{Id. at 1151} The clause further proscribed parties from

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\text{[b]ring[ing] a claim on behalf of other individuals, and any arbitrator [from]: (i) combi}[\text{n}[\text{ing] more than one individual's claim or claims into a single case; (ii) participat}[\text{i}[\text{ng] in or facilitat}[\text{i}[\text{ng] notification of others of}
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\footnote{Id. at 539.} \footnote{Id. at 360–61.} \footnote{Id. at 364.} \footnote{Id.} \footnote{Id. at 365 (quoting D.R. Horton, Inc., 2012 WL 36274, at *11 (2012)).} \footnote{See generally Lewis v. Epic Systems Corp., 823 F.3d 1147 (7th Cir. 2016).} \footnote{Id. at 1151}
potential claims; or (iii) arbitrat[ing] any form of a class, collective or representative proceeding.  

The email stated that if the employees continued to work at Epic, they accepted this provision; it also required an acknowledgment from each employee at the end of the email.  

However, once a labor dispute developed between him and Epic, he sued in the United States District Court for the Western District of Wisconsin. The corporation moved to compel arbitration, and Lewis countered, alleging that the arbitration clause violated the National Labor Relations Act by “interfer[ing] with employees’ right to engage in concerted activities.” The district court denied Epic’s motion to dismiss, and the business appealed to the Seventh Circuit.

The NLRA provides that employees may “engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection,” and furthers the protection of this right by rendering unenforceable any contracts that renounces employees’ rights guaranteed by Act. The NLRB has consistently rebuked employers from imposing individual agreements that curbed employees’ access to concerted actions. And while the Act did not explicitly define “concerted activities”, both the district court and the Seventh Circuit concluded that class actions “fit well within the [term’s] ordinary understanding.” Epic contended that, because FRCP Rule 23 did not exist in 1935, the NLRA could not have protected an action that did not exist when it was passed. However, an unpersuaded Judge Wood noted, Rule 23 was not divined from tabula rasa. Indeed, West v. Randall and its progeny proved that collective actions had existed.

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99 Id. at 1154–55.
100 Id. at 1151.
101 Id.
102 Id.
103 Id.
104 Id. at 1151.
105 Id.
106 Id. at 1152.
107 Id. at 1153.
108 Id. at 1154.
well before Judicial Conference of the United States first drafted the FRCP. Thus, the NLRA protected the class action purported by Lewis.\(^{109}\)

The Seventh Circuit upheld the district court on the case’s next issue: whether Epic’s arbitration clause violated the NLRA.\(^{110}\) Answering in the affirmative, the unanimous panel held that the individual arbitration provision ran afoul of the NLRA; the clause prevented employees from suing through a “concerted activity”, and thus qualified as an “unfair labor practice.”\(^{111}\) The court distinguished itself from the Ninth Circuit—which concluded that, where an employer allowed an employee to “opt-out” of an individual arbitration without penalty, that employer’s arbitral policy did not violate the NLRA.\(^{112}\) While its sister court permitted such arbitration clauses to stand, the Seventh Circuit found that an individually bargained-for arbitration agreement limiting concerted actions in such a way is \textit{per se} invalid.\(^{113}\)

Finally, on the issue of whether the FAA conflicts with and supersedes the NLRA in its mandate to enforce Epic’s arbitration clause, Judge Wood interpreted that the former did not bind the court to enforce the provision.\(^{114}\) The FAA’s savings clause—which requires courts to enforce ADR agreements “save upon such grounds as exist at law or in equity for [their] revocation”—permitted the NLRA class action to continue because the NLRA itself made the arbitration clause illegal.\(^{115}\)

\(^{109}\) Id.\(^{110}\) Id. at 1156.\(^{111}\) Id. at 1155.\(^{112}\) Id.\(^{113}\) In her opinion, Judge Wood points out that the NLRB has followed such a \textit{per se} mantra in its hearings as well, and that the Ninth Circuit failed to cite why it did not engage practice \textit{Chevron} deference to the Board’s decisions. I suspect that the Ninth Circuit might have been trying to be Solomonic in its decision, given that most Supreme Court jurisprudence does not favor employees in such situation. The Seventh Circuit’s decision, then, tilts more toward the idealistic. \textit{Id.}\(^{114}\) Id. at 1160.\(^{115}\) Id.
Wood excoriated the D.R. Horton majority for parroting Scalia’s “class arbitration is inefficient” rationale. To her, the Fifth Circuit had not even attempted to reconcile the two statutes, and instead “pick[ed] . . . among congressional enactments.” She also took Italian Color’s reasoning and spun it on its head. Whereas the Supreme Court reasoned that antitrust laws cannot pursue their general purpose at all costs (such as in vindicating the rights of negative value claimants through class arbitration), Judge Wood posited that the FAA cannot usurp all class-action-permitting statutes to protect ADR from the judiciary’s scrutiny. For these reasons, the Seventh Circuit found Epic’s arbitration agreement unenforceable, and affirmed the Wisconsin district court.

II. FAMILIAR BACKINGS: ARGUMENTS SUPPORTING AND OPPOSING INDIVIDUAL ARBITRATION PROVISIONS AND CLASS ARBITRATION

The positions taken by D.R. Horton and Lewis clearly disharmonize the circuit courts. The Seventh Circuit went out on a limb with Epic Systems, swimming against the jurisprudential current followed by other courts of appeal. What used to be an uneven split disfavoring the Seventh Circuit, though, has recently become more even-keeled. On the one hand, the Eighth and Second Circuits agree with the Fifth. Through August, the Seventh Circuit stood alone against its three appellate brethren. However, toward the end of that month, the Ninth Circuit agreed with Judge Wood, and created a more even, three-to-two fissure.

The policy points that each side argues attract certain special interests as well. On the one hand, academics and regulatory agencies champion the cause of the lowly plaintiffs’ classes; this pair aims to

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116 Id. at 1158.
117 Id.
118 Id.
119 Id. at 1161.
120 See Owen v. Bristol Care, Inc., 702 F.3d 1050, 1052 (8th Cir. 2013); Richards v. Ernst & Young, LLP, 744 F.3d 1072, 1075 (9th Cir. 2013).
121 See supra note 120.
122 Morris v. Ernst & Young, LLP, 834 F.3d 975, 983, 990 (9th Cir. 2016).
level the current legal landscape surrounding class arbitration so that individuals have a fighting chance. On the other side, large law firms and special interest groups like the U.S. Chamber of Commerce advocate for individual arbitration provisions, claiming they reduce wasteful litigation and promote the freedom to contract with fewer regulatory encumbrances. This Note will next shift to assess some of these positions; it first summarizes arguments against individual arbitration mainly levied by academics and media sources, and then dives into the private sector’s ripostes. Finally, it argues why Lewis properly sided with academia and regulatory agencies.

A. Opinions Disfavoring Individual Arbitration

Legal academia coalesces its scholasticism on arbitration provisions and class waivers around two similar but distinct cores. Some argue for the idealistic, calling for a ban on individual arbitration provisions between commercial entities and employees, shareholders, and consumers. Others fight for a more pragmatic (albeit flawed, in my opinion) position that allows for class arbitrations. Many scholars overarchingly view the commercial

sector as weaponizing arbitration provisions against individuals in a way that exceeds their intended purpose under the FAA. Some authors analyze the problems they cause in certain sectors like employment or business law, while another group spells a far greater threat to the general sphere of litigation; one author has gone so far to say that arbitration provisions have the propensity to “eliminate virtually all class actions.”

Perhaps the strongest points scholastics make is the inapplicability of arbitration clauses in parties with disparate bargaining power. The FAA’s legislative history strongly indicates that Congress enacted the statute to foster arbitration between businesses, not between a business and individuals. Why would Congress want to limit the FAA only between such parties? After all, ADR provides feuding parties an efficient forum for resolving their qualms, as the streamlined process avoids the public court system’s sluggishness. Rather than a judge deciding an issue through a generalist application of the law, ADR supplies an adjudicator with specific acuity in a legal niche to precisely apply (at times) arcane legal doctrines, and to resolve a conflict between parties. If the parties would like to circumscribe certain rules of evidence or procedure to quicken the arbitration’s pace, then they could contractually agree to forego such formalities. Parties can still reap benefits from such proceedings when they are between an individual and a commercial entity.

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127 Fitzpatrick, supra note 10 at 164 n. 9.
128 Id. at 161.
129 Id. at 164 n.9.
130 Id.
Yet, arbitrations that feature an individual going against a business usually do not involve careful negotiation over an arbitration clause’s terms. Rather, scholastics argue, the commercial actor presents a person with a standard-form contract at some “trigger deal” such as purchasing a product or share of stock, or obtaining employment. The individual cannot tailor her contract with the commercial actor both because she does not possess sufficient bargaining power to convince the business to make contractual concessions, and because the business could not feasibly keep track of the various bargains it strikes with each individual employee or shareholder. Thus, the individual has two options: walk away from the “deal” and find another (presumably one that does not feature an arbitration provision), or take the “deal” despite its unfavorable terms. Many opt for the latter either because they do not care that the “deal” cedes their (and the business’s) access to a court, they feel that they will not get into a conflict with the business that would result in litigation, or they are unwittingly unaware that the contract even has an arbitration clause.

Narrowing to a labor context, even if a potential employee walks away from a contract that limits the parties to individual arbitration and seeks a contract without such constrictions, that employee might not find an employer that offers such terms. In this example, I assume that the employee is searching for jobs in a particularized sector, such as a computer manufacturer or cell phone service provider. If that sector’s participating companies each possess employment contracts with individual arbitration provisions, then that employee would either be forced to work in a different market, or—if the employee cannot

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133 See Fitzpatrick, supra note 10 at 176.
134 Id. Courts have upheld the validity of such “package” contractual provisions, despite the fact that the consumer might not have had the opportunity to read the language on the packaging until after she bought it.
135 Silver-Greenberg & Gebeloff, supra note 132 (“Prevented from joining together as a group in arbitration, most plaintiffs gave up entirely, records show. . . . Many companies give people a window—typically between 30 and 45 days—to opt out of arbitration. Few people actually do, either because they do not realize they have signed a clause, or do not understand its consequences, according to plaintiffs and lawyers.”).
readily transfer from one industry to another because his work experience or education is particularized to one industry—acquiesce to a contract requiring arbitration. In this way, certain sectors can implicitly act as cartels in their standard-form contracts.

The choice between an individual accepting such a contract and seeking access to a court with a less restrictive contract raises an inherent question: how are individuals disadvantaged in arbitration through standard-form contracts? For plaintiffs like those in Concepcion, whose arbitration terms were rather generous, the problem of chronically imbalanced dispute resolution does not seem as apparent.  

Under AT&T’s arbitration clause, plaintiffs enjoy a convenient location to arbitrate (the plaintiff’s county), AT&T pays for the costs of arbitration, and the arbitrator is not capped at a damages award.  

Despite the AT&T contract’s facially favorable terms, the benefits reaped by the cellular service provider outnumber those enjoyed by individual plaintiffs. By requiring individual arbitration, AT&T can minimize its exposure to large litigation expenses and contain a dispute’s costs to small, individualized arbitral awards as

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137 Id. at 336–37. (“In the event the parties proceed to arbitration, the agreement specifies that AT & T must pay all costs for nonfrivolous claims; that arbitration must take place in the county in which the customer is billed; that, for claims of $10,000 or less, the customer may choose whether the arbitration proceeds in person, by telephone, or based only on submissions; that either party may bring a claim in small claims court in lieu of arbitration; and that the arbitrator may award any form of individual relief, including injunctions and presumably punitive damages. The agreement, moreover, denies AT & T any ability to seek reimbursement of its attorney's fees, and, in the event that a customer receives an arbitration award greater than AT & T's last written settlement offer, requires AT & T to pay a $7,500 minimum recovery and twice the amount of the claimant's attorney's fees.”)
138 Id. at 365 (Breyer, J. dissenting) (“But class proceedings have countervailing advantages. In general agreements that forbid the consolidation of claims can lead small-dollar claimants to abandon their claims rather than to litigate. I suspect that it is true even here, for as the Court of Appeals recognized, AT & T can avoid the $7,500 payout . . . simply by paying the claim's face value, such that ‘the maximum gain to a customer for the hassle of arbitrating a $30.22 dispute is still just $30.22.’”).
opposed to a larger class award. Rather than claimants receiving a potential benefit from litigation passively—as they would if they were in a class and not acting as a class representative—individual arbitration requires active litigation on behalf of all plaintiffs if those plaintiffs want to collect any damages. The burden to litigate shifts from a select individual or small group to many more (depending on the scope of the harmful activity, of course). Given this, individual arbitration clauses promote an active, “opt-in” form of dispute resolution rather than a passive, “opt-out” model (as Rule 23(b)(3) class actions normally are structured).\textsuperscript{139} Such a model prevents plaintiffs from filing an action that asks for a lump-sum damages award for all putative class members—including passive plaintiffs, which give class action damages their “meat.”

Ultimately, an “opt-in” action dulls class actions’ capabilities of fulfilling tort law’s behavior-deterrent purpose.\textsuperscript{140} One would expect that fewer individuals would pursue a claim that requires active participation rather than passive participation. Active participation requires a claimant to expend time and money, costs that some people might not find worthwhile paying relative to the expected damages they might receive (or, if they lose, the possibility of facing no reward and a hefty bill for attorneys’ fees). With less participation, a corporation could be expected to pay out fewer damages awards to a smaller pool of plaintiffs. In this sense, individual arbitration provisions not only threaten the existence of the class action procedure, but also weaken the bedrock of certain principles of tort law.\textsuperscript{141}


\textsuperscript{141} See id.
Implicitly, *Lewis* preserves the class mechanism as a means of dispute resolution. Judge Wood frequently mentioned how the NLRA protected covered employees’ abilities to engage in “concerted activity.” The Act’s legislative history reflects that collective actions are intended to provide workers with access to proper redress; part of this redress involves levying both ordinary and exemplary damages on a defendant so as to chill the behavior that harmed individuals in the first place. Wood noted that other circuit courts took issue with arbitration provisions that proscribed damages awards. Individual actions would not provide as great a deterrent effect on corporations; in addition to business’s reduced exposure to actual damages, punitive damages stemming from individual suits would be limited to smaller amounts (assuming uniform, single-digit multiplier caps) than such damages deriving from a class award.

Aside from chipping away at tort law’s deterrent effect, mandatory individual arbitrations’ proscriptive procedures also prevent plaintiffs from presenting a case against a defendant. Clauses that limit parties in or prohibit them from introducing experts might make an employment discrimination suit depend solely on party testimony. Plaintiffs facing such limitations might fail in providing sufficient evidence to make out their cause of action. The same effect occurs in procedures that limit the amount of interrogatories parties may send to one another, or in procedures that limit the amount of evidence parties may present to the arbitrator.

Scholastics argue that even if an arbitration proceeds under traditional rules of evidence and procedure, other pecuniary issues malign plaintiffs when they individually arbitrate. For example, class actions may serve as the only means by which a plaintiff (or a group) could afford experts to prove their claim. While *Lewis* did not specifically address this financial quandary, other courts have raised it.

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142 Lewis v. Epic Systems Corp., 823 F.3d 1147, 1154 (7th Cir. 2016).
143 *Id.* at 1152.
144 *Id.* at 1153.
145 *Id.* at 1160.
146 See Fitzpatrick, *supra* note 10 at 172–73.
in a context that could readily be ascribed to employment actions.\footnote{Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2316 (2013) (Kagan, J., dissenting) (“Italian Colors cannot prevail in arbitration without an economic analysis defining the relevant markets, establishing Amex’s monopoly power, showing anticompetitive effects, and measuring damages.”). Employment discrimination experts, while presumably not as expensive as experts in economics or medicine, still could charge a hefty hourly rate. See Expert Witness Fee Study, SEAK, http://www.seak.com/expert-witness-fee-study/ (last visited Dec. 2, 2016).} To illustrate, if an arbitration provision does not detail whether attorneys’ or experts’ fees shift to a party, then the plaintiff will have to dole out the costs of those people, all in the hopes that she can recover an award that covers the fees she accrued during arbitration. In alleged “negative value” suits—claims whose individual cost to litigate exceed the expected damages award—plaintiffs cannot feasibly litigate without harming themselves financially. On the other hand, the commercial defendant, by virtue of being a business entity, usually has an ample fisc to cover litigation expenses, and thus can afford expert testimony and hefty attorneys’ fees more readily.

The class action levels the playing field from a dollars perspective, as it provides plaintiffs the benefit of cost-sharing amongst themselves. While cost-sharing’s virtues are apparent in “positive value” claims, its utility is felt most when used in the “negative value” suits. Expert witness fees are simply subtracted from an aggregate damages award, and then the parties split that cost up amongst themselves. In turn, one plaintiff will not be saddled with the cost of the expert, and a class’s negative value claims become feasible to pursue.

Additionally, both academics and the Lewis majority scoff at the idea that class arbitration—one of individual arbitration’s alternatives—is irreconcilable with arbitration’s intended informality. One academic paper challenged this claim after Justice Scalia raised it in Concepcion’s majority.\footnote{Catherine Fisk & Erwin Chemerinsky, The Failing Faith in Class Actions: Wal-Mart v. Dukes and AT&T Mobility v. Concepcion, 7 DUKE J. CONST. L. & PUB. POL’Y SPECIAL ISSUE 73, 89 (2011).} Scalia argued that class arbitration threatened ADR’s informality and economy by bogging down a speedier alternative to litigation with cumbersome Rule 23 procedures.
like certification; he felt that until an individual arbitration clause affected a parties’ substantive rights, courts would be forced to uphold such provisions.¹⁴⁹

In response, Erwin Chemerinsky and Catherine Fisk noted that Scalia’s failure to provide a bright-line rule as to what constituted a substantive violation provides the judiciary with capricious latitude in enforcing such arbitration provisions.¹⁵⁰ While the authors did not express a problem with such latitude, they criticized Scalia for invalidating California’s attempts at trying to draw a more definitive line with its *Discover Bank* rule.¹⁵¹

*Lewis*’s majority took this argument a step further; it criticized the Fifth Circuit as mimicking Scalia’s uncompromising protection of arbitration’s informality.¹⁵² The Seventh Circuit argued *D.R. Horton* was “looking for trouble” when it suggested that “any law that even incidentally burdens arbitration . . . necessarily conflicts with the FAA.”¹⁵³ Judge Wood observed that, in its quest to maintain arbitration’s relaxed nature, the Fifth Circuit caused the FAA to trump a federally granted substantive right—in that case, the right for employees to act in concerted activity given to them under the NLRA.¹⁵⁴ Rather than one statute superseding the other, the two statutes should be reconciled.¹⁵⁵ In this case, the plaintiffs’ arbitration agreement triggered the FAA’s savings clause that enforces arbitration agreements “save upon such grounds as exist at law or in equity . . . .”¹⁵⁶ Because the NLRA affirmatively grants the right to concerted actions, it would follow that Epic’s individual arbitration provision was illegal under the Act, and therefore unenforceable under the FAA’s savings clause.¹⁵⁷ Judge Wood rebuked Scalia’s standard, noting that the FAA “does not ‘pursue its purposes at all costs’”; even

¹⁵⁰ Chemerinsky & Fisk, *supra* note 148 at 89.
¹⁵¹ Id.
¹⁵² Lewis v. Epic Systems Corp., 823 F.3d 1147, 1157–58 (7th Cir. 2016).
¹⁵³ Id. at 1158.
¹⁵⁴ Id. at 1157–58.
¹⁵⁵ Id. at 1158.
¹⁵⁶ Id. at 1159–60.
¹⁵⁷ Id. at 1160.
if Epic’s arbitration clause allowed for class proceedings, such a concerted action would be allowed by the NLRA. 158

Several media sources have reported on individual arbitration clauses’ effects, and have reached conclusions similar to academics’. 159 In a lengthy series on arbitration, the New York Times determined that not only do few individuals know most standard-form contracts contain arbitration provisions, but, once they find out, even fewer bother to pursue their claim at all. 160 Moreover, the relative lack of bargaining power employees and consumers have in negotiating their arbitration provisions extends well beyond them; corporations wield sufficient leverage to make even their corporate-level executives sign arbitration provisions addressing labor disputes. 161

The media also calls arbitrators’ objectivity into question. Ostensibly, arbitrators supplied through the two major ADR service providers, JAMS and AAA, decide cases in an impartial manner. 162 However, several arbitrators have noted that they felt “beholden to

158 Id. at 1159. While Judge Wood’s point comports with her theory that the NLRA requires concerted actions, I question whether a class arbitration would be held valid under the NLRA, and then invalidated under the FAA and relegated to ordinary class action litigation rather than class arbitration.


160 Silver-Greenberg & Gebeloff, supra note 135.

161 Silver-Greenberg & Gebeloff, supra note 37 (“the use of class-action bans is spreading far beyond low-wage industries to Silicon Valley and Wall Street, where banks like Goldman Sachs require some executives to sign contracts containing the clauses.”).

162 Silver-Greenberg & Gebeloff, supra note 132 (“The American Arbitration Association and JAMS [serve as] the country’s two largest arbitration firms . . . .”).
companies” because they often paid for the administration of arbitration. In a common scenario where the individual serves as a “one-time player” in the arbitration, and the business acts as a “repeat player” that both hires and habitually comes before an arbitrator, that arbitrator has a pecuniary interest to arbitrate in favor of the party that controls the amount of business provided to her. Beyond this financial bias, studies have shown that arbitrators form psychological biases that favors arbitral “repeat players.”

B. Positions Supporting Individual Arbitration

While academics excoriates arbitration provisions’ maladies, large law firms and pro-business lobbies advocate for their enforcement. Purported “BigLaw” firms’ stance supporting class waivers and individual arbitration clauses juxtaposes well with professors’. That large law firms support individual arbitration should not come as a shock; when a plaintiffs’ class sues a corporation, the corporation often retains a BigLaw firm to represent it, and one should expect the literature these firms distribute to cater to clients’ needs.

163 Id.
164 See id. See also Lisa Bingham, Employment Arbitration: the Repeat Player Effect, 1 EMP. RTS. & EMP. POL’Y J. 222 (1997).
165 Bingham, supra note 164 at 223.
Weil, Gotshal & Manges published an article that extolled the holdings in *Concepcion*, *Italian Colors*, and their progeny.\(^{167}\) The article warned clients not to reserve the question of whether an arbitration clause allows for class arbitration to the arbitrator; rather, clients should try to have a court decide the issue of whether a clause allows for class arbitration.\(^{168}\) These actions would preserve the question of arbitrability for robust appellate review under a de novo standard. Additionally, businesses that wish to avoid the threat of class arbitration must expressly denote its unavailability directly in the contractual provision.\(^{169}\)

Law firms that represent commercial clients issued memos on *Concepcion* and *Italian Colors*’ potential impacts, and offered suggestions on how to trek the new legal landscape.\(^{170}\) A group of lawyers from one firm went on to write an op-ed excoriating scholars for lamenting class arbitration’s death without any supportive empirics.\(^{171}\) They noted that arbitrators continue to allow class arbitrations, and did not skirt the point that “negative valueclass arbitrations often resulted in negligible or no damage awards for plaintiffs, but did yield high plaintiffs’ attorneys’ fees.\(^{172}\)


\(^{168}\) Id.

\(^{169}\) Id.

\(^{170}\) See Deuelle & Berman, *supra* note 167.


\(^{172}\) *Id.* The article notes that in one case, for example, a plaintiffs’ class received no actual damage awards, and only $2 million dollars in punitive damage awards,
Turning to pro-business lobbying organizations, the United States Chamber of Commerce (“the Chamber”) lobbies Congress to insulate businesses from the threat of frivolous class actions.\textsuperscript{173} The Chamber has also acts as an ardent \textit{amicus} throughout the Supreme Court’s consideration of these arbitration clauses, including cases like \textit{Concepcion}, \textit{Italian Colors}, and other landmark cases.\textsuperscript{174}

The Chamber observed that individual arbitration serves as a balanced process amongst participants, and that its critics mischaracterize its effects on individual claimants.\textsuperscript{175} “[A]rbitration before a fair, neutral decision maker leads to outcomes for consumers and individuals that are comparable or superior to the alternative—litigation in court—and that are achieved faster and at lower expense.”\textsuperscript{176} The organization keenly mentioned that arbitration, with its convenient forum selection and plaintiff-friendly fee-shifting clauses, makes arbitration more utilitarian.\textsuperscript{177} For the Chamber, class

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\textsuperscript{174} See Brief of the Chamber of Commerce, \textit{supra} note 124; Brief of the Chamber of Commerce of the United States of America, Business Roundtable, American Bankers Association, and National Association of Manufacturers as Amici Curiae or Petitioners at 1, Am. Express Co. v. Italian Colors Rest., 133 S.Ct. 2304, (No. 12-133) (“[M]any of amici’s members use arbitration agreements in millions of their contractual relationships. By eliminating the huge litigation costs associated with resolving disputes in court, those agreements create cost savings that result in lower prices for consumers, higher wages for employees, and benefits for the entire national economy.”).
\textsuperscript{175} Letter from David Hirschmann, President and Chief Executive Officer, Center for Capital Markets Competitiveness, and Lisa A. Rickard, President, U.S. Chamber Institute for Legal Reform, to Ms. Monica Jackson, Executive Secretary, Consumer Financial Protection Bureau at 44 (Dec. 11, 2013) [hereinafter \textit{Chamber Letter}], http://www.instituteforlegalreform.com/uploads/sites/1/2013_12.11_CFPB\_arbitration\_cover\_letter.pdf (last visited Dec. 2, 2016) (“Moreover, claimants can effectively vindicate in individual arbitration any claims that might be asserted through class actions.”).
\textsuperscript{176} \textit{Id.} at 3.
\textsuperscript{177} \textit{Id.} at 14.
\end{center}
actions with small-value claims do not need to be preserved because they yield a small benefit to individuals, and merely act as a source of enrichment for lawyers with their hefty fee awards.\textsuperscript{178}

The Chamber highlighted that arbitration acts as a superior alternative to the resource-depleted judiciary.\textsuperscript{179} In a world where courts are shuttering their doors and cannot operate under a crushing backlog of case dockets, arbitration acts as the only rapid-response solution to citizens’ need for redress.\textsuperscript{180} In a world where class actions lead to meager damages awards for plaintiffs, pro-consumer arbitration provisions can provide superior recovery amounts per plaintiff over litigation.\textsuperscript{181} In a world where the chance of a plaintiff winning in litigation can be reduced to a fifty-fifty coin toss, arbitration has not only been disproven as an inferior venue for consumers and employees, but has been shown by certain studies to serve as an equally effective and occasionally superior venue for the same groups.\textsuperscript{182}

For employment-related arbitrations, the Chamber found that ADR served as a blessing rather than a curse. The letter cited to a 2004 study revealing employees were “almost 20% more likely to win in arbitration than in litigated employment cases.”\textsuperscript{183} Further, the study touted,

\begin{quote}
[L]ow-income employees brought 43.5\% of arbitration claims, most of which were low-value enough that the employees would not have been able to find an attorney willing to bring litigation on their behalf. These employees were often able to pursue their arbitrations without an attorney, and they won
\end{quote}

\begin{footnotes}
\item[178] \textit{Id.} at 47 (“In short, class actions do not provide class members with anything close to the benefits claimed by their proponents, although they can . . . enrich attorneys—both on the plaintiffs’ and defense side.”).
\item[179] \textit{Id.} at 3.
\item[180] \textit{See id.} at 4.
\item[181] \textit{See id.} at 18.
\item[182] \textit{Id.} at 17–22.
\item[183] \textit{Id.} at 22.
\end{footnotes}
their arbitrations at the same rate as individuals with representation.\textsuperscript{184}

Finally, the Chamber deduced that arbitrations between employers and high-income employees proved as winnable for the employee as litigation.\textsuperscript{185}

The Chamber opposed federal regulations addressing individual arbitration provisions promulgated by the Consumer Financial Protection Bureau.\textsuperscript{186} In eschewing a uniform federal standard that rendered such clauses invalid in contracts between individuals and financial institutions, the organization argued that states were free to declare certain types of arbitration clauses as violating state unconscionability standards; indeed, courts have interpreted state unconscionability laws as holding such arbitration agreements invalid when the plaintiff was capped.\textsuperscript{187} However, federal schemes regulating arbitration agreements overstepped the boundaries of federal authority, and created friction between the CFPB’s power and the FAA.\textsuperscript{188} And while the CFPB’s regulation has yet to suffer any litigation challenging its validity, it might not live long enough to see that day under President Trump.

I take issue with the Chamber’s assertions; to begin, the notion that the commercial sector is resolving disputes in a fashion that greatly benefits individuals over traditional litigation is disingenuous. While certain plaintiffs may fair better under arbitration than they would under a class action, not every plaintiff chooses to pursue arbitration in the first place, nor does every plaintiff perform as well as the sample of plaintiffs the Chamber chose to measure.\textsuperscript{189} If each

\textsuperscript{184} Id. at 21.
\textsuperscript{185} Id.
\textsuperscript{186} See generally id.
\textsuperscript{187} See, e.g., Oestreicher v. Alienware Corp., 322 Fed. App’x. 489, 492 (9th Cir. 2009); Omstead v. Dell, Inc., 594 F.3d 1081, 1086 (9th Cir. 2010).
\textsuperscript{188} Arbitration Agreements, 81 Fed. Reg. 32829 (proposed May 3, 2016).
\textsuperscript{189} See Silver-Greenberg & Gebeloff, supra note 132; AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 365 (2011) (Breyer, J., dissenting) (“What rational lawyer would have signed on to represent the Concepciones in litigation for the possibility of fees stemming from a $30.22 claim?”).
claimant in a purported class received more in arbitration than they would in litigation, and if arbitration is as accessible a procedure as a class action, then surely it would be against the business’s best interest to facilitate such proceedings, and the business would forego arbitration in favor of traditional litigation. For a business to do otherwise would be for it to inflict economic harm on itself.

To provide a more concrete example, assume every person in a one-thousand-member putative class proceeded to arbitrate against a commercial entity rather than litigate as a class; assume also that each person held a valid claim that, when litigated or arbitrated, would result in damages for them. If the business was forced to arbitrate, it would have to allot a larger allowance for litigation contingencies in its retained earnings. First, because each of those claims resulted in an award for the plaintiff, the business is paying out the same damages in arbitration than it is in litigation. Beyond that, one-thousand arbitrations would, from an administrative standpoint, cost more money and eat up more time (assuming a favorable clause that shifts ADR costs on the business) than a class action, and business would suffer more magnified losses than if it had opted for litigation.

Realistically, arbitration benefits the corporation just as much as it does plaintiffs who collect more under it. As mentioned above, because arbitration requires a plaintiff’s active participation in the proceeding, and because class proceedings—which inherently feature a large mass of passive plaintiffs—are often prevented in arbitration provisions, the business expects fewer plaintiffs to devote their resources toward pursuing a claim. The passive class member does not exist in arbitration, which allows business to enjoy reduced total costs of dispute resolution because fewer people pursue their claim.

Further, as I briefly noted previously, arbitration also reduces the threat of another liability for businesses: large punitive damages awards. Historically, class awards that culminate in significant sums of ordinary damages also featured large punitive damages. Courts award these exemplary damages as a means of deterring an actor’s unwanted behavior from habitual repetition. Because the Supreme Court has

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190 See supra note 139 and accompanying text.
191 See id.
jurisprudentially limited their magnitude to single digit multipliers of ordinary damages, they achieve their deterrent purposes optimally when attached to large ordinary damages awards. But because many commercial entities have foreclosed the class proceeding as a viable means, punitive damages will have to be levied in individual arbitrations. In advancing the arbitral regime of dispute resolution, commercial entities have almost completely shielded themselves from any significant financial exposure to exemplary damages.

Why is this bad? For one, it allows a business to supply products, services, and employment with certain societal deficiencies. An example might help illustrate this point. Let us consider a shareholder who decides to invest in a company that just became listed on a public exchange. The Securities Act of 1933 mandates that before a corporation goes public—absent any exemption—it must file a registration statement that includes a prospectus warning investors of risks associated with an investment in that company. If a shareholder acquires stock that requires individual arbitration under its stock legend, and somebody later discovers the representations made in the prospectus were deficient, that shareholder and all other shareholders purchasing that stock in an the company’s initial public offering would have a cause of action against the corporation. But because the stock legend expressly called for individual arbitration of claims, the shareholders would have to proceed alone in their dispute with the company.

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192 Brief of Civil Procedure and Complex Litigation Professors as Amici Curiae in Support of Respondents, supra note 140.
193 The Chamber does acknowledge that this occurs. See Chamber Letter, supra note 175 at 18. (“Claimants are able to win not only compensatory damages but also ‘other types of damages, including attorneys’ fees, punitive damages, and interest.’ In particular, 63.1% of prevailing claimants who sought attorneys’ fees were awarded them.”).
194 Fitzpatrick, supra note 10 at 190 (“As I noted at the outset, in many cases, these waivers are tantamount to insulating businesses altogether from liability for the small-stakes injuries they cause. Why wouldn’t every business want such insulation?”).
Let us further assume the shareholder wins his suit, or settles with the corporation. Not only do many arbitration provisions mandate, pre-dispute, that shareholder to sign a confidentiality agreement with any potential outcome, but the doctrine of collateral estoppel may not apply to the commercial entity in arbitration.\(^{197}\) This could paralyze potential claimants from discussing the results of the arbitration with one another or the public, which can harm current investors in the company who unwittingly remain invested despite undisclosed risks, and which makes markets less efficient. The absence of preclusion also would allow the corporation to avoid pre-established liability from any previous arbitration, which gives the opportunity for the corporation to both win and lose claims stemming from similar or identical fact patterns. This hypothesis strengthens when considering the Note’s previous discussions about arbitrator’s biases that favor “repeat players.” That is to say, if an arbitrator rules against the corporation, nothing prevents the business from simply using another arbitrator—perhaps a more favorably-ruled one—in the future.\(^{198}\)

I do not mean to completely discredit the arguments advanced by proponents of individual arbitrations. Some of them are compelling, so much so that the Supreme Court has agreed with their propositions. The decision between affirming individual arbitration clauses and striking them is difficult, and it seems that the considerations, while veiled in policy, tend to boil down into normative results. With a class action, putative claimants who survive class certification will likely recover something, though that amount could be paltry in comparison

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\(^{198}\) See Silver-Greenberg & Gebeloff, *supra* note 132 (“But in interviews with The Times, more than three dozen arbitrators described how they felt beholden to companies. Beneath every decision, the arbitrators said, was the threat of losing business.”). This implies that arbitrator would be more inclined to decide a case in favor of a “repeat player” that could provide consistent business. *See* Bingham, *supra* note 164 at 223
to the harm done by the actor; with individual arbitration, many claimants will either not pursue the claim, or, when faced with an onerous arbitration provision, not recover at all. The decision likens to a “pick your poison” scenario. For these reasons, courts have spilt a great deal of ink and have split on whether individual arbitration provisions should be upheld or stricken. The decision confounds judges both state and federal, from the trial-level and appellate rungs to our nation’s highest court. It is not easy.

And as things stand now, supporters of arbitration provisions have proven highly competent in advancing their arguments in cases involving contractual arbitration provisions and class waivers. The Chamber, for example, has already filed a brief with the Supreme Court that supports Epic’s petition. Given Epic’s appeal and prayer for reversal, and for the reasons noted in Part III, infra, I join the Chamber’s zealously in having this nation’s highest court review Lewis. However, where the Chamber seeks reversal, I seek affirmation.

III. JUDICIAL AND REGULATORY SOLUTIONS: THE SUPREME COURT SHOULD UPHOLD THE SEVENTH CIRCUIT’S EPIC DECISION

Predictably, when the Seventh Circuit handed down Lewis—and especially after the Ninth Circuit joined its position by invalidating employment contracts’ arbitration clauses in Morris v. Ernst & Young,

200 Silver-Greenberg & Gebeloff, supra note 37 (“Corporations said that class actions were not needed because arbitration enabled individuals to resolve their grievances easily. But court and arbitration records show the opposite has happened: once blocked from going to court as a group, most people dropped their claims entirely.”).
201 See supra Parts II.B–II.F.
202 The success these lobbying groups have had in the Supreme Court demonstrates this the best. See supra Parts II.B–II.F
LLP—the Supreme Court swiveled its attention back to class actions and arbitration provisions after leaving the topic dormant for more than three years, and granted certiorari in mid-January. For them, Lewis checks all the boxes that makes a case ripe for the Court’s consideration: it features a disagreement between federal appellate courts on how the law should be settled when individual arbitration clauses fly in the face of the NLRA. Additionally, the case concerns a legal topic whose subject matter causes the Court itself to split five-to-four. Finally, the Lewis holding would impact wide swaths of the populace in an important and intimate part of their lives: employment. The case for granting certiorari was strong. And while the Court has yet to hear Lewis’s oral arguments, it has strong motivations to hold off on this task until the Senate confirms Judge Gorsuch and he warms a freshly hewn Court seat.

The current justices recognize their previous cases have put them at loggerheads with one another, and an evenly-split, eight-justice Court would simply affirm the Seventh Circuit’s holding with non-binding effect on the other federal circuits. Thus, their current abstention from hearing oral arguments until the October 2017 term is unsurprising. Nevertheless, once the Court returns to its nine-justice normality, it should affirm the Seventh Circuit’s holding that invalidates Epic’s arbitration clause.

Why affirm Lewis? First, the Supreme Court’s decision in such a case—irrespective of whether the Court affirms or reverses the Seventh Circuit—would answer an otherwise ignored question: does the FAA supersede statutes that permit collective actions, do such statutes trump the FAA, or must courts reconcile the two statutory schemes? The Court’s definitive holding (unless it only garners a plurality opinion) would provide lower federal courts a means of analogizing to Lewis when assessing other statutes similar to the NLRA. Thus, if a securities statute permits collective action against a corporation, lower federal courts would be able to graft the Court’s interpretation in Lewis to such a statute and conclude whether a case’s plaintiffs are entitled to a class action, or whether each claimant must

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proceed on an individual basis. Presumably, the same would occur in statutes addressing consumers’ rights. In taking up Lewis for argument, the Supreme Court would color in another section of the fragmented jurisprudence surrounding class actions and the FAA.

More importantly, the Court should uphold the Seventh Circuit because to not do so would result in seismic shifts in the legal landscape of employment law. A reversal of Lewis’s holding would effectively relegate any employment dispute—whether for something as purely financial as unpaid wages to something as personal as race and gender discrimination suits—to individual arbitration. Nothing would stop employers from enforcing individual arbitration clauses into all its employees’ contracts.

Ostensibly, one could argue that not all businesses would necessarily blunt their employees’ rights to collective action through such contractual provisions. Yet, assuming the Court does reverse Judge Wood’s opinion, what would cause businesses to not incorporate individual arbitration clauses in all their employment contracts? The agreements curb damages awards (both compensatory and punitive) businesses pay out to claimants through individual arbitration, and reduce potential allowance accounts in a company’s retained earnings statement (or balance sheet). They save the corporation money relative to traditional court filings. They prevent communication amongst claimants in arbitration through non-disclosure provisions. What does a business have to lose?

Even if one takes the Chamber of Commerce’s point in Part II, infra, at face value—that is, that individuals recover more from an employer in individual arbitration than in class litigation—virtually nothing deters a commercial entity from engaging in the unwanted behavior for which it was sued in the first place. As noted above, while a business’s employees may have their individual harms redressed, the workforce as a whole might not, and the business is free to continue its socially harmful behavior without any retributive threat.

205 See Fitzpatrick, supra note 10 at 190 (“In my view, this question—whether businesses will take advantage of the opportunity to slip arbitration clauses with class action waivers into all their contracts—is largely a rhetorical one. Why wouldn’t businesses take advantage of this opportunity?”).
from its workforce. That means that unpaid wages could continue to go unpaid for those unaware that they were deprived of their earnings, and women and minority workers would experience no improvement in promotional opportunities. At its worst, arbitration clauses could allow businesses to operate with a non-diverse workforce without any internal pressures to change.206

In the end, the issue remains whether Judge Gorsuch would vote alongside Judge Wood and reconcile the FAA with the NLRA, or whether this justice would determine that the former supersedes the latter and preserves individual arbitrations.207 While the choice for a conservative justice seems clear-cut from a political ideology, the issue blurs when one assesses the issue from a statutorily interpretive lexicon. Few would argue that the Seventh Circuit’s decision to invalidate Epic’s arbitration provision in its contracts qualifies as a politically liberal decision; the result strips away a pro-business safeguard and exposes Epic to increased risk.

However, Judge Wood had to assess Lewis within the Supreme Court’s established analyses in Concepcion and Italian Colors.208 In doing so, she argued that conservative doctrines of statutory interpretation require that “when two statutes are capable of co-existence . . . it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective” and that “[w]hen two statutes complement each other”—that is, ‘each has its own scope and purpose’ and imposes ‘different requirements and protections’—finding that one precludes the other would flout the congressional design.”209 Wood posited that because the NLRA invalidates Epic’s contractual provision (by preventing enforcement of contract provisions that abrogate collective actions), such an invalidation qualifies as the clause being illegal “upon grounds in law

206 This is true unless the employees resort to a walk-out or the market reacts negatively to such provisions, an unlikely event because many people don’t know the contracts they sign contain arbitration provisions.
208 Lewis, 812 F.3d at 1158–59.
209 Id. at 1157, 1159.
or in equity” under the FAA.210 Concluding, Wood observed that the two statutes can symbiotically work with one another, and one did not oust the other.211

Judge Gorsuch will face an interpretive fork: he could either assume the Seventh Circuit’s reconciliation of the FAA and the NLRA—which, assuming the nominee carries a textualist pedigree, would likely comport with her jurisprudential philosophy on constitutional and statutory interpretation—or he could perpetuate Justice Scalia’s trailblazing interpretation of the FAA that preserves arbitration in the vast majority of contexts. A fiscally neoliberal platform adopted by many Republicans in Congress would call for a nominee who would carry Italian Colors’ holding into the employment setting.212 But that policy point seems to go against conservative forms of statutory interpretation.213 Thus, the Court’s ruling on Lewis remains enshrouded in uncertainty. The Court would splinter, likely five-to-four or six-to-three, but which way the majority falls can only be answered with time.

If the Court reverses Lewis, such a sudden upheaval in the way employment actions are brought could trigger remedial legislation from Congress that would undo the Court’s holding. Despite Republicans’ traditional, pro-business platform, the 2016 election

210 Id.
211 See id. at 1159–60.
212 Neoliberalism, INVESTOPEDIA, http://www.investopedia.com/terms/n/neoliberalism.asp?lgl=no-infinite (last visited Dec. 2, 2016). See George Monbiot, Neoliberalism – the Ideology at the Root of All Our Problems, GUARDIAN (Apr. 15, 2016), https://www.theguardian.com/books/2016/apr/15/neoliberalism-ideology-problem-george-monbiot (last visited Dec. 2, 2016). As suggested by The Guardian’s article, in this case, the United States has a legislative scheme in place that transfers some of peoples’ access to courts through a mutually-agreed-to contract. If efficiency can be achieved in arbitration over litigation, then a neoliberal economist would argue for a political and judicial climate that favors arbitration.
injected the GOP with a strong populist ire that allowed Donald Trump to . . . well . . . trump his Republican colleagues in the primaries and Hilary Clinton in the general election.\textsuperscript{214} Republican lawmakers, along with blue-collar Democrat legislators, might propose legislation that preserves the class action explicitly under the NLRA and statutes like it in the securities and consumer settings. Though, admittedly, similar legislation has been previously proposed under Republican-controlled Congresses, and has not received so much as a discussion in committee.\textsuperscript{215} Yet, one other avenue exists for remedial reform: administrative regulation.

Alluded to previously, the CFPB has drafted a regulation that proscribes financial institutions from including arbitration provisions in their consumer contracts that foreclose parties from filing a class action against the financial institution.\textsuperscript{216} While such a regulation is on President Trump’s chopping block along with the rest of the Dodd-Frank Wall Street Reform and Consumer Protection Act, its regulation of consumers’ financial contracts demonstrates a structure that other agencies can use to regulate arbitration provisions in their own spheres. Thus, the NLRB, for example, could draw up a regulation to the tune of the CFPB’s, one which prevents employers from drafting arbitration agreements that preclude any class action filings for employment discrimination cases. The same can be said of the


\textsuperscript{216} Arbitration Agreements, 81 Fed. Reg. 32829 (proposed May 3, 2016).
Securities and Exchange Commission, which could enact a similar regulatory regime in the context of stock certificates or other security-related contracts.

Just as with the CFPB’s proposed rule, one must question the likelihood of such regulations taking place over the next four years. And just like other regulations, those that abrogate arbitration provisions would likely be the subject of litigation, and judges would be reluctant to stray away from deferring to agencies’ expertise in accordance with the *Chevron* doctrine (even with Judge Gorsuch’s questionable jurisprudence on this deference). Challenges aside, the administrative arm of the federal government remains an open avenue to reform arbitration clauses.

**CONCLUSION**

Few recognize how much the Supreme Court’s interpretation of the Federal Arbitration Act affects the populace’s access to courts. As contractual provisions erode the class action mechanism’s prevalence, there arises a need for judges, legislators, and regulators to step in and support individuals’ abilities to collectively litigate. Just as it has in other hot-button issues, Justice Scalia’s death—alongside the Senate’s effective obstruction of Judge

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220 Silver-Greenberg & Gebeloff, *supra* note 132.
Garland and President Trump’s nomination of Neil Gorsuch\textsuperscript{221}—has caused scholars to question whether the Court’s newest member will take up the conservative mantle of his predecessor, or instead adjudicate with a more moderate jurisprudence. To that end, Lewis offers the Court an opportunity to either shift its scorched-earth stance on arbitration toward a balanced relationship between private dispute resolution and class litigation, or maintain the status quo and let class actions slip off into procedural extinction. Ultimately, the judiciary, and indeed the public must ask itself: do we ever want to see a case like Ms. Rajender’s again? As is frequently the answer to such a question, only time will tell. Nevertheless, while the Court may struggle with this case, this student has made up his mind: Lewis merits affirmation, if not for the mere fact that a reversal would bring the country one step closer to the death knell of the class action.

THE SEVENTH CIRCUIT JUSTIFIES LIFETIME GPS MONITORING BY CALLING IT PREVENTION

ANDREA R. TORRES*


INTRODUCTION

In July 2016, parents at Assumption Catholic School in a small city in Washington learned that the school had failed to inform them about the presence of a registered sex offender parent for nearly a year.1 Although school officials established strict policies regarding the supervision of the parent while on school grounds, they decided against informing the families of all the students.2 In the 1980s, this parent was convicted of molesting two girls under the age of twelve in South Dakota.3 In 2002, he was convicted for abusing two other girls in Washington.4 By 2008, he was charged again with molesting two...

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2 Id.

3 Id.

4 Id.
more underage girls. This time, the charges were dropped due to a lack of sufficient evidence. A few years later, he married a woman who gave birth to his daughter. In 2015, their daughter started attending preschool at Assumption. The following year, one of the mothers at the elementary school started pairing up new families with more established ones in order to create a “buddy system.” When a family declined to be paired up with the sex offender’s family, the mother decided to search for answers on the Internet. To her horror, she found out that the man who had been visiting the school on a daily basis was a registered sex offender. The school principal somehow concluded that because the preschool was separate from the other schools, the notification of parents outside of the preschool was unnecessary, especially since the sex offender was only on campus for a “very, very brief” time. Several parents found the presence of a known sex offender and the “moderate risk” that he would reoffend too much to bear and decided to withdraw their children from the school.

This worry is exactly what Wisconsin legislators sought to address when they passed Section 301.48 of the Wisconsin Statutes, which requires lifetime GPS monitoring of serious child sex offenders. The relevant portion of the statute states:

(2) Who is covered . . .
(b) Except as provided in subs. (7) and (7m), the department shall maintain lifetime tracking of a person if any of the

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5 Id.
6 Id.
7 Id.
8 Id.
9 Id.
10 Id.
11 Id.
12 Id.
13 Id.
following occurs with respect to the person on or after January 1, 2008 . . .

2. A court discharges the person under s. 980.09 (4). This subdivision does not apply if the person was on supervised release immediately before being discharged.\(^{15}\)

The above provision of the statute applies to sexually violent persons who were released from civil commitment.\(^{16}\) The language of 980.09(4) states:

If the court or jury is satisfied that the state has not met its burden of proof under sub. (3), the person shall be discharged from the custody of the department. If the court or jury is satisfied that the state has met its burden of proof under sub. (3), the court shall proceed under s. 980.08 (4) to determine whether to modify the person’s existing commitment order by authorizing supervised release, unless the person waives consideration of the criteria in s. 980.08 (4) (cg). If the person waives consideration of these criteria, the waiver is a denial of supervised release for purposes of s. 980.08 (1).\(^{17}\)

A recent case involving this statute, Belleau v. Wall, tells the story of Michael Belleau who was convicted of multiple sexual assaults of minors.\(^{18}\) After spending years in prison, in jail, and on probation, he was committed to a secure treatment center as “a sexually violent person” under Chapter 980 of the Wisconsin Statutes.\(^{19}\)

“Sexually violent person” means a person who has been convicted of a sexually violent offense, has been adjudicated delinquent for a sexually violent offense, or has been found

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\(^{15}\) § 301.48(2)(b)(2).

\(^{16}\) Id.

\(^{17}\) Wis. Stat. § 980.09(4) (1994).


\(^{19}\) Id.
not guilty of or not responsible for a sexually violent offense by reason of insanity or mental disease, defect, or illness, and who is dangerous because he or she suffers from a mental disorder that makes it likely that the person will engage in one or more acts of sexual violence.\textsuperscript{20}

In 2010, he was released from civil commitment wearing a GPS tracking device on his right ankle.\textsuperscript{21} By then, Belleau’s sentences had expired, and he was not under any form of supervision.\textsuperscript{22} If the lifetime monitoring was part of his sentence as punishment for his crimes, the story would have ended here.\textsuperscript{23} “Given the fact that one can be sentenced to life in prison for such a crime, it necessarily follows that lifetime GPS tracking, as a component of a sentence imposed for such an offense, would be lawful.”\textsuperscript{24} Similarly, the monitoring would have been acceptable if it was a condition of his release.\textsuperscript{25} The United States District Court Eastern District of Wisconsin declared that the statute was an ex post facto law because it applied to Belleau retroactively and because it was punitive in effect.\textsuperscript{26} Judge Griesbach further held that the monitoring program was not a reasonable search under the Fourth Amendment.\textsuperscript{27}

The United States Court of Appeals for the Seventh Circuit overturned the decision and declared that the statute did not violate the Ex Post Facto Clause of the Constitution because the monitoring was considered “prevention,” not “punishment.”\textsuperscript{28} It also decided that the statute did not offend the Fourth Amendment because a search under the circumstances was reasonable, and the Amendment only prohibits

\begin{thebibliography}{9}
\bibitem{20} § 980.01(7).
\bibitem{21} Belleau, 132 F. Supp. 3d at 1090.
\bibitem{22} \textit{Id.} at 1093.
\bibitem{23} \textit{Id.} at 1092.
\bibitem{24} \textit{Id.}
\bibitem{25} \textit{Id.}
\bibitem{26} \textit{Id.} at 1104.
\bibitem{27} \textit{Id.} at 1109-10.
\bibitem{28} Belleau v. Wall, 811 F.3d 929, 937 (7th Cir. 2016).
\end{thebibliography}
unreasonable searches.29 After all, people like Belleau “have a diminished right of privacy as a result of the risk of their recidivating.”30

Despite having the best interests of children in mind, GPS monitoring laws have the potential to infringe upon the constitutional rights of offenders. Part I of this paper takes a closer look at the background of lifetime satellite-based monitoring of sex offenders. Part II focuses on the procedural history of Belleau v. Wall and reviews the contrasting opinions of the district court and the Seventh Circuit. Lastly, Part III discusses the current state and the constitutional implications of lifetime tracking programs.

I. SHOULD STATES MONITOR SEX OFFENDERS FOR LIFE?

The majority of victims do not report sexual abuse.31 This is especially true when the victims are minors.32 Children often have difficulty describing what happened to them.33 Though they may provide hints, these are easily missed by adults.34 Other times, children are simply too afraid to talk, either because they don’t know how their parents will react or they worry that their abusers may retaliate.35 The younger the victim, the more likely the crime goes unreported.36 In light of these facts, it is not hard to imagine that many children grow

29 Id.
30 Id. at 935.
32 Id.
33 Id.
34 Id.
35 Id.
up without access to adequate treatment and that, in turn, increases the likelihood of anxiety, depression, substance abuse, and even suicide.\textsuperscript{37} Even with treatment, the psychological and physical scars remain for many years, if not forever.\textsuperscript{38} Victims are more likely to run into problems in school and have difficulty holding onto jobs as adults.\textsuperscript{39} They may even become child abusers themselves.\textsuperscript{40}

The high rate of recidivism further exacerbates the problem.\textsuperscript{41} Because of the significant underreporting of these crimes, it is particularly difficult to properly estimate how high the recidivism rates are among child sex offenders.\textsuperscript{42} Pedophiles with more than one prior arrest are two or three times more likely to repeat their crimes.\textsuperscript{43} The National Institute of Justice (“NIJ”) sponsored a study that examined the effect of satellite-based monitoring of sex offenders in California.\textsuperscript{44} The study “found that those placed on GPS monitoring had significantly lower recidivism rates than those who received traditional supervision.”\textsuperscript{45} In fact, 38% more arrests were recorded in the group

\begin{itemize}
\item \textsuperscript{37} *Understanding and Preventing Child Abuse and Neglect*, AMERICAN PSYCHOLOGICAL ASSOCIATION, http://www.apa.org/pi/families/resources/understanding-child-abuse.aspx (last visited Nov. 11, 2016).
\item \textsuperscript{38} *Child Sexual Abuse Statistics*, DARKNESS TO LIGHT, http://www.d2l.org/atf/cf/{64AF78C4-5EB8-45AA-BC28-F7EE2B581919}/Statistics_5_Consequences.pdf (last visited Nov. 11, 2016).
\item \textsuperscript{41} Przybylski, *supra* note 36.
\item \textsuperscript{42} *Id.*
\item \textsuperscript{43} *Id.*
\item \textsuperscript{44} Philip Bulman, *Sex Offenders Monitored by GPS Found to Commit Fewer Crimes*, NATIONAL INSTITUTE OF JUSTICE (Feb. 27, 2013), http://www.nij.gov/journals/271/pages/gps-monitoring.aspx.
\item \textsuperscript{45} *Id.*
\end{itemize}
under traditional supervision as opposed to the group wearing GPS monitors.\(^46\)

With these statistics in mind and given the states’ well-recognized compelling interest in protecting children from physical and psychological harm, it is understandable why many states have enacted statutes requiring the satellite-based monitoring of sexual predators.\(^47\) A few of the states even provide for lifetime monitoring.\(^48\) Nonetheless, legislatures should not overlook the constitutional implications of these programs. The Seventh Circuit analyzed both the Fourth Amendment and the Ex Post Facto Clause to determine that the Wisconsin statute was constitutional.

A. The Fourth Amendment

The purpose of the Fourth Amendment of the United States Constitution is to protect people from unreasonable searches and seizures.\(^49\) As the word “unreasonable” suggests, not all searches are prohibited.\(^50\) Determining what is reasonable is usually not simple and may involve the balancing of the right of individuals “to be secure in their persons, houses, papers, and effects” against legitimate government interests.\(^51\)

In *Grady v. North Carolina*, the Supreme Court reviewed the case of Torrey Dale Grady, a two-time sex offender subjected to North

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\(^{46}\) Id.


\(^{48}\) Richy, *supra* note 47.


\(^{50}\) Id.

\(^{51}\) Id.; U.S. CONST. amend. IV.
Carolina’s lifetime satellite-based monitoring program. Grady argued that the tracking device violated his right to be free from unreasonable searches under the Fourth Amendment. The North Carolina courts rejected his argument relying on the theory that “the State’s system of nonconsensual satellite-based monitoring d[id] not entail a search within the meaning of the Fourth Amendment.”

In its decision to reverse the lower court, the Supreme Court cited two of its prior cases that were inconsistent with this reasoning. In United States v. Jones, the Court concluded that attaching a GPS tracking device to a vehicle was a search because the government physically entered a constitutionally protected space. In Florida v. Jardines, the Court held that taking a drug-sniffing dog onto a person’s porch was also a similar physical intrusion that fit well within the definition of a Fourth Amendment “search.”

Next, the Court reviewed the text of the North Carolina statute, which required the monitoring to provide “[t]ime-correlated and continuous tracking of the geographic location of the subject” and “[r]eporting of subject’s violations of prescriptive and proscriptive schedule or location requirements.” Based on this language and the two prior cases, the Court declared that attaching “a device to a person’s body, without consent, for the purpose of tracking that individual’s movements” was in fact a “search.” The only question left for the lower court to answer on remand was whether the search itself was reasonable.

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53 Id.
54 Id. at 1370.
55 Id.
56 Id. (citing United States v. Jones, 132 S. Ct. 945, 949 (2012)).
57 Grady, 135 S. Ct. at 1370 (citing Florida v. Jardines, 133 S. Ct. 1409, 1417 (2013)).
58 Id. at 1371.
59 Id.
60 Id.
When law enforcement obtains a judicial warrant before conducting a search, it is generally considered reasonable.\footnote{Belleau v. Wall, 132 F. Supp. 3d 1085, 1105 (D. Wis. 2015).} When law enforcement operates without a warrant, courts review the reasonableness of the search by examining the totality of the circumstances.\footnote{Grady, 135 S. Ct. at 1371.} Specifically, the court will evaluate the level of intrusion on the reasonable expectation of privacy of the person being searched and the character and purpose of that search.\footnote{Id.}

The Supreme Court in \textit{Grady} did not review whether this type of statute may be applied retroactively to an offender who completed serving his sentence.\footnote{Id. at 1370.} Some state courts have answered in the negative.\footnote{Lance J. Rogers, \textit{Lifetime GPS Monitoring Is Constitutional}, CRIMINAL LAW REPORTER (Feb. 3, 2016), http://www.bna.com/lifetime-gps-ankle-n57982066905/\footnote{Id. \footnote{Peugh v. United States, 133 S. Ct. 2072, 2081 (2013).} \footnote{Id.} \footnote{Id.} \footnote{Id. (citing Calder v. Bull, 3 U.S. 386, 390 (1798)).}} “According to these courts, the monitoring law’s adverse effects are so punitive that they negate whatever civil intent was envisioned by state legislature.”\footnote{Id. (citing Calder v. Bull, 3 U.S. 386, 390 (1798)).}

\textbf{B. The Ex Post Facto Clause}

The Constitution of the United States proscribes the enactment of retroactive laws through the Ex Post Facto Clause.\footnote{Peugh v. United States, 133 S. Ct. 2072, 2081 (2013).} There are actually two such clauses in the Constitution.\footnote{Id.} One is in Article I Section 9, which applies to the federal government, and another is in Article I Section 10, which applies to the states.\footnote{Id.} In \textit{Calder v. Bull}, the Supreme Court announced four circumstances when the clauses are implicated.\footnote{Id. (citing Calder v. Bull, 3 U.S. 386, 390 (1798)).}
1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.71

The Supreme Court has not addressed whether a state may subject a convicted sex offender to lifetime GPS tracking retroactively. The Court did address the ex post facto implications of a civil commitment statute in Kansas v. Hendricks, a law that is cited as most similar to the satellite-based tracking program statutes.72 In 1994, Kansas enacted the Sexually Violent Predator Act to mitigate the risk recidivist sex offenders pose to public safety.73 In the same year, Leroy Hendricks, who had an extensive history of sexually abusing minors, was about to be released to a halfway house.74 The State asked the court’s permission to place him under civil commitment.75 The trial court granted the State’s request and held that pedophilia fit the definition of “mental abnormality” described in the statute.76 In his appeal, Hendricks attacked the statute on an ex post facto basis, among other claims.77 The Court discussed the dangerousness of pedophilia and the

71 Peugh, 133 S. Ct. at 2081 (quoting Calder, 3 U.S. at 390).
72 See Belleau v. Wall, 811 F.2d 929, 937 (7th Cir. 2016) (citing Kansas v. Hendricks, 521 U.S. 346, 369 (1997)).
73 Id. at 351.
74 Id. 354-55.
75 Id. at 355.
76 KAN. STAT. ANN. § 59-29a02(b) (1994) (“‘Mental abnormality’ means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others.”); id. at 355-56.
77 Hendricks, 521 U.S. at 350.
The statute’s narrow focus on well-defined offenders in detail. Because the statute lacked punitive legislative intent, because it only applied to a narrow class of dangerous offenders who were unable to control their urges, because procedural safeguards required the periodic judicial review of the appropriateness of ongoing confinement, and because the statute required the offender to undergo treatment, the Court declared that the civil commitment statute was not punitive.

If GPS tracking is found comparable to civil commitment, the Supreme Court may similarly label it “prevention” when it finally decides an ex post facto challenge in a case involving this type of monitoring. Some state courts disagree with this theory. In Riley v. New Jersey State Parole Bd., the Supreme Court of New Jersey reviewed the ex post facto implications of the State’s Sex Offender Monitoring Act (“SOMA”) passed in 2007. George Riley was “convicted of the second-degree attempted sexual assault of a minor” in 1986. Because of his prior sexual assault convictions, he was sentenced to twenty years. Six months after his release, the New Jersey Parole Board advised Riley that, pursuant to SOMA, he would have to wear an anklet monitor for the rest of his life. The Appellate Division reversed the decision of the Parole Board and declared that the statute violated federal and state ex post facto laws. The Parole Board appealed arguing that Riley was subject to monitoring not because of his past crimes but because of his “present dangerousness.” The Supreme Court of New Jersey rejected this argument because Riley’s 1986 conviction was the reason behind this designation. The court held that the monitoring program was no

78 Id. at 357-60.
79 Id. at 368-69.
81 Id.
82 Id.
83 Id. at 274.
84 Id. at 278-79.
85 Id. at 281.
86 Id. at 291.
different than parole, even though Riley was not under any court
ordered supervision. 87 The court recognized that the legislature
intended to pass a nonpunitive statute, but it found the law to be
significantly punitive in effect, therefore, in violation of the “the Ex
Post Facto Clauses of the Federal and State Constitutions.” 88

The Seventh Circuit decided to follow a different approach and
rejected both the Fourth Amendment and ex post facto violation
arguments in Belleau v. Wall.

II. BELLEAU V. WALL

In 1992, Michael Belleau was found guilty of sexually assaulting
an eight-year-old boy multiple times during a period of five years,
starting around 1987. 89 Despite the severity of his crimes, his sentence
was only one year in jail and five years on probation. 90 While on
probation in 1994, he was tried and convicted of the sexual assault of
another child, a nine-year old girl, which took place in 1988. 91 This
time, his punishment was an additional ten years in prison. 92
Nevertheless, he was paroled again after six years. 93 By October 1,
2001, a year after his release, Belleau was back in prison. 94 His parole
was revoked after he revealed his desire to molest two additional
children. 95 Before he finished serving his latest sentence, the State of
Wisconsin petitioned to place him under civil commitment as “a
sexually violent person.” 96 Belleau spent the next six years at the Sand

87 Id. at 294.
88 Id. at 297-98.
90 Belleau v. Wall, 811 F.3d 929, 931 (7th Cir. 2016).
91 Belleau, 132 F. Supp. 3d at 1088.
92 Id.
93 Id.
94 Id.
95 Id.
96 Id. (citing WIS. STAT. § 980.01(7) (1994)).
Ridge Secure Treatment Center in Mauston, Wisconsin. In 2010, Dr. Richard Ellwood, a psychologist at the facility, concluded that Belleau no longer met the definition of “a sexually violent person” under the civil commitment statute. As a result, he was going to be released again.

While Belleau was under civil commitment, the Wisconsin legislature passed Wis. Stat. § 301.48, which requires the Wisconsin Department of Corrections (“DOC”) to continue monitoring the locations of persons who committed serious sexual offenses against children following their release from involuntary civil commitment under Chapter 980. Shortly after Belleau was released from the Sand Ridge Secure Treatment Center, DOC agents detained him “without any warrant or other court order” and secured a GPS device on his right ankle. Belleau was “required to wear the GPS device 24 hours per day, seven days a week, for the rest of his life.” Although the device is waterproof, it may cause skin irritation and has to be charged about one hour every day. Moreover, technicians may need to visit Belleau’s home periodically to replace the batteries in the device. The anklet itself is fairly large, requiring the wearer to put on long pants to hide it from plain sight.

The law requires the DOC to create individualized inclusion zones, which the offender is prohibited from leaving, and exclusion zones, which he is prohibited from entering except to pass through, if needed to protect the public. The DOC is not required to define such zones for maximum discharge registrants, “those who have completed

97 Id. at 1088.
98 Id. at 1089.
99 Id. at 1090.
100 Id.
101 Id.
102 Id.
103 Id.
104 Id.
105 Belleau v. Wall, 811 F.3d 929, 932 (7th Cir. 2016).
and been discharged from their sentences and/or commitments.”

While Belleau was not subject to an exclusion zone at the time of his trial, the statute left the creation of the zones in the hands of the DOC. He was not monitored in real time, but a DOC employee reviewed his whereabouts every night.

Belleau appeared pro se in front of the United States District Court Eastern District of Wisconsin to contest the constitutionality of the statute. Recognizing the importance of Belleau’s challenge, the court advised him to retain an attorney. “In view of the significance of the issue Belleau has attempted to raise and his obvious lack of legal training and difficulty in even naming and serving the proper party, it would appear that this might be an appropriate case for the court to consider recruitment of counsel to represent him.” Following the court’s advice, Belleau retained attorneys who submitted an amended complaint on his behalf claiming that the GPS monitoring statute violated the Ex Post Facto clauses, the Fourth Amendment, and the Fourteenth Amendment of the Constitution.

A. The District Court Agreed With the Defendant

The district court did not question the need for the GPS monitoring statute. “Given his prior convictions, Dr. Ellwood’s diagnosis of pedophilia, and the impact of sexually assaultive crimes on children, few would not want to take any step that could reduce the risk of another offense.” However, the court disagreed with the

107 Belleau, 132 F. Supp. 3d at 1091.
108 Id.
109 Id.
111 Id. at *5.
112 Id.
114 Belleau, 132 F. Supp. 3d at 1092.
application of the statute to an individual who was no longer under any supervision, probation, or parole.\textsuperscript{115} The court stated:

Having served his sentences for his crimes and been discharged from his civil commitment, Belleau’s liberty has thus been restored, subject to the limited disqualifications, such as the right to possess a firearm, that the law expressly allows. He is, moreover, legally presumed to be free, like the rest of us, to cho[o]se whether or not to engage in criminal conduct.\textsuperscript{116}

The question the court focused on was “whether such a person who has already served his sentence for his crimes and is no longer under any form of court ordered supervision can be forced by the State to wear such a device and to pay the State for the cost of monitoring him for the rest of his life” when it granted Belleau’s motion for summary judgment “on his ex post facto and Fourth Amendment claims.”\textsuperscript{117} Judge Griesbach found it unnecessary to address Belleau’s equal protection violation claim under the Fourteenth Amendment.\textsuperscript{118}

1. The District Court Found That the Statute Violated the Ex Post Facto Clause of the Constitution

The district court first examined whether applying the statute to Belleau was an ex post facto violation.\textsuperscript{119} Judge Griesbach answered the question in the affirmative.\textsuperscript{120} He rejected the State’s argument that

\textsuperscript{115} Id.
\textsuperscript{116} Id.
\textsuperscript{117} Id. at 1092-93, 1110.
\textsuperscript{118} Id. at 1092-93, 1111 n.6 (“Although Belleau also argues that the State's lifetime GPS tracking law violates his right to equal protection of the law under the Fourteenth Amendment, it is not necessary to address that issue, especially since the answer likely rises or falls with my analysis of his claims that the law violates his rights under the Ex Post Facto Clause and the Fourth Amendment.”)
\textsuperscript{119} Id. at 1093-1104.
\textsuperscript{120} Id.
the statute was not retroactive because it was triggered by Belleau’s release from civil commitment in 2010, not by the crime he committed twenty years prior.\textsuperscript{121} “[E]ven if it was the discharge from his civil commitment that made him subject to lifetime GPS monitoring, it was his previous criminal convictions that made him eligible for civil commitment in the first place.”\textsuperscript{122} There was no “subsequent misconduct” that would suggest otherwise.\textsuperscript{123}

After concluding that the statute applied to Belleau retroactively, the court turned its focus to whether the statute itself was a punishment.\textsuperscript{124} While Judge Griesbach could not ascertain the legislative intent behind the statute regarding punishment, he did highlight that the execution of the statute itself was in the hands of the DOC, whose purpose was to “provide ‘correction’ to people who engage[d] in criminal conduct.”\textsuperscript{125} The statute itself can be found in a section that “governs corrections,” but that fact by itself is not dispositive because Wisconsin’s sex offender registry is located under the same section, and it has been declared “not to be punitive.”\textsuperscript{126}

Historically, the court observed, the supervision of persons was “regarded as a traditional form of punishment.”\textsuperscript{127} Moreover, if Belleau failed to charge the device or tampered with it, he would face a hefty fine or imprisonment.\textsuperscript{128} Judge Griesbach noted that the public shaming that accompanied the wearing of an ankle monitor further tipped the scale toward punishment.\textsuperscript{129} Belleau would not be able to wear shorts or change in a public dressing room if he did not want his

\begin{itemize}
\item \textsuperscript{121} Id. at 1094.
\item \textsuperscript{122} Id.
\item \textsuperscript{123} Id.
\item \textsuperscript{124} Id. at 1095.
\item \textsuperscript{125} Id. at 1096.
\item \textsuperscript{126} Id. (citing Doe v. Raemisch, 895 F. Supp. 2d 897, 906 (D. Wis. 2012), aff’d in part and rev’d in part by Mueller v. Raemisch, 740 F.3d 1128 (7th Cir. 2014)).
\item \textsuperscript{127} Id. at 1098.
\item \textsuperscript{128} Id.
\item \textsuperscript{129} Id. at 1099.
\end{itemize}
device discovered.\textsuperscript{130} Additionally, the required payment of $50 per month “ha[d] the effect of a fine, another traditional form of punishment imposed by the State on criminal defendants.”\textsuperscript{131}

The court also considered the time Belleau was obligated to spend dealing with the device. He was required to plug it into an outlet one hour each day.\textsuperscript{132} While there are many devices today that take about an hour a day to be fully charged, most do not require a person to remain near the outlet during that time.\textsuperscript{133} According to the court, this added up to 75 days over five years, not including the time Belleau had to spend waiting to let technicians into his home.\textsuperscript{134} Admittedly, the goal of the statute is to protect the public because “a person subject to GPS supervision is believed to be less likely to re-offend since he knows he will be caught.”\textsuperscript{135} However, that “is simply deterrence by another name,” and deterrence can be a form of punishment.\textsuperscript{136}

Judge Griesbach concluded that the Wisconsin law violated the Ex Post Facto Clause of the Constitution because “the effects of the law [were] so punitive that they negate[d] the legislature’s non-punitive intent.”\textsuperscript{137} He then turned his attention to Belleau’s Fourth Amendment violation claim.\textsuperscript{138}

2. The District Court Found That the Statute Violated the Fourth Amendment of the Constitution

Relying on \textit{Grady v. North Carolina}, the district court concluded that GPS monitoring of a person implicated the Fourth Amendment.\textsuperscript{139}

\begin{itemize}
  \item \textsuperscript{130} \textit{Id.}
  \item \textsuperscript{131} \textit{Id.} at 1100.
  \item \textsuperscript{132} \textit{Id.}
  \item \textsuperscript{133} \textit{Id.}
  \item \textsuperscript{134} \textit{Id.}
  \item \textsuperscript{135} \textit{Id.} at 1102.
  \item \textsuperscript{136} \textit{Id.}
  \item \textsuperscript{137} \textit{Id.} at 1104.
  \item \textsuperscript{138} \textit{Id.}
  \item \textsuperscript{139} \textit{Id.} (citing \textit{Grady v. North Carolina}, 135 S. Ct. 1368, 1371 (2015)).
\end{itemize}
However, because “the Fourth Amendment prohibits only unreasonable searches,” not all searches fall into this category. Reasonableness “depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations.”141 If the primary purpose of a search is to gather evidence, law enforcement is generally under an obligation to obtain a warrant.142 The existence of probable cause that a crime has been committed is necessary to convince a judge to sign a warrant.143 Accordingly, attaching a GPS monitoring device to a vehicle without a warrant was found to be unlawful in United States v. Jones.144 In Belleau’s case, the court found no probable cause.145

Precedent leads to the conclusion that a search may be considered reasonable without a warrant in some cases but still “requires a balancing of the individual privacy interests at stake against the needs of the public.”146 In Samson v. California, for example, “the Court upheld a warrantless and suspicionless search of a parolee” while acknowledging the “high levels of recidivism in California and the State's strong interest in reducing that rate and promoting reintegration of people released from prison into the community.”147 However, in Samson, the offender consented to the search as a condition of his parole.148 While holding that the GPS monitoring program in Belleau’s case violated the Fourth Amendment, the court concluded that his expectation of privacy was higher than the parolee in Samson because

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140 Id. (quoting Grady, 135 S. Ct at 1371).
141 Id.
142 Id. (citing Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 653 (1995)).
143 Id. at 1105 (citing Skinner v. Ry. Labor Execs.’ Ass’n, 489 U.S. 602, 619 (1989)).
144 Belleau, 132 F. Supp. 3d at 1105 (citing United States v. Jones, 132 S. Ct. 945, 948-49 (2012)).
145 Belleau, 132 F. Supp. 3d at 1105.
146 Id.
147 Id. at 1105-06 (citing Samson v. California, 547 U.S. 843, 848 (2006)).
Belleau fully served his sentence.\footnote{Belleau, 132 F. Supp. 3d at 1108.} At the same time, the court acknowledged the unquestionable “importance of protecting children from sexual assault or the devastating effects of such crimes,” which is why states could include lifetime GPS monitoring in punishments for serious crimes.\footnote{Id.}

\textbf{B. The Seventh Circuit Reversed the District Court}

The State appealed the lower court’s decision to grant Belleau’s motion for summary judgment.\footnote{Belleau v. Wall, 811 F.3d 929, 931 (7th Cir. 2016).} Judge Posner, who delivered the opinion of the United States Court of Appeals for the Seventh Circuit, focused heavily on the nature of Belleau’s crimes when he reversed the district court’s holding.\footnote{Id. at 932.} The court also noted that pedophilia was not curable and predisposed offenders to molest children.\footnote{Id. at 932-33.} The court quoted the Sand Ridge Secure Treatment Center psychologist who “concluded that Mr. Belleau had not shown that he could suppress or manage his deviant desire.”\footnote{Id. at 933.} Although Belleau’s age may have reduced the probability that he would commit another crime against a child, the court noted that these types of offenses are especially heinous due to the deep psychological scars that follow and the shocking level of underreporting.\footnote{Id. at 933-34.} Though Belleau’s supervision ended, he had not become harmless.\footnote{Id. at 934.} “[W]e doubt that the community would or should be reassured by a psychologist’s guess that a pedophile has ‘only’ (say) a 49 percent chance of reoffending, or even the 16 percent chance estimated in this case.”\footnote{Id.}
With these factors in mind, the court announced that “persons who have demonstrated a compulsion to commit very serious crimes and have been civilly determined to have a more likely than not chance of reoffending must expect to have a diminished right of privacy as a result of the risk of their recidivating.”\textsuperscript{158} The Seventh Circuit went on to compare Belleau’s current state of privacy under the existing sex offender registry law to the added loss of his privacy under the GPS monitoring statute and concluded that this additional loss was merely incremental: “it just identifies locations.”\textsuperscript{159}

1. The Seventh Circuit Found no Fourth Amendment Violation

The court cited \textit{Grady} as an indication that GPS monitoring of sex offenders was valid under the Fourth Amendment as long as the search itself was reasonable.\textsuperscript{160} Although continuously keeping track of Belleau’s locations can generate evidence if he does decide to commit another heinous crime against a child, the primary goal of the monitoring statute is to deter him from doing so.\textsuperscript{161} Even his own attorney admitted that lifetime monitoring of a child sex offender would not offend the Fourth Amendment if it was part of the punishment or a condition of parole.\textsuperscript{162}

The court was not particularly convinced that the GPS monitor was a burden on Belleau, but even if it was, it had to “be balanced against the gain to society from requiring that the anklet monitor be worn.”\textsuperscript{163} At least one study in California pointed to the likelihood that parolees wearing such devices were less likely to be re-arrested for a new sex offense.\textsuperscript{164} Society benefits if law enforcement can easily identify the locations of sex offenders when a victim reports a sexual

\textsuperscript{158} \textit{Id}. at 935.
\textsuperscript{159} \textit{Id}. at 936.
\textsuperscript{160} \textit{Id}. at 932 (citing \textit{Grady v. North Carolina}, 135 S. Ct. 1368, 1371 (2015)).
\textsuperscript{161} \textit{Id}. at 935.
\textsuperscript{162} \textit{Id}. at 935-36.
\textsuperscript{163} \textit{Id}. at 936.
\textsuperscript{164} \textit{Id}.
assault. Judge Posner noted that even sex offenders would benefit from this statute. They are provided with a rock solid alibi if they were nowhere near the crime scene. More broadly, the court noted that the balance of Belleau’s rights against the goal of protecting children weighed in favor of protection. “Given how slight is the incremental loss of privacy from having to wear the anklet monitor, and how valuable to society (including sex offenders who have gone straight) the information collected by the monitor is, we can’t agree with the district judge that the Wisconsin law violates the Fourth Amendment.”

Belleau argued that the monitoring required a search warrant, which was not necessary under the statute. The court disagreed, calling the idea “absurd.” Police officers use surveillance techniques to keep an eye on a neighborhood where illegal drug dealing is suspected. They use hidden cameras to record drivers who run a red light. No warrant is required in either case because these techniques are considered “investigative surveillance.” Furthermore, because DOC agents could follow Belleau after he left his house, there is no reason why they couldn’t utilize a GPS tracking device to achieve the same result. With that said, the court concluded that there was no Fourth Amendment violation because Belleau’s monitoring was reasonable under the circumstances.

165 Id.
166 Id.
167 Id.
168 Id.
169 Id.
170 Id.
171 Id.
172 Id.
173 Id.
174 Id. at 936-37.
175 Id. at 937.
2. The Seventh Circuit Found no Ex Post Facto Violation

Next, the Seventh Circuit turned its attention to Belleau’s claim that the GPS monitoring statute was an ex post facto law.\textsuperscript{176} While the statute did take effect after Belleau had committed his crimes, the ex post facto rule only applies to statutes that impose punishments.\textsuperscript{177} The court briefly discussed \textit{Kansas v. Hendricks}, a case in which the Supreme Court held that civil commitments of sex offenders were considered prevention, not punishment.\textsuperscript{178} Drawing on this case, Judge Posner declared that if civil commitment was not punishment, neither was GPS monitoring.\textsuperscript{179} They both had the same goal: to prevent violent sex offenders from hurting children.\textsuperscript{180} The court continued with comparing the anklet monitor to posted speed limits.\textsuperscript{181} The same way speed limit signs inform a driver that he will face a fine if he doesn’t obey them, the GPS monitor informs the pedophile that he could be punished if he commits another crime.\textsuperscript{182} Because the court found that the lifetime tracking served a preventive purpose and was not intended as a punishment, they also concluded that the law did not violate the Ex Post Facto Clause.\textsuperscript{183}

3. The Concurring Opinion Offered Slightly Different Justifications

Judge Flaum concurred in judgment and authored a separate opinion.\textsuperscript{184} He focused on the need for balancing a person’s right to privacy against the state’s compelling interest in protecting children

\textsuperscript{176} \textit{Id}.  \\
\textsuperscript{177} \textit{Id}.  \\
\textsuperscript{178} \textit{Id}. (citing \textit{Kansas v. Hendricks}, 521 U.S. 346, 368-69 (1997)).  \\
\textsuperscript{179} \textit{Id}.  \\
\textsuperscript{180} \textit{Id}.  \\
\textsuperscript{181} \textit{Id}. at 938.  \\
\textsuperscript{182} \textit{Id}.  \\
\textsuperscript{183} U.S. CONST. art. I, § 10, cl. 1; \textit{id}.  \\
\textsuperscript{184} \textit{Belleau}, 811 F.3d at 938 (Flaum, J., concurring).
from sexual abuse. These sexual predators victimize children, who may suffer from trauma from the assault for the rest of their lives." Because Belleau was no longer under any supervision, Judge Flaum turned to the special needs doctrine to find justification for the GPS monitoring statute. The doctrine applies to “suspicionless searches” that serve special needs and do not exist merely for gathering evidence. Because the primary goal of the tracking program was to reduce recidivism, it qualified as a special needs search. Judge Flaum acknowledged the tremendously important privacy interest at stake in this case, especially because Belleau fully served his sentence and was not a parolee. At the same time, Belleau’s expectation of privacy was not the same as an ordinary citizen’s due to “mandatory registration laws and civil commitment.” In this program, requiring a warrant just did not make sense because warrants are usually issued when there is a suspicion that a crime has been committed. Here, the goal was to prevent the crime from ever taking place. Therefore, the monitoring was “a reasonable special needs search,” and the Fourth Amendment was not violated.

Next, Judge Flaum turned his attention to the ex post facto claim. Unquestionably, this law applies retroactively to Belleau. From the language of the statute, Judge Flaum found it

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185 Id.
186 Id.
187 Id. at 939.
188 Id.; See 12 Wash. Prac., § 2736 “Special needs” exception, Westlaw (database updated Nov. 2016).
189 Id. at 940.
190 Id. at 941.
191 Id.
192 Id.
193 Id.
194 Id. at 939.
195 Id. at 941.
196 Id.
clear that the primary goal of the legislature was prevention.\textsuperscript{197} “The language of the monitoring statute indicates that the legislature’s objective was to protect children, not punish sex offenders.”\textsuperscript{198} He also considered whether, in spite of the lack of punitive intent, the law had a punitive effect.\textsuperscript{199} He relied on five of the seven “Mendoza-Martinez factors” the Supreme Court promulgated in \textit{Kennedy v. Mendoza-Martinez} to guide his review.\textsuperscript{200}

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.\textsuperscript{201}

GPS technology is “distinguishable from traditional forms of punishment” because it is “relatively new.”\textsuperscript{202} It is not like probation or parole because those “impose restrictions.” In this case, there were not any restrictions on where Belleau was able to go.\textsuperscript{203} Although Belleau complained of “public shaming” because the device occasionally became visible to others, it was not the objective of the statute.\textsuperscript{204} The minor inconvenience was not significant enough to be

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 942.
\item \textit{Id.}
\item \textit{Id.} at 942-43.
\item \textit{Id.}
\item \textit{Belleau}, 811 F.3d at 943.
\item \textit{Id.}
\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
called punitive.\textsuperscript{205} “[A]s GPS devices become smaller and batteries last longer, any affirmative restraint imposed by this law will, over time, become less and less burdensome.”\textsuperscript{206} The statute is similar to sex offender registries where the goal is not punishment but deterrence.\textsuperscript{207} Similarly, the primary goal is to protect children from such offenders, not to punish them.\textsuperscript{208}

Lastly, Judge Flaum found that the law was not excessive because pedophilia was simply not treatable.\textsuperscript{209} “Coupled with the particularly devastating consequences of their conduct, these offenders pose a unique—and perhaps insurmountable—challenge for conventional law enforcement techniques.”\textsuperscript{210} In the end, Judge Flaum came to the same conclusion as the majority: the GPS monitoring statute was not an ex post facto law.\textsuperscript{211}

### III. What Happens Next?

**A. States May Utilize GPS Technology to Monitor Sex Offenders for the Rest of Their Lives**

After \textit{Belleau v. Wall}, States in the Seventh Circuit’s jurisdiction may freely monitor sex offenders for life, even if they fully served their sentences and are not under any form of supervision.\textsuperscript{212} Considering that no warrant or court order is needed, the ruling appears to be in slight conflict with the district court judge’s statement that “[t]he State’s authority over the individual is not unlimited.”\textsuperscript{213}

\begin{footnotesize}
\begin{enumerate}
\item[205] Id.
\item[206] Id.
\item[207] Id.
\item[208] Id.
\item[209] Id. at 944.
\item[210] Id.
\item[211] Id.
\item[212] See id. at 938.
\item[213] See \textit{Belleau v. Wall}, 132 F. Supp. 3d 1085, 1110 (E.D. Wis. 2015).
\end{enumerate}
\end{footnotesize}
The Supreme Court of the United States offered limited guidance on the issue. In *Samson*, the Court held that the suspicionless search of a parolee did not offend the Fourth Amendment, and because Donald Curtis Samson, the defendant in the case, was on parole “following a conviction for being a felon in possession of a firearm,” his expectation of privacy was drastically diminished.\(^{214}\) Although Belleau was not a parolee, because of the seriousness of his crimes and because there was a significant possibility that he would repeat them, the Seventh Circuit concluded that his right to privacy was similarly reduced.\(^{215}\) In *Grady v. North Carolina*, Torrey Dale Grady, a convicted sex offender, argued that “his Fourth Amendment right to be free from unreasonable searches and seizures” was violated when he was ordered to wear a GPS anklet monitor for the rest of his life.\(^{216}\) The Supreme Court declared that such tracking did constitute a search implicating the Fourth Amendment, but it was only unconstitutional if it was unreasonable.\(^{217}\) Several states now allow or even require lifetime monitoring of sex offenders.\(^{218}\)

Ultimately, *Grady* and *Samson* suggest that the Supreme Court will find lifetime tracking programs constitutional, especially when considering the high rates of recidivism among sex offenders and the ongoing need to protect children from them.\(^{219}\) For now, the Court has left open the question whether lifetime GPS monitoring is reasonable under the Fourth Amendment.\(^{220}\) Until and unless the Supreme Court or Congress says otherwise, tracking sex offenders for the remainder of their lives is permitted, even after they fully serve their sentences and complete their probation.


\(^{215}\) *Belleau*, 811 F.3d at 935.


\(^{217}\) *Id.*


\(^{220}\) *Grady*, 135 S. Ct. at 1371.
B. The Supreme Court Needs to Review Whether States are Permitted to Apply GPS Monitoring Laws Retroactively

The Seventh Circuit conceded that the Ex Post Facto Clause of the Constitution was implicated because the Wisconsin statute became effective long after Belleau had committed his crimes.\textsuperscript{221} To escape this limitation, the court relied on \textit{Kansas v. Hendricks}, a case in which the Supreme Court concluded that the civil commitment of a violent sex offender was a preventive measure, not a punishment.\textsuperscript{222} After Judge Posner declared that civil commitments and GPS monitoring were alike, the Ex Post Facto Clause was no longer an obstacle to the validity of the Wisconsin statute.\textsuperscript{223}

Other circuits have come to a different conclusion. In \textit{Riley}, George C. Riley, a convicted sex offender, claimed that New Jersey’s Sex Offender Monitoring Act, a law that was passed two decades after his last offense, was additional punishment because it was no different than a form of supervision for life.\textsuperscript{224} The Supreme Court of New Jersey agreed with the defendant and concluded that the statute violated “both the federal and state constitutional guarantees against ex post facto laws.”\textsuperscript{225} In \textit{Commonwealth v. Cory}, the Supreme Judicial Court of Massachusetts came to the same conclusion that GPS monitoring was punishment and could not be applied to a sex offender retroactively.\textsuperscript{226}

Several factors suggest that GPS monitoring is different from civil commitment. Tracking devices merely monitor an offender’s location and do not provide treatment similar to the ones available in civil commitment settings. Belleau, for example, spent time with a psychologist at the Sand Ridge Secure Treatment Center.\textsuperscript{227}

\begin{itemize}
\item \textsuperscript{221} Belleau v. Wall, 811 F.3d 929, 937 (7th Cir. 2016)
\item \textsuperscript{222} \textit{Id.}
\item \textsuperscript{223} \textit{Id.}
\item \textsuperscript{224} Riley v. New Jersey State Parole Bd., 219 N.J. 270, 274 (2014).
\item \textsuperscript{225} \textit{Id.} at 275.
\item \textsuperscript{226} Commonwealth v. Cory, 454 Mass. 559, 560 (Mass. 2009).
\item \textsuperscript{227} Belleau v. Wall, 132 F. Supp. 3d 1085, 1088-89 (E.D. Wis. 2015).
\end{itemize}
Additionally, the Wisconsin monitoring program, unlike the statute in *Hendricks*, does not provide for periodic judicial review.\(^{228}\) The main objective of the ankle monitor was to deter Belleau from repeating his crimes.\(^{229}\) The *Hendricks* Court, however, differentiated civil commitments from deterrence because pedophiles were “unlikely to be deterred by the threat of confinement.”\(^{230}\) Lastly, unlike the lifetime length of the GPS monitoring statute, an offender under civil commitment is not to “remain confined any longer than he suffers from a mental abnormality rendering him unable to control his dangerousness.”\(^{231}\)

The Supreme Court should weigh in on the disagreement among the lower courts and proclaim whether the retroactive application of GPS monitoring programs to sex offenders is an additional punishment or simply a preventive measure. In their current state, these programs look more like punishment and less like prevention because they penalize the offender for noncompliance.\(^{232}\) Even if the offender just forgets to charge the device, he may be in violation of the statute that could punish him with imprisonment or a hefty fine.\(^{233}\) Today, better technology is available to keep batteries charged longer than a single day.\(^{234}\) There is no reason, other than perhaps cost, why the states could not design a more maintenance-free version of the ankle monitor. Additionally, if legislatures removed the threat of punishment from these programs, they would start looking more like preventive measures or even treatments. At a minimum, legislatures should consider incorporating mandatory satellite-based lifetime

\(^{228}\) See Wis. Stat. § 301.48 (2006); Kansas v. Hendricks, 521 U.S. 346, 364 (1997)).

\(^{229}\) Belleau v. Wall, 811 F.3d 929, 935 (7th Cir. 2016).

\(^{230}\) *Hendricks*, 521 U.S. at 362-63.

\(^{231}\) *Id.* at 364.

\(^{232}\) See Belleau, 132 F. Supp. 3d at 1090.

\(^{233}\) *Id.*

monitoring of repeat sex offenders in their sentencing guidelines to avoid ex post facto challenges all together.

CONCLUSION

Due to the heinous nature of sexual assault, particularly the impact on children, there is tremendous pressure on courts to keep sex offenders under lifetime surveillance or supervision. Because of this pressure, courts struggle to find the right balance between the rights of felons to be free from unreasonable searches and retroactive application of laws against the rights of the public, including children, to be free from sexual violence.

Surveillance is fairly common today, and many of the methods do not raise serious constitutional questions. Red light cameras, for example, are acceptable because they are installed on traffic signals and monitor public roads. Perhaps monitoring by using drone technology could also fall into the permitted category. However, the moment monitoring devices are attached to individuals or their vehicles, the government is crossing into a world protected by the Constitution. These lifetime GPS tracking programs are powerful tools that allow offenders to re-enter society and deter them from repeating their crimes, but states should proceed with caution and design their programs without violating the Constitution’s prohibition against unreasonable searches and seizures and ex post facto application of laws.
STORMING THE PERSIAN GATES: THE SEVENTH CIRCUIT DENIES ATTACHMENT TO IRANIAN ANTIQUITIES

CLAIRE E. STEPHENS*


INTRODUCTION

The Persepolis Tablets have withstood two battles in their lifetime. In 329/330 B.C., Alexander the Great stormed the Persian Gates and captured the Persian city of Persepolis before burning it to the ground. The tablets survived Alexander’s sack of Persepolis, but they faced a second battle this past year. This time it was a legal battle, fought by the victims of a terrorist attack on the one hand, and the tablet’s stewards on the other. The battle threatened to dismember this unique collection of antiquities by auctioning off each tablet piece by piece. Had the victims won, the single most important surviving insight\(^1\) into the organization of the 2,500-year-old Persian Empire would be sold into the living rooms of private collectors around the world.

The Persepolis Tablets have been likened to the “crown jewels of England, or the original document of the Magna Carta, or the Western

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\(^1\) Amy Braverman Puma, Worth Millions . . . or Priceless?, U. CHI. MAG., Oct. 2006, at 16, 18.
Wall in Jerusalem, or the Parthenon in Athens.”

Why would such an important piece of history be put up for auction? Perhaps only the harrowing tale of the plaintiffs in *Rubin v. Islamic Republic of Iran* could justify such a sorrow.

On the afternoon of September 4, 1997, hundreds of people gathered at the Ben-Yehuda Street mall on one of Jerusalem’s main streets to shop, dine, and enjoy the nice weather. Three Hamas suicide bombers entered the crowded mall and detonated five pounds of explosives packed with nails, screws, glass, and chemical poisons. The blast shattered windows, collapsed buildings, and propelled bodies through the air. Five people were killed, and nearly two hundred were injured. Among the injured were eight Americans: Diana Campuzano, Avi Elishis, Gregg Salzman, Jenny Rubin, Daniel Miller, Abraham Mendelson, Stuart Hersh, and Noam Rozenman. The victims suffered life-threatening injuries and to this day continue to suffer physical and psychological effects of the blast.

In addition to the eight American victims, four of the victim’s family members not present that day—Deborah Rubin, Renay Frym, Elena Rozenman, and Tzvi Rozenman—sought recovery for the emotional injuries caused by watching their loved ones suffer, and for the time and effort required to provide full-time care to them in the attack’s immediate aftermath. Together, these thirteen victims

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4 Id.

5 Id.

6 Id.

7 Id.

8 Id.

9 Id. at 267–68.
brought suit against the Islamic Republic of Iran in the United States District Court for the District of Columbia.\textsuperscript{10}

In September 2003, the plaintiffs were awarded a default judgment against Iran for providing Hamas with training, money, and operational support that aided in the 1997 attack.\textsuperscript{11} This award—comprised of $71.5 million in compensatory damages and $300 million in punitive damages\textsuperscript{12)—was far from the end of the road for the victims. Thirteen years later, they are still unable to collect on the judgment, but they continue to seek justice by bringing suit in jurisdictions throughout the United States. \textit{Rubin v. Islamic Republic of Iran} is one such suit.\textsuperscript{13}

In order to satisfy their judgment, the \textit{Rubin} plaintiffs sought to obtain possession of Iranian cultural artifacts, including the Persepolis Tablets, located in various Chicago museums and institutions.\textsuperscript{14} The plaintiffs set forth three bases for obtaining execution jurisdiction over these cultural artifacts: §1610(a) and § 1610(g) of the Foreign Sovereign Immunities Act (“FSIA”), and § 201(a) of the Terrorism Risk Insurance Act (“TRIA”).\textsuperscript{15}

The Seventh Circuit in \textit{Rubin} held that the Persepolis Tablets may not be used to execute the \textit{Rubin} plaintiff’s judgment against Iran.\textsuperscript{16} Pursuant to the FSIA, the court restricted execution to foreign sovereign assets that are used by the foreign sovereign itself for commercial activity in the United States, ultimately preventing such execution.\textsuperscript{17}

The Seventh Circuit created a circuit split by expressly declining to follow the Ninth Circuit’s decision in \textit{Bennett v. Islamic Republic of Iran}.\textsuperscript{18}

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\textsuperscript{11} \textit{Id.} at 265.

\textsuperscript{12} \textit{Id.}

\textsuperscript{13} \textit{Rubin v. Islamic Republic of Iran}, 830 F.3d 470 (7th Cir. 2016).

\textsuperscript{14} \textit{Id.} at 473.

\textsuperscript{15} \textit{Id.}

\textsuperscript{16} \textit{Id.} at 489.

\textsuperscript{17} \textit{Id. See} 28 U.S.C. § 1610(a).
\end{flushleft}
Iran. Bennett held that § 1610(g) provides a freestanding basis for executing judgments for state sponsored terrorism, which enabled the Bennett plaintiffs to execute on assets that were not used commercially in the United States. If followed by the Seventh Circuit, this would have allowed the Rubin plaintiffs to execute their judgment on the museum collection at issue in this case. Additionally, the court partially overruled two previous Seventh Circuit decisions to the extent that they can be read as holding that § 1610(g) is a freestanding exception to execution immunity for terrorism-related judgments. This further narrowed the ability for terrorism victims to execute their judgments.

This Note first sets forth the historical development of foreign sovereign immunity in the United States, and how the law has developed into what it is today. Next, it examines the Seventh Circuit’s decision in Rubin, focusing on the court’s decision to partially overrule Wyatt v. Syrian Arab Republic and Gates v. Syrian Arab Republic and the court’s rejection of the Ninth Circuit’s decision in Bennett. The analysis of this decision relates to the issue of whether the FSIA § 1610(g) offers a freestanding basis for executing judgments against state sponsors of terrorism, independent of § 1610(a) and (b). Finally, this Note concludes that, from a statutory interpretation perspective, the Seventh Circuit reached the correct result in denying the plaintiffs execution on the Persepolis Tablets. Additionally, auctioning cultural property raises policy concerns that further buttress the Seventh Circuit’s outcome. However, the Rubin plaintiffs are deserving victims who have been denied execution of their judgment despite repeated attempts to do so. The Rubin victims are not alone; many other victims of state-sponsored terrorism have been unsuccessful at receiving compensation for their grievous injuries. This Note argues that, in lieu of a judicial remedy of the kind

18 Id. at 487.
19 Bennett v. Islamic Republic of Iran, 825 F.3d 949, 960 (9th Cir. 2016).
20 Rubin, 830 F.3d at 487. See Wyatt v. Syrian Arab Republic, 800 F.3d 331, 342–43 (7th Cir. 2015); Gates v. Syrian Arab Republic, 755 F.3d 568, 575–77 (7th Cir. 2014).
the plaintiffs sought, the executive branch should establish a comprehensive victim’s compensation fund, paid for by the United States government, to compensate the victims of state-sponsored terrorism.

I. HISTORICAL BACKGROUND

The Foreign Sovereign Immunities Act provides the sole basis for obtaining jurisdiction over foreign states in both state and federal courts.\(^2\) The foreign sovereign immunity doctrine developed at common law in United States' historical nascent.\(^2\) At that time, the United States accorded foreign states and governments “absolute” immunity from suit in domestic court based on principles of customary international law.\(^3\) The doctrine “is premised upon the ‘perfect equality and absolute independence of sovereigns, and th[e] common interest in impelling them to’” mutual association.\(^4\) Due to its control of foreign relations, the executive branch traditionally made determinations of immunity, and was accorded deference to determine when the judiciary was permitted to override the presumption of immunity and subject a foreign sovereign to suit.

In 1952, the United States abandoned “absolute” sovereign immunity when the Department of State adopted the “restrictive” approach.

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\(^{24}\) Schooner Exchange, 11 U.S. at 137. See also Nat’l City Bank of N.Y. v. Republic of China, 348 U.S. 356, 362 (1955) (foreign sovereign immunity is based on “reciprocal self-interest . . . and respect for the ‘power and dignity’ of the foreign sovereign.”).
theory of sovereign immunity.25 The restrictive theory reflects the view that foreign sovereign immunity is preserved for sovereign or “public” acts, but disputes that arise from a state’s commercial activities may be adjudicated in United States court.26

This “restrictive” approach toward immunity advocated by the Department of State was later codified when Congress enacted the Foreign Sovereign Immunities Act of 1976 (FSIA).27 In addition to shifting foreign sovereign immunity decision-making from the executive branch to the courts, the FSIA set forth “a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities.”28 Accordingly, the FSIA provides the sole basis for obtaining jurisdiction over foreign states in both state and federal court.29

The FSIA codifies the rules for obtaining jurisdiction over foreign states in state and federal United States courts. Foreign states and governments are immune from suit in the United States unless one of the FSIA’s specific exceptions applies.30 One such exception is “Acts of State-Sponsored Terrorism”, which permits a foreign state to be sued in the United States.31 The FSIA also provides that foreign state and government property is immune from attachment and execution in the United States unless any one of the FSIA’s specific

28 Verlinden, 461 U.S. at 488.
31 Id. §§ 1605–07.
exceptions applies. Pertinent to the *Rubin* case, property belonging to a foreign state that is located in the United States and used for commercial activity in the United States may be attached and executed if one of seven enumerated conditions is satisfied. Additionally, a terrorism victim who wins a § 1605A judgment may execute on the property of the foreign state.

**A. Jurisdictional Immunity**

Under the FSIA, foreign states and governments are immune from suit in the United States unless one of the FSIA’s specific exceptions applies. The basic rule, stated in 28 U.S.C. § 1604, provides that:

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in section 1605 to 1607 of this chapter.

The FSIA lists nine exceptions to sovereign immunity, in which foreign states are subject to the jurisdiction of United States courts: waiver, commercial acts, expropriations, rights in certain kinds of property in the United States, non-commercial torts, enforcement of arbitral agreements and awards, cases arising from certain acts of state-sponsored terrorism, maritime liens, preferred mortgages, and counterclaims.

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32 Id. § 1609.
33 Id. § 1610(a).
34 Id. § 1610(g).
35 Id. § 1604.
38 Id. § 1605A.
39 Id. § 1605 (b)–(d).
40 Id. § 1607.
Acts of state-sponsored terrorism first became an exception to foreign sovereign immunity in 1996 after a series of significant terrorist incidents in the 1980’s and 1990’s. This exception was codified under 28 U.S.C. § 1605(a)(7). Section 1605(a)(7) stripped foreign states of their immunity with respect to cases seeking money damages for personal injury or death caused by torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources engaged in by specifically designated states or their officials.

In response to difficulties that plaintiffs faced in asserting jurisdiction under this exception, Congress passed the Flatow Amendment to clarify the provision. The Flatow Amendment sought to enable terror victims to recover in private causes of action, and provided that money damages in FSIA suits could include economic damages, solatium, pain and suffering, and punitive damages. However, the Flatow Amendment failed to resolve the most significant obstacles facing plaintiffs under the statute: in spite of the amendment, courts issued contradictory opinions on whether the exception provided a cause of action against a foreign state itself, or only a

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41 STEWART, supra note 26, at 83.
43 Id.
44 See id.; Flatow v. Iran, 999 F. Supp. 1, 15 (D.D.C. 1998) (ruling that § 1605(a)(7) did not itself create a federal cause of action, but merely allowed plaintiffs to bring suit in federal court for claims based on state law).
47 Flatow Amendment § 589.
cause of action against the individual officials, employees, or agents of a foreign state.\footnote{Cicippio-Puleo v. Islamic Republic of Iran, 353 F.3d 1024 (D.C. Cir. 2004) (holding that neither § 1605(a)(7) nor the Flatow Amendment created a private right of action against foreign state sponsors of terrorism, removing the basis for punitive damage awards); Acree, 370 F.3d at 59–60 (holding that plaintiffs must identify a “particular cause of action raising out of a specific source of law”).}


The new provision clearly established a private right of action, re-codified the provisions for the award of punitive damages, authorized compensation for special masters to assist the courts in resolving cases, and incorporated new mechanisms for the enforcement of judgments.\footnote{In re Islamic Republic of Iran Terrorism Litig., 659 F. Supp. 2d 31, 39 (D.D.C. 2009). 28 U.S.C. § 1605A is “more comprehensive and more favorable to plaintiffs because it adds a broad array of substantive rights and remedies that simply were not available in actions under” previous law. Id. at 58.}

The terrorism exception provides that a foreign state shall not be immune from jurisdiction:

\[\text{[I]n any case . . . in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.}\] \footnote{28 U.S.C. § 1605A(a)(1) (2010).}
In the majority of state-sponsored terrorism cases brought under the terrorism exception, neither the foreign state nor the individuals named as defendants appear or answer.\footnote{STEWART, supra note 26, at 89.} In those cases, § 1608(e) provides that a default judgment can be entered against a foreign state after the plaintiff “establishes his claim or right to relief by evidence that is satisfactory to the court.”\footnote{28 U.S.C. § 1608(e).}

Although the FSIA generally prohibits the award or recovery of punitive damages against foreign states,\footnote{Id. § 1606.} the terrorism exception explicitly provides the ability to collect economic, solatium, pain and suffering, and punitive damages.\footnote{Id. § 1605A(c)(4).} Such judgments are awarded both to punish defendants and to deter future terrorist acts.

**B. Execution Immunity**

In addition to jurisdictional immunity, the FSIA provides foreign states with presumptive immunity from pre-judgment attachment and post-judgment execution of judgments on foreign states’ property. Defeating foreign states’ jurisdictional immunity does not automatically entitle a plaintiff to collect on a favorable judgment, however. Plaintiffs must separately obtain execution immunity, the rules governing which are in some respects more restrictive than jurisdictional rules.\footnote{STEWART, supra note 26, at 3.} Thus, a foreign state may validly be subject to a court’s jurisdiction but be insulated from the execution of a resulting judgment. 28 U.S.C. § 1609 lays out the basic rule on execution immunity:

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from

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  \item \footnote{STEWART, supra note 26, at 89.}
  \item \footnote{28 U.S.C. § 1608(e).}
  \item \footnote{Id. § 1606.}
  \item \footnote{Id. § 1605A(c)(4).}
  \item \footnote{STEWART, supra note 26, at 3.}
\end{itemize}
attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.\textsuperscript{58}

Many of the judgments rendered under the terrorism exception have been substantial, sometimes exceeding $100 million.\textsuperscript{59} Most of the judgments have been default judgments, and most claimants remain unsatisfied.\textsuperscript{60} Despite § 1610 and § 1611’s exceptions to execution immunity, plaintiffs have had great difficulty executing their judgments.\textsuperscript{61} In part, this is a result of the restrictive provisions of the law itself, but more generally, this is a result of the fact that designated state sponsors of terrorism have taken steps to minimize or eliminate any property or assets in the United States that might be subject to execution.

In response, FSIA provisions governing judgments against state-sponsors of terrorism have been amended several times, and several separate but related statutes, discussed below, have been enacted. This changing legislative framework has stimulated various judicial interpretations, resulting in a complicated, ever-evolving area of law.

\textsuperscript{58} 28 U.S.C. § 1609.


\textsuperscript{60} STEWART, supra note 26, at 110.

\textsuperscript{61} See 28 U.S.C. §§ 1610–11; In re Islamic Republic of Iran Terrorism Litig., 659 F. Supp. 2d 31, 37 (D.D.C. 2009) (concluding that “civil litigation against Iran under the FSIA state sponsor of terrorism exception represents a failed policy” because “[t]he cases do not achieve justice for victims, are not sustainable, and threaten to undermine the President’s foreign policy initiatives.” In defense of this argument, the court noted there were over ten billion dollars in outstanding court judgments but only forty-five million dollars of Iranian assets in the United States).
1. Section 1610(a): Limited Exceptions to Execution Immunity

Section 1610 sets forth limited exceptions to immunity for attachment in aid of execution and for execution of judgments obtained under the statute against foreign states. Under § 1610(a), a plaintiff who holds a judgment against a foreign state may execute it on the foreign state’s property if the property is located in the United States, is “used for commercial activity in the United States,” and if one of seven enumerated conditions is satisfied.

The Second, Fifth, and Ninth Circuits have examined the definition of “commercial use” to determine who must use the commercial property in the United States for § 1610(a) to be triggered. The circuits agree that the foreign state must use the property for a commercial purpose in order to trigger § 1610(a).

Pertinent to the Rubin case, the seventh enumerated condition, § 1610(a)(7), permits attachment and execution if a judgment is

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63 The FSIA does not apply to the property and assets of a sovereign defendant located outside of the United States. Walters v. People’s Republic of China, 672 F. Supp. 2d 573, 574 (S.D.N.Y. 2009).

64 The property must be “used for the commercial activity upon which the claim is based;” thus, “commercial activity” is defined pursuant to § 1603(d). See also Republic of Argentina v. Weltover, 504 U.S. 607, 614 (1992). However, the definition poses difficult factual determinations. See, e.g., EM Ltd. v. Republic of Argentina, 473 F.3d 463, 482–83 (2d Cir. 2007) (government repayment of debt to IMF is not a “commercial activity”); Af-Cap, Inc. v. Chevron Overseas Ltd., 475 F.3d 1080, 1091 (9th Cir. 2007) (“[T]he property is ‘used for a commercial activity in the United States’ when the property in question is put into action, put into service, availed or employed for a commercial activity, not in connection with a commercial activity or in relation to a commercial activity.”).


66 Id. § 1610(a). See Aurelius Capital Partners v. Republic of Argentina, 584 F.3d 120, 131 (2d Cir. 2009); Conn. Bank of Commerce v. Republic of Congo, 30 F.3d 240, 256 n.5 (5th Cir. 2002) (“[W]hat matters under the statute is how the foreign state uses the property, not how private parties may have used the property.”); Af-Cap, Inc., 475 F.3d at 1090-91 (same).

obtained for a claim of state-sponsored terrorism. When the state-sponsored terrorism exception to jurisdiction was added to the FSIA in 1996, a parallel provision was added at § 1610(a)(7) to permit the execution of judgments rendered under the terrorism exception. As it stands today, § 1610(a)(7) provides that a foreign state’s property in the United States, used for commercial activity in the United States, shall not be immune from attachment in aid of execution:

[I]f the judgment relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7) . . . regardless of whether the property is or was involved with the act upon which the claim is based.

Accordingly, pursuant to § 1610(a)(7), a § 1605A claim that results in a judgment against a foreign state extinguishes the state’s execution immunity and allows the plaintiff to attach the judgment to the foreign state’s property that is used for a commercial purpose.

2. Section 1610(g): Easing the Burden on Executing Judgments

Section 1610(g) of the FSIA is another provision that was implemented to ease the collection process for victims of state-sponsored terrorism. Congress enacted § 1610(g) as part of the National Defense Authorization Act of 2008, which ushered in several changes to the FSIA as applied in cases of state-sponsored terrorism. Section 1610(g) further expanded the category of property

\[68\] Id. § 1610(a)(7).
\[69\] Id.
\[70\] Id.
\[71\] Id.
\[72\] Id.
\[73\] 28 U.S.C. § 1610(g).
\[75\] 28 U.S.C. § 1610(g).
subject to attachment for cases involving state sponsors. Section 1610(g) provides that

the property of a foreign state against which a judgment is entered under section 1605A . . . is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—(A) the level of economic control over the property by the government of the foreign state; (B) whether the profits of the property go to that government; (C) the degree to which officials of that government manage the property or otherwise control its daily affairs; (D) whether that government is the sole beneficiary in interest of the property; or (E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.\(^\text{76}\)

Prior to § 1610(g)’s enactment, there was a general presumption that a judgment against a foreign state may not be executed on property owned by a juridically separate agency or instrumentality.\(^\text{77}\) This presumption was established by the Supreme Court in First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba (Bancec). The Court recognized two exceptions: the holder of a judgment against a foreign state may execute on the property of its instrumentality (1) if the sovereign and its instrumentalities are alter-egos, or (2) if adhering to the rule of separateness would create a fraud or injustice.\(^\text{78}\) The

\(^{76}\text{Id. § 1610(g)(1)(A)–(E).}\)

\(^{77}\text{First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba ("Bancec"), 462 U.S. 611, 626–27 ("Due respect for the actions taken by foreign sovereigns and for principles of comity between nations leads us to conclude . . . that government instrumentalities established as judicial entities distinct and independent from their sovereign should normally be treated as such.").}\)

\(^{78}\text{Id. at 628–33.}\)
court expressly declined to elaborate on these exceptions, leaving lower courts to fill in the gaps.\footnote{Id. at 633.} Soon after Bancec was decided, the federal courts coalesced around a set of five factors to determine when the exceptions applied.\footnote{See, e.g., Flatow v. Islamic Republic of Iran, 308 F.3d 1065, 1071 n.9 (9th Cir. 2002); Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines, 965 F.2d 1375, 1380–82, 1380–81 n.7 (5th Cir. 1992) (these factors are: (1) the level of economic control by the government; (2) whether the entity’s profits go to the government; (3) the degree to which the government officials manage the entity or otherwise have a hand in its daily affairs; (4) whether the government is the real beneficiary of the entity’s conduct; and (5) whether adherence to separate identities would entitle the foreign state to benefit in United States courts while avoiding its obligations).}

However, § 1610(g) eliminated the Bancec doctrine by permitting a terrorism victim who wins a § 1605A judgment to execute on the property of the foreign state and the property of its agency or instrumentality “as provided in this section” but “regardless of” the five factors listed in subsections (A)–(E).\footnote{28 U.S.C. § 1610(g)(1)(A)–(E).} The five factors set forth in subsections (A)–(E) mirror almost exactly the five factors developed by the lower courts under the Bancec doctrine, thereby eliminating the Bancec doctrine irrelevant for terrorism-related judgments.\footnote{Id. See also Gates v. Syrian Arab Republic, 755 F.3d 568, 576 (7th Cir. 2014).}

Accordingly, § 1610(g) eases the collection process for victims of state-sponsored terrorism by eliminating the Bancec rule.

### 3. Terrorism Risk Insurance Act

Despite the 1996 amendments to the FSIA, most plaintiffs have been unsuccessful at executing judgments against state sponsors of terrorism. This is due in part to the fact that the states in question typically do not engage in commercial activity in the United States, and because many assets that these foreign states possess are typically seized or frozen as a result of government sanctions. To help plaintiffs
overcome this obstacle, Congress enacted the Terrorism Risk Insurance Act of 2002 (“TRIA”).\(^{83}\) TRIA provides an additional exception to the FSIA rule that property of a foreign state is immune from attachment and execution in the United States.\(^{84}\) Section 201(a) of the TRIA provides that:

> in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, . . . the blocked assets of the terrorist party . . . shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.\(^{85}\)

An asset is considered “blocked” when it has been “seized or frozen” by the United States pursuant to § 5(b) of the Trading with the Enemy Act (“TEA”), or under §§ 202 or 203 of the International Emergency Economic Powers Act (“IEEPA”).\(^{86}\)

In response to the 1979 Iran hostage crisis, President Carter issued Executive Order 12170, which froze all Iranian assets in the United States pursuant to the IEEPA.\(^{87}\) Executive Order 12281 subsequently unblocked all uncontested property interests of the Iranian government when the Algiers Accords resolved the hostage crisis in 1981.\(^{88}\) The order gave implementing authority to the Treasury Department.\(^{89}\) The Treasury Department’s office of foreign assets control issued

\(^{84}\) Id. § 101(b). See 28 U.S.C. § 1609.
\(^{89}\) Id.
regulations broadly defining unblocked property as “all uncontested and non-contingent liabilities and property interests of the Government of Iran, its agencies, instrumentalities, or controlled entities.” A property interest is considered “contested only if the holder thereof reasonably believes that Iran does not have title or has only partial title to the asset,” and a belief is considered reasonable “only if it is based on a bona fide opinion, in writing, of an attorney licensed to practice within the United States stating that Iran does not have title or has only partial title to the asset.”

Despite Congress’s intentions, these TRIA provisions have been ineffective for several reasons. Generally, determining whether particular assets are blocked requires reference to Office of Foreign Assets Control (“OFAC”) regulations. When they are blocked, transactions in those assets are prohibited, and thus the assets may not be available to judgment creditors regardless of any sovereign immunity shield. When transactions have been licensed, the assets are “unblocked” to the extent of the license, and are definitionally outside of TRIA § 201. Furthermore, one purpose of the TRIA was to override OFAC’s regulations and permit attachment and execution even when no OFAC license had been issued. Yet, the TRIA has been ineffective to this end, as few states that sponsor terrorism have assets in the United States that may be blocked. TRIA excluded property used exclusively for diplomatic or consular purposes and thus such property is entitled to immunity and inviolability under the Vienna

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90 31 C.F.R. § 535.333(a).
91 Id. § 535.333(c).
94 STEWART, supra note 26, at 117.
Conventions.\(^{95}\) As a result, the practical impact of TRIA has been limited.\(^{96}\)

II. **RUBIN V. ISLAMIC REPUBLIC OF IRAN**

   \textit{A. The Facts}

   On September 4, 1997, three members of the Hamas terrorist group carried out a suicide bombing in a crowded pedestrian mall in Jerusalem.\(^{97}\) Eight U.S. citizens were grievously injured in the attack.\(^{98}\) While all eight survived, each victim suffered severe injuries including burns covering more than forty percent of the body, over one hundred shrapnel entry wounds, permanent nerve damage, perforated eardrums, chronic infections, scarring, post-traumatic stress disorder, and depression.\(^{99}\)

   In 2003, those individuals, along with their close family members, filed a civil suit against the Islamic Republic of Iran for its role in financing and training the Hamas suicide bombers.\(^{100}\) The plaintiffs brought suit in the United States District Court for the District of Columbia.\(^{101}\) Iran was subject to the suit as a state-sponsor of terrorism under the terrorism exception to the FSIA.\(^{102}\) The plaintiffs won a default judgment against Iran, comprised of $71.5 million in compensatory damages and $300 million in punitive damages.\(^{103}\)

\(^{95}\) TRIA § 201(d)(2)(B)(ii); Bennett v. Islamic Republic of Iran, 618 F.3d 19 (D.C. Cir. 2010).
\(^{96}\) \textit{Stewart, supra} note 26, at 110.
\(^{98}\) \textit{Id.} at 263–68.
\(^{99}\) \textit{Id.}
\(^{100}\) \textit{Id.}
\(^{101}\) \textit{Id.}
\(^{103}\) Campuzano, 281 F.Supp.2d. at 265.
Iran never paid. Over the course of the next decade, the plaintiffs tried unsuccessfully to attach and execute on Iranian assets across the country in order to satisfy the judgment. Given Iran’s minimal assets in the United States, the plaintiffs identified priceless Persian antiquities located in American Museums as the only meaningful source of recovery. The plaintiffs registered the judgment and initiated attachment proceedings in the First Circuit and the Northern District of Illinois. Though ultimately unsuccessful at executing their judgment on Iranian antiquities located at the Boston Museum of Fine Arts and Harvard University, the plaintiffs

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104 Rubin v. Islamic Republic of Iran, 830 F.3d 470, 470 (7th Cir. 2016).
106 Rubin, 709 F.3d at 50.
107 Rubin v. Islamic Republic of Iran, 408 F. Supp. 2d 549, 551 (N.D. Ill. 2005).
108 Rubin, 709 F.3d at 50.
continued their pursuit of the Persian antiquities in federal court in the Seventh Circuit.

A. District Court Opinion

The plaintiffs named four collections of ancient Persian artifacts located in the territorial jurisdiction of the Northern District of Illinois to subject to attachment. The collections included the Persepolis Tablets, the Chogha Mish Collection, the Oriental Institute Collection—which were in the possession of the University of Chicago—and the Herzfeld Collection—which was split between the University of Chicago and the Chicago Field Museum of Natural History. If attached, the invaluable collections would be sold to the highest bidder at auction to pay the plaintiffs’ judgment award.

The District Court found that, “as a matter of law, no party other than Iran may assert Iran’s foreign sovereign immunity defenses under Sections 1609 and 1610 for the FSIA.” This ruling forced Iran to appear in litigation for the first time to try to protect the artifacts, which it later did.

For procedural reasons, Rubin already made its way to the Seventh Circuit once before. After the case was sent back down to the district court, Iran and the Museums moved for summary judgment. The district judge granted the motion, determining that the § 1610(a) exception to execution immunity was limited to commercial activity conducted by the foreign state itself, and not by a third party. Iran had not used the artifacts for commercial activity,

109 Rubin, 830 F.3d at 475–76.
110 James Wawrzyniak, Rubin v. The Islamic Republic of Iran: A Struggle for Control of Persian Antiquities in America, YEARBOOK OF CULTURAL PROPERTY LAW 223, 227 (Sherry Hutt ed., 2008).
111 Rubin, 408 F. Supp. 2d at 563.
112 Id.
113 See Rubin v. Islamic Republic of Iran, 637 F.3d 783 (7th Cir. 2011).
114 Rubin v. Islamic Republic of Iran, 33 F.Supp.3d 1017 (N.D. Ill. 2014).
115 Id.
so the district judge held that § 1610(a) did not apply. The judge also held that execution under the TRIA was unavailable because the assets in question were not blocked by any current executive order. The plaintiffs responded to the summary judgment motion by identifying a third possible path to reach the artifacts: § 1610(g). The plaintiffs argued that § 1610(g) is a free-standing exception to execution immunity available to victims of state-sponsored terrorism. The judge rejected this argument, however, holding that § 1610(g) is not a freestanding terrorism exception to execution immunity. The district court found no statutory basis to execute on the artifacts and accordingly entered judgment for Iran and the Museums. The plaintiffs subsequently appealed this decision to the Seventh Circuit, reprising all three arguments.

B. Appeal to the Seventh Circuit

On appeal, the plaintiffs asserted the same arguments pursuant to § 1610(a), § 1610(g), and the TRIA. The Rubin majority opinion was written by Judge Bauer, Judge Sykes, and Chief Judge Reagan of the Southern District of Illinois. Judge Hamilton penned a short dissent. The court affirmed the District Court’s holding.

1. Collections Potentially Subject to Attachment

As a threshold matter, the Seventh Circuit first identified which collections were potentially subject to attachment and execution by applying two basic criteria. First, the artifacts must be owned by Iran, and second, the artifacts must be within the territorial jurisdiction of

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116 Id.
117 Id. at 1011.
118 Id. at 1013.
119 Id. at 1017.
120 See Rubin v. Islamic Republic of Iran, 830 F.3d 470, 470 (7th Cir. 2016).
121 Id.
the district court. The court found that there was no question that the Persepolis Tablets are owned by Iran and in the physical possession of the University, within the territorial jurisdiction of the court. The Persepolis Tablets, a collection consisting of roughly 30,000 dried clay tablets dating from 509 to 494 B.C., contain information about the Persian Empire. In 1931, the tablets were found underneath one of the fortification walls in Persepolis, modern day Iran. Although Iran owns the tablets, Iran permitted the University of Chicago’s Oriental Institute to conserve and research the tablets pursuant to a long-term loan.

However, the three other collections did not meet the criteria. The court held that the Herzfeld and the Oriental Institute Collections are not Iranian property, but are owned by their respective American institutions. Despite the plaintiff’s attempt to cast doubt on the legitimacy of the artifact’s removal from Iran, the museums maintained that they were bona fide purchasers or recipients of the collections, and Iran expressly disclaimed any legal interest in the two collections. The district court judge found no evidence that supported Iranian ownership of the artifacts, and plaintiffs did not meaningfully contest that point on appeal.

Additionally, the Chogha Mish Collection was in the possession of the University when the district court entered judgment. However, upon request by the State Department, the University

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122 Id. at 475. See also 28 U.S.C. § 1610(a).
123 Id. at 476.
124 Hilton, supra note 105, at 486.
125 Rubin, 830 F.3d at 476, 480.
126 See id. at 476.
127 The plaintiffs argued that Dr. Herzfeld is regarded by some in the academic community as a plunderer and that the artifacts in these collections are covered by Iran’s national heritage Protection Act of 1930, which gives the government of Iran an option to exercise control over certain antiquities unearthed in the country. Id.
128 See id.
129 See id.
returned the Chogha Mish artifacts to Iran. Thus, at the time of the appeal, the collection was no longer within the territorial jurisdiction of the court. Accordingly, the court confined the merits of review to the Persepolis Tablets.

On the merits of their appeal, the plaintiffs identified § 1610(a) and § 1610(g) of the FSIA, and § 201(a) of the TRIA as possible paths to execute their judgment on the Persepolis Tablets.

2. Execution Judgment Denied under Section 1610(a)

The plaintiffs first pointed to § 1610(a)(7) as an avenue to execute their judgment on the Persepolis Tablets. The Seventh Circuit rejected this argument. The major issue that the court looked to under § 1610(a) was a question of statutory interpretation: where Congress did not identify who must “use” the property, does a third party’s use suffice?

Section 1610(a)(7) permits the holder of a judgment against a foreign state to execute on “property in the United States of a foreign state . . . used for a commercial activity in the United States” if the judgment relates to a claim for which the foreign state is not immune under § 1605A or § 1605(a)(7). The court found that the judgment did relate to a claim for which Iran was not immune under § 1605A, but took issue with the passive-voice phrasing of the above quote, which provided the basis of the key issue in this case: who must use the Iranian property for a commercial activity?

130 See id. The University notified the Seventh Circuit that they return the artifacts unless the court ordered otherwise. The Seventh Circuit did not, and the University returned the artifacts to Iran’s National Museum in Tehran and filed notice with the court that Iran received and accepted them.

131 See id.

132 See id. at 478.

133 See id. at 481.

134 See id. at 479.


136 Rubin, 830 F.3d at 479.
The plaintiffs argued that a third party’s commercial use of the property triggers § 1610(a) and that the University’s academic study of the Persepolis Tablets counts as a commercial use.\footnote{137} Iran and the University countered that the foreign state itself must use the property for commercial activity and that academic study is not commercial use.\footnote{138} The United States provided an amicus curiae brief supporting the latter argument.\footnote{139}

Following the Second, Fifth, and Ninth Circuit’s holdings, the Seventh Circuit held that the exception is triggered only when the foreign state itself uses its property in the United States for commercial activity.\footnote{140} The court reasoned that attributing the legislature’s use of a passive voice to reflect indifference to the actor would be inconsistent with the FSIA’s statutory declaration of purpose in § 1602, which explicitly invokes the international law understanding of foreign sovereign immunity that foreign sovereigns do not have immunity for “their commercial activities” or immunity from execution on “their commercial property.”\footnote{141} The court deduced that § 1602’s declaration of purpose clarifies that a foreign state’s property is subject to execution under § 1610(a) only when the state itself uses the property for commercial activity.\footnote{142}

The court rejected the plaintiff’s argument that the declaration of purpose is irrelevant because resorting to legislative history is unnecessary when statutory language is unambiguous.\footnote{143} The Seventh Circuit countered that § 1602 is legislation, not legislative history.\footnote{144} The court further asserted that the passive-voice phrasing of § 1610(a)
creates uncertainty about whose commercial use of the property suffices to forfeit a foreign state’s execution immunity, so the words must be read “in their context and with a view to their place in the overall statutory scheme.” The court stated that although § 1610(a) does not unambiguously abrogate execution immunity when a third party uses a state’s property for commercial activity, the statutory declaration of purpose suggests that a narrower interpretation is correct, that a foreign state may lose its execution immunity only by its own commercial use of its property in the United States.

The plaintiffs further argued that the language in § 1605(a), that the commercial activity must be “carried on in the United States by the foreign state,” does not appear in § 1610(a). Thus, the commercial activity exception to execution immunity is broader than § 1610(a), and applies to third parties. The court relied on the settled principle that exceptions to execution immunity are narrower than, and independent from, the exceptions to jurisdictional immunity. Further, the court reasoned that seizing a foreign state’s property is a more serious affront to its sovereignty than taking jurisdiction in a lawsuit, and it carries far reaching implications for American property abroad. Thus, the court held that a third party’s commercial use of a foreign state’s property does not trigger the § 1610(a) exception to execution immunity, but § 1610(a) applies only when the foreign state itself has used its property for a commercial activity in the United States, and the actions of third parties are irrelevant.

Because nothing in the record suggested that Iran itself used the Persepolis Tablets for a commercial activity in the United States, and the

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145 Id. (quoting FDA v. Brown & Williamson Tobacco Corp. 529 U.S. 438, 450 (2002)).
146 Rubin, 830 F.3d at 480.
147 Id.
148 Id.
149 Id. See Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. 2250, 2256 (2014); Rubin v. Islamic Republic of Iran, 637 F.3d 783, 790 (7th Cir. 2011); DeLetelier v. Rep. of Chile, 748 F.3d 790, 798–99 (2d Cir. 1984).
150 Rubin, 830 F.3d at 481.
plaintiffs did not argue that they do, the court held that § 1610(a) did not apply.  

3. Section 1610(g) is Not a Freestanding Exception

Second, the plaintiffs pointed to § 1610(g) and made the argument that § 1610(g) makes all Iranian assets available for execution without needing to prove that the property has a nexus to commercial activity, as § 1610(a) requires. In other words, the plaintiffs argued that § 1610(g) is a freestanding exception to execution immunity for terrorism-related judgments. The court rejected this argument.

The text of § 1610(g) states that “the property of a foreign state against which a judgment is entered under section 1605A . . . is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section . . . .” In its analysis, the court first identified the obvious textual parallels between § 1610(g) and the Bancec rule, concluding that § 1610(g) overrides the Bancec doctrine for terrorism-related judgments, as the defendants argued, and as the Seventh Circuit has previously held. The court next looked to the key question that was not decided in Gates — whether § 1610(g) establishes a freestanding terrorism exception to execution immunity.

The plaintiffs argued that the § 1610(g) language “as provided in this section” refers only to the “non-substantive rules” set forth in § 1610. However, the plaintiffs did not provide a basis to limit the phrase in this way, and they did not identify which non-substantive rules they thought Congress intended to include in § 1610(g). The

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151 Id.
152 28 U.S.C. § 1610(a), (g).
153 Rubin, 830 F.3d at 481.
154 Id. at 487.
156 The United States supported this interpretation in an amicus curiae brief.
157 Rubin, 830 F.3d at 483. See also Gates v. Syrian Arab Republic, 755 F.3d 568, 576 (7th Cir. 2014).
158 Rubin, 830 F.3d at 482; 28 U.S.C. § 1610(g)(1).
159 Rubin, 830 F.3d at 484.
plaintiff’s argument relied on assumptions made about § 1610(g) in the Seventh Circuit Gates and Wyatt decisions, and in the Ninth Circuit’s Bennett decision.\footnote{Bennett v. Islamic Republic v. Iran, 799 F.3d 1281, 1286–87 (9th Cir. 2015); Wyatt v. Syrian Arab Republic, 800 F.3d 333, 333–34 (7th Cir. 2015); Gates, 755 F.3d at 574–75.}

The court declined to read the phrase in this way, arguing that it was odd to read “as provided in this section” as referring to only certain unidentified subsections.\footnote{Rubin, 830 F.3d at 484; 28 U.S.C. 1610(g)(1).} Instead, the court concluded that “section” means what it says: that § 1610(g) modifies all of § 1610, not just certain parts of it.\footnote{Rubin, 830 F.3d at 484.} The court further reasoned that treating § 1610(g) as an independent basis for execution creates superfluities in other parts of the statute—if § 1610(g) were a freestanding exception to execution immunity, then the amendments enacted at the same time were completely unnecessary.\footnote{Id. For instance, if § 1610(g) paves a dedicated lane for execution actions by victims of state-sponsored terrorism, then § 1610(a)(7), which relates specifically to judgments obtained under § 1605A, serve no purpose at all. Section 1610(a)(7) was enacted at the same time as § 1605A and added in the same 2008 legislation to make the commercial-activity exceptions applicable to judgments obtained under § 1605A.} Understanding § 1610(g) in this way, the court overruled Gates and Wyatt in part, and declined to follow Bennett.\footnote{Id. at 487. See also Bennett, 799 F.3d 1281; Wyatt, 800 F.3d at 333; Gates, 755 F.3d at 568.}

The court reasoned that Gates assumed rather than decided the crucial question of whether § 1610(g) is itself a freestanding exception to execution immunity.\footnote{Gates, 755 F.3d at 576.} The court in Gates simply described § 1610(g) in a way that implied that it is an independent basis for attachment and execution for all terrorism-related judgments, without further inquiry.\footnote{Id.} There is no mention in Gates of the limiting phrase in § 1610(g) “as provided in this section” nor any reference to statutory superfluities created by the broader interpretation advanced
by the *Rubin* plaintiffs in this case.\textsuperscript{167} The court conceded that there is no doubt that the opinion treats § 1610(g) as if it were an independent exception to execution immunity, albeit without actually deciding the questions.

Similarly, in *Wyatt*, the Seventh Circuit did not directly address the fundamental interpretative question about the scope of § 1610(g), leaving the underlying premise of *Gates* unexamined. The court relied on the holding of *Gates* that “[§] 1610(c) simply does not apply to the attachment of assets to execute judgments under § 1610(g) for state-sponsored terrorism.”\textsuperscript{168} Consequently, the *Rubin* court explicitly stated that “[t]o the extent that *Gates* and *Wyatt* can be read as holding that § 1610(g) is a freestanding exception to execution immunity for terrorism-related judgments, they are overruled.”\textsuperscript{169}

The *Rubin* court then rejected the Ninth Circuit’s holding in *Bennett*, arguing that the *Bennett* majority explained away the “as provided in this section” language in § 1610(g) by interpreting it to apply only to § 1610(f).\textsuperscript{170} The court explained that this opinion “implausibly reads the word ‘section’ as ‘subsection,’ so the phrase ‘as provided in this section’ actually means ‘as provided in this subsection (f).’”\textsuperscript{171} The *Rubin* court explained that § 1610(f) never became operative,\textsuperscript{172} thus does not allow any form of execution, so if the Ninth Circuit’s reasoning is correct, § 1610(g) was effectively a nullity upon the passage.\textsuperscript{173} The court concluded that interpreting “as provided in this section” to refer only to § 1610(f), an inoperative part of the statute, makes no sense and cannot be the correct interpretation.\textsuperscript{174} If that were the case, then execution “as provided in this section” would

\textsuperscript{167} See *Rubin*.
\textsuperscript{168} *Wyatt*, 800 F.3d at 343 (quoting *Rubin* at 575).
\textsuperscript{169} *Rubin*, 830 F.3d at 487.
\textsuperscript{170} *Id.* See also *Bennett v. Islamic Republic v. Iran*, 799 F.3d 1287 (9th Cir. 2015).
\textsuperscript{171} *Rubin*, 830 F.3d at 486.
\textsuperscript{172} *Id.* at 486–87.
\textsuperscript{173} *Id.* at 487.
\textsuperscript{174} See 28 U.S.C. §§ 1610(f), (g)(1).
mean no execution at all. Thus, the court declined to follow the Ninth Circuit’s interpretation of § 1610(g).

Based on this analysis, the court held that § 1610(g) is not itself an exception to execution immunity for terrorism-related judgments; rather, it abrogates the Bancec rule for terrorism-related judgments. Accordingly, terrorism victims with unsatisfied § 1605A judgments against foreign states may execute on the foreign state’s property and the property of its agency or instrumentality—without regard to the Bancec presumption of separateness—but they must do so “as provided in this section.”

Pertinent to the Rubin case, this required the plaintiffs to satisfy the commercial activity requirement laid out in § 1610(a).

4. Dissent from the Denial of En Banc Review

In accordance with Circuit Rule 40(e), the Rubin opinion was circulated to all judges in active service. Circuit Rule 40(e) requires circulation within the court before publication to inquire whether a majority of active judges wish to rehear the case en banc. Chief Judge Wood and Circuit Judges Posner, Flaum, Easterbrook, and Rovner did not participate, so a majority did not vote to rehear the case en banc. Judge Hamilton filed a rare dissent from the denial of en banc review.

In his dissent, Hamilton took issue with the fact that the panel had the power to partially overrule two recent Seventh Circuit decisions.

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175 Rubin, 830 F.3d at 487.
176 Id.; 28 U.S.C. § 1610(g).
177 Rubin, 830 F.3d at 487.
179 U.S. Ct. of App. Fed. Cir. Rule 40(e); Rubin, 830 F.3d at 487 n.6.
180 Circuit Rule 40(e).
181 Rubin, 830 F.3d at 487 n. 6.
182 Id.
and create a circuit split without meaningful Rule 40(e) review. In Rubin, the majority of active judges were disqualified, and thus did not have the opportunity to vote; it was functionally impossible to rehear the case en banc. Thus, Hamilton argued that one panel’s decision to overrule another’s decision should not be treated as settling the legal issue in the Seventh Circuit.

Hamilton argued the practical consequences of ruling that § 1610(g) does not offer a freestanding basis for executing judgments against state sponsors of terrorism independent of § 1610 (a) and (b). He also asserted that the Bennett and Rubin textual readings are both reasonable, and that the text is ambiguous. Thus, the courts must choose between two statutory readings: one that favors state sponsors of terrorism, or one that favors the victims of that terrorism. According to Hamilton, the court should favor a textual reading that favors the victims of terrorism.

5. Terrorism Risk Insurance Act

The plaintiffs’ third argument asserted that the Persepolis Tablets are subject to attachment and execution under § 201(a) of the TRIA. Section 201(a) permits a person who holds a judgment against a state sponsor of terrorism to execute on the foreign state’s assets if the assets have been blocked by an executive order under certain international sanction provisions. Though President Carter blocked all Iranian assets in the United States, he subsequently unblocked all

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183 Id. at 489.
184 Id.
185 Id.
186 Id.
187 Id.
188 Id.
189 Id.
190 Id.
191 Id. at 487. See TRIA § 201(a).
192 TRIA § 201(a).
“uncontested property interest of the Iranian government.” The plaintiffs argued that the Persepolis Tablets were a contested property interest, and consequently, remained blocked by Executive Order 12170.

The court rejected this argument, citing the absence of evidence that the University contests Iran’s title to the Persepolis Tablets, and the University’s reaffirmation of the terms of the long-term academic loan, which unambiguously requires the University to return the artifacts to Iran upon completion of study. The court acknowledged the University’s possessory interest in the collection, but found it relevant only for the argument that Iran retains full ownership of the collection.

The court also rejected the plaintiff’s claim that the Persepolis Tablets have been “reblocked” by President Obama’s Executive Order 13599. The court reasoned that section 4(b) of Order 13599 expressly exempts all “property and interests in property of the Government of Iran that were blocked pursuant to Executive Order 12170 of November 14, 1979, and thereafter made subject to the transfer directives set forth in Executive order 12281 of January 19, 1981.”

The court dismissed the plaintiff’s interpretation of “transfer directives” to be a directive from Iran, reasoning that this misreads the 2012 order, which refers to “transfer directives set forth in” Executive Order 12281 requiring all property meeting certain specified criteria be returned to Iran. That is, the directive is categorical rather than contingent on particularized demands by Iran. Accordingly, the court found that attachment and execution under § 201 was unavailable.

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193 Rubin, 830 F.3d at 488.
194 Id. at 487. See supra note 86 and accompanying text.
195 Id. at 488.
196 Id.
198 Rubin, 830 F.3d at 488 (citing 77 Fed. Reg. 6659, 6660 (Feb. 8, 2012)).
199 Id.
200 Id. at 489.
III. Analysis

From a statutory interpretation perspective, the Seventh Circuit reached the correct result in denying the plaintiffs execution on the Persepolis Tablets. Additionally, auctioning cultural property raises policy concerns that further buttress the Seventh Circuit’s outcome. However, the Rubin plaintiffs are deserving victims who have been denied execution of their judgment despite repeated attempts to do so. The Rubin victims are not alone; many other victims of state-sponsored terrorism have been unsuccessful at receiving compensation for their grievous injuries. In lieu of a judicial remedy of the kind the plaintiffs sought, the executive branch should establish a comprehensive victim’s compensation fund, paid for by the United States government, to compensate the victims of state-sponsored terrorism.

A. The Court Correctly Interpreted § 1610(g)

The court’s interpretation that § 1610(g) is not a freestanding exception to execution immunity was correctly determined.201 Had the court found that § 1610(g) was a freestanding exception, it would permit plaintiffs to seize sovereign property without regard to its commercial status. The restrictive theory of sovereign immunity that was codified in the FSIA in 1976 was a codification of customary international law that permits adjudication of disputes arising from a foreign state’s commercial activities.202 The rules governing execution immunity are more restrictive than jurisdictional rules.203 There is no indication that customary international law has changed since 1976, nor that adjudication is permitted to extend beyond commercial activities. Sovereign immunity is a reciprocal arrangement; by ignoring the obligation to protect other states’ diplomatic property, the

201 Id. at 487.
202 See supra Part II.
United States’ property abroad, valued anywhere from $12–$15 billion, becomes increasingly vulnerable. Judge Hamilton’s contention that the language of § 1610(g) is ambiguous fails to understand the majority’s argument. Hamilton noted that the interpretation of § 1610(g) in both Bennett and in Rubin are reasonable. However, the Bennett majority purported to explain away the “as provided in this section” language in § 1610(g) by interpreting it to apply only to § 1610(f). This reading is not reasonable, as Judge Hamilton purported. As the Rubin majority explained, the Bennett court read the word “section” as “subsection” and interpreted “as provided in this section” to mean “as provided in subsection (f).” This is implausible and unreasonable, contrary to Hamilton’s suggestion.

Moreover, Hamilton conceded that “in interpreting an ambiguous statutory text, we can and should draw on statutory purpose and legislative history.” Hamilton concluded that the court must choose between one of the two statutory interpretations of the ambiguous text, one reading which favors state sponsors of terrorism, and the other which favors the victims of terrorism. Hamilton asserted that the court should interpret the statute in a light most favorable to the victims. While the plaintiffs are deserving victims who, arguably, most anyone would want to see compensated for their suffering, that alone is not sufficient for a judgment in their favor.

Hamilton posited that the court “should not attribute to Congress an intent to be so solicitous of state sponsors of terrorism, who are also

205 See Rubin, 830 F.3d at 489.
206 *Id.* See Bennett v. Islamic Republic v. Iran, 799 F.3d 1281 (9th Cir. 2015).
207 Bennett, 799 F.3d at 1287.
208 Rubin, 830 F.3d at 486.
209 *Id.* at 490.
210 *Id.* at 489–90.
211 *Id.* at 490.
undeserving beneficiaries . . . .”212 However, it is not clear that courts should ascribe such a congressional intent. The premise of the FSIA is to provide only narrow exceptions to sovereign immunity and, historically, Congress has been wary of providing plaintiffs with an avenue to sue a foreign state in the United States.213 There are other considerations to take account of, such as retaliatory suits against U.S. citizens abroad. This consideration may have more far reaching consequences than denying a terrorist victim the ability to sue a state sponsor of terrorism in the United States.

While § 1610(g) is intended to provide relief to terrorist victims, it should be viewed in light of the larger context of the FSIA. The dissent acknowledges that “[t]his Court has admonished that ‘no legislation pursues its purposes at all costs,’ and that it ‘frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute’s primary objective must be the law.”214 Section 1610(g) indeed provides relief to terrorist victims by abrogating the Bancec doctrine to make it easier for terrorist victims to pursue their claim against state-sponsors of terrorism. However, the court should not interpret this to mean that such plaintiffs are entitled to win at all cost.

Although the Rubin court’s statutory interpretation of § 1610(g) is a reasonable interpretation, it is troubling that courts continue to follow the Ninth Circuit’s view in Bennett. Around the time that the Rubin opinion was published, two other circuits issued an opinion on whether § 1610(g) is a freestanding exception to execution immunity. In Weinstein v. Islamic Republic of Iran215 and Kirschenbaum v. 650 Fifth Ave.,216 the D.C. Circuit and the Second Circuit, respectively,

212 Id.
described § 1610(g) as freestanding. However, similar to the Ninth Circuit and the Seventh Circuit cases that *Rubin* overruled, these courts did not provide any analysis of the “as provided in this section” language.\textsuperscript{217}

While it appears that all other circuits that have approached the issue have decided that § 1610(g) is freestanding, they have done so without adequate analysis. The Seventh Circuit is the only court that delves into the analysis of the grammatical structure of the language “as provided in this section.”\textsuperscript{218} The dissent claims that the language can be interpreted in two different ways. However, the Seventh Circuit’s arguments are incredibly persuasive, and the other courts did not provide arguments against this interpretation, as they have not delved into the analysis. For this reason, it appears that the language should be interpreted as the *Rubin* court has done.

In October 2016, the *Rubin* defendants submitted a petition for a writ of certiorari.\textsuperscript{219} In large part, the defendants identified the stark differences between the Seventh and Ninth Circuits’ contradictory holdings on § 1610(g).\textsuperscript{220} Perhaps the Supreme Court will settle this issue in the future.

**B. Public Policy Supports the Court’s Interpretation**

Removed from the legal issues considered in *Rubin*, there exists an underlying policy concern that further buttresses the Seventh Circuit’s outcome: cultural property should not be used to satisfy a legal judgment. While this proposition rests on more ideological considerations rather than legal considerations, guiding principles in international and domestic conventions indicate that the Persepolis

\textsuperscript{217} See Weinstein, F.3d, 2016 WL 4087940. See also Kirschenbaum, F.3d 2016 WL 3916001.

\textsuperscript{218} 28 U.S.C. § 1610(g)(1).

\textsuperscript{219} Petition for a Writ of Certiorari, Rubin v. Islamic Republic of Iran, 830 F.3d 470 (7th Cir. 2016) (No. 16-543), 2016 WL 6124417.

\textsuperscript{220} Id.
Tablets should be treated different from other property based on their status as cultural property.  

Cultural property is defined as “objects that are a product of a particular group or community and embody some expression of that group’s identity.”221 It is a “specific form of property that enhances identity, understanding, and appreciation for the culture that produced the particular property.”222 The preservation of cultural property requires measures against the destruction, mutilation, or division of sets and collections.223  

Article 1(2)(c) of the UNESCO Constitution, to which the United States is a party, identifies three obligations to cultural heritage that state parties must adhere to: (1) conservation and protection; (2) the recommendation of international conventions; and (3) the encouragement of international exchange.224 Scholars argue that, to uphold these principles, the United States must allow for “the question for knowledge, for valid information about the human past, for the historical, scientific, cultural and aesthetic truth that the object and its context can provide.”225 Further, the object must be “optimally accessible to scholars for study and to the public for education and enjoyment.”226  

The Persepolis Tablets hold great historical importance, as their text provides a unique cognizance of the Persian Empire. Prior to the tablet’s discovery, the Persian Empire was largely understood

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222 Id. at 569.
223 Id.
227 Id.
through the writing of contemporary foreigners. The tablets, written by the Persians themselves, provide a first-hand, impartial understanding of the everyday life and internal workings of the Empire. However, the analysis and publication of the tablets is still far from complete. Selling the collection would prevent scholars from completing the tablet’s study, and would prevent the public from accessing them for education; society at large would lose a wealth of knowledge.

The preamble of the 1970 UNESCO Convention of the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, to which the United States is party, provides that “cultural property constitutes one of the basic elements of civilization and national culture,” and “that the interchange of cultural property among nations for scientific, cultural and educational purposes increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations.” The 1970 Convention, however, acts as a set of guidelines, and is not self-executing. Thus, it does not exert legal authority over the United States.

In 1983, the United States passed the Convention on Cultural Property Implementation Act (CPIA) to implement the 1970 Convention into law in the United States. The CPIA was implemented to “promot[e] U.S. leadership in achieving greater international cooperation towards preserving cultural treasures that not only are of importance to nations whence they originate, but also to a

228 Stein, supra note 2, at 3–4.
229 Id.
231 The United States required Congress to enact legislation by which the convention would be implemented into domestic law to have domestic legal effect. PATTY GERSTENBLITH, ART, CULTURAL HERITAGE, AND THE LAW: CASES & MATERIALS 622–23 (3d ed. 2012).
greater international understanding of our common heritage." In addition, a comment by the U.S. Department of State regarding the U.S. Cultural Property Act contends that “[t]he legislation is important to our foreign relations, including our international cultural relations.”

While neither the 1970 Convention nor the CPIA provide controlling law over the Persepolis Tablets, the United States’ willingness to adhere to the principles set forth in the texts reinforces the idea that cultural property should not be used to satisfy a legal judgment. The Persepolis Tablets are “irreplaceable items of cultural heritage for the people of Iran.” To demonstrate the modern significance of the tablets, Professor Gil Stein emphasizes that “Persepolis and the Persian Empire are the central symbols of Iranian cultural identity.” The tablets, as actual records of the Persian King Darius I, are incredibly important to the cultural heritage of the Iranian people.

In a petition to the court opposing seizure of the tablets, Attorney James S. Irani argued that the tablets belong not only to the Iranian government but “to the world as well.” As an irreplaceable piece of shared human history, the tablets themselves and the knowledge that they hold should be available to the world at large, not just to a single individual.

In addition, permitting the attachment and execution of judgments on cultural property that is on loan from another country, and the subsequent sale of this cultural property, would have profound consequences. Countries would, understandably, be very wary of lending invaluable and irreplaceable artifacts to museums in the

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233 S. REP. NO. 97-564, at 1 (1982). See also GERSTENBLITH, supra note 231, at 557.
234 GERSTENBLITH, supra note 231, at 558.
235 Stein, supra note 2, at 3–4.
236 Id.
237 Id.
United States. This would prevent the exchange and study of culture in the United States. At a time of rampant xenophobia in the United States, particularly towards Middle Easterners, cultural exchange and understanding are of the upmost importance.

These policy concerns support the Seventh Circuit’s outcome in *Rubin*. Cultural artifacts should not be auctioned, even to award damages to the most deserving victims. Sympathetic, innocent plaintiffs such as those in *Rubin* make a strong case that their rights to recovery should prevail over more dubious sociological ownership claims. However, it would be tragic for society-at-large to remedy the plaintiff’s grievances by sending cultural property to the auction block.

**C. Congress Should Implement a Comprehensive Victims Compensation Fund**

While the *Rubin* decision properly shielded the Persepolis Tablets from execution, the *Rubin* plaintiffs are deserving victims whose grievances should be remedied. For the past thirteen years, the *Rubin* victims have tirelessly pursued execution of their judgment. Despite the time and money that they have devoted to endless court battles, their judgment remains unsatisfied. The United States government and federal courts have been unable to compel state-sponsors of terrorism to pay the judgments awarded against them. In large part, this is due to the inadequate funds available from foreign states’ assets in the United States to pay successful litigants. Congress should provide an alternative to these lawsuits through a comprehensive victim compensation fund. Such a fund would guarantee that victims are compensated, regardless of a terrorist state’s available property in the United States, and would satisfy several U.S. policy concerns.

Congress has already created limited a victim compensation fund to provide compensation to victims of state-sponsored terrorism. In December 2015, President Obama signed the Justice for United
States Victims of State Sponsored Terrorism Act ("VSST").\textsuperscript{239} The VSST, part of the Consolidated Appropriations Act of 2016, is an omnibus spending bill passed by Congress to set aside funds to compensate victims of state sponsored terrorism with unsatisfied final court judgments.\textsuperscript{240} This fund, overseen by a Special Master, will receive over $1 billion in appropriations from the Treasury Department in 2017.\textsuperscript{241} The VSST will compensate eligible victims for:

compensatory damages awarded to a United States person in a final judgment issued by a United States district court . . . against a state sponsor of terrorism; and arising from acts of international terrorism, for which the foreign state was determined not to be immune from jurisdiction . . . under section 1605A.\textsuperscript{242}

Claimants with final judgments dated before July 14, 2016 must have filed their application for compensation by October 12, 2016.\textsuperscript{243} Filings are confidential, and it is therefore unclear whether the Rubin plaintiffs filed for compensation.

While the VSST is a terrific start to compensating terrorism victims, it does not provide a true alternative to lawsuits, as the fund will not satisfy the entirety of the Rubin plaintiffs’ judgment award. The fund will pay no more than $20 million to individual claimants, regardless of whether their claim exceeds that amount.\textsuperscript{244} While a one billion dollar fund appears significant, a 2008 report by the

\begin{footnotesize}
\textsuperscript{239} 42 U.S.C. § 10609.
\textsuperscript{242} 42 U.S.C. § 10609(c)(2)(A)(i)–(ii).
\textsuperscript{243} U.S. Victims of State Sponsored Terrorism Fund, \textit{supra} note 240.
\textsuperscript{244} \textit{Id.}
\end{footnotesize}
Congressional Research Service indicated that there are nineteen billion dollars in outstanding judgments against state-sponsors of terrorism.\textsuperscript{245} Further, given the number of claims that have already been submitted to the VSST, it is anticipated that initial payments will be less than the total eligible claim amount.\textsuperscript{246}

Furthermore, the VSST only provides compensation for compensatory damage awards.\textsuperscript{247} The VSST defines compensatory damages as “excluding pre-judgment and post-judgment interest or punitive damages.”\textsuperscript{248} Therefore, while the fund may satisfy the \textit{Rubin} plaintiff’s $71.5 million compensatory damages award, their $300 million award for punitive damages, the bulk of their award, will remain unsatisfied. To fully compensate the \textit{Rubin} victims and other similarly situated victims of state-sponsored terrorism, Congress must designate further appropriations to the VSST and must expand claims to include punitive damages.

Taxpayers will likely oppose a compensation fund that is funded by taxpayer dollars, as opposed to requiring Iran to pay damages. Nevertheless, it is in the Untied State’s best interest to fully compensate victims of state-sponsored terrorism to prevent U.S. based lawsuits against Iran.

Allowing American citizens to sue Iran neither protects Americans from terrorist attacks, nor improves the effectiveness of the United States’ response to the attacks. States will continue to support terrorist attacks on foreign soil, regardless of whether the state is subject to litigation on American soil. However, allowing suit against foreign nations in the United States weakens the U.S.’s approach to dealing with state sponsors of terrorism, and potentially opens up American service members, diplomats, and private entities to spurious


\textsuperscript{246} U.S. Victims of State Sponsored Terrorism Fund, \textit{supra} note 240.

\textsuperscript{247} Id.

\textsuperscript{248} Id.
lawsuits in courts around the world. For instance, Iran and Cuba have each passed legislation encouraging retaliatory suits in their courts.249

A compensation fund for these victims reflects both foreign policy considerations as well as domestic goals of compensation and deterrence. Implementing a victim’s compensation fund that pays the full amount of the victim’s damages will prevent U.S. courts from having to freeze foreign states' assets or attach property to enforce judgments. This will protect U.S. citizens and property abroad.

CONCLUSION

Alexander the Great sacked Persepolis in retaliation for Persia’s burning of the Athenian Acropolis. Should the United States accord compensation to the victims of Iranian-sponsored terrorist acts by once again permitting the plunder of Persian cultural property? While this time it is deserving terrorism victims that have stormed the Persian Gates, the Seventh Circuit denied them entry. From a statutory interpretation perspective, the Seventh Circuit reached the correct result in denying the plaintiffs execution on the Persepolis Tablets. Auctioning cultural property also raises policy concerns that further buttress the Seventh Circuit’s outcome. However, the Rubin plaintiffs are deserving victims who have been denied execution of their judgment despite repeated attempts to do so. The Rubin victims are not alone; many other victims of state-sponsored terrorism have been unsuccessful at receiving compensation for their grievous injuries. In lieu of a judicial remedy of the kind the plaintiffs sought, the executive branch should establish a comprehensive victim’s compensation fund, paid for by the United States government, to compensate the victims of state-sponsored terrorism.

ERISA REMEDIES: RETHINKING INDEMNIFICATION AND CONTRIBUTION FOR CO-FIDUCIARIES

NICHOLAS L. DEBRUYNE*


INTRODUCTION

Congress passed the Employee Retirement Income Security Act of 1974 (“ERISA”)1 to protect participants and beneficiaries of private employee benefit plans. ERISA imposes strict duties upon those who manage benefit plans and their assets.2 Although these people—otherwise known as “fiduciaries”—are held accountable for breaching their obligations, the statute makes no reference as to whether fiduciaries can seek contribution or indemnification from others when found liable for breaching their duties.3 This is important because if such rights are not implied, then breaching fiduciaries may sustain

3 Contribution apports liability among joint tortfeasors by requiring each to pay his proportionate share, whereas indemnification shifts the entire liability from one tortfeasor to another who should bear it instead. *Virginia Sur. Co. v. Northern Ins. Co. of N.Y.*, 866 N.E.2d 149, 153 (Ill. 2007).
liability unequal to their share of wrongdoing. To date, federal courts of appeal are split as to whether contribution and indemnification should be allowed as equitable remedies under ERISA.

Part I of this article briefly discusses the history and purpose of ERISA. Part I then presents the issue of whether ERISA co-fiduciaries can seek indemnification and contribution as equitable remedies in light of their statutory roles, duties, and liabilities. Part II analyzes the circuit split pertaining to this statutory issue. Part III then examines the recent Seventh Circuit decision in *Chesemore v. Fenkell* both factually and procedurally. Finally, Part IV argues that the Seventh Circuit got its decision wrong when it held the district court had the authority to provide indemnification and contribution to co-fiduciaries.

**ERISA BACKGROUND**

Throughout the 1950s and early 1960s, the Studebaker automobile company was struggling to compete against the Big Three in the United States automotive industry. In an attempt to save the company, Studebaker increased the pension benefits it was promising to its employees on several occasions; however, Studebaker was unable to sustain these contributions. By the end of 1963, Studebaker ceased its automotive operations and terminated its pension plan, leaving more than 4300 workers and retirees without the pension benefits they had

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5 829 F.3d 803 (7th Cir. 2016).


7 “A pension plan is a retirement plan that requires an employer to make contributions into a pool of funds set aside for a worker’s future benefit. The pool of funds is invested on the employee’s behalf, and the earnings on the investments generate income to the worker upon retirement.” *Pension Plan*, INVESTOPEDIA http://www.investopedia.com/terms/p/pensionplan.asp (last visited Oct. 26, 2016).

8 Lowenstein, *supra* note 6.
been promised. The collapse of the Studebaker automobile company subsequently pushed Congress to undertake pension reform, which eventually led to the enactment of ERISA in 1974.

ERISA is a federal law that establishes minimum regulatory standards for employee pension benefit plans in the private sector. These benefit plans include any plan, fund, or program that is maintained by an employer to the extent that it defers employees’ income up to their employment termination or beyond. This means that if an employer chooses to provide employee benefits—e.g., retirement income, hospital or medical care, vacation benefits, prepaid legal services, etc.—it generally has to comply with ERISA regulations and procedures. Notably, ERISA does not cover benefit plans that are established or maintained by governmental entities, church plans, or plans that are maintained for the purpose of complying with workers’ compensation, unemployment, or disability laws.

ERISA also does not cover plans that are maintained outside of the United States for the benefit of non-resident aliens.

The main goal of ERISA is to protect participants and beneficiaries of employee benefit plans against fiduciary abuses and mismanagement. Congress attempted to achieve this by subjecting plan fiduciaries to numerous duties, liabilities, and standards of conduct. As discussed below, analyzing the roles and responsibilities of a fiduciary will contextually frame the issue of whether co-fiduciaries can seek indemnification and contribution as equitable remedies under ERISA.

10 Id. at 433 (citing James A Wooten, “The Most Glorious Story of Failure in the Business”: The Studebaker-Packard Corporation and the Origins of ERISA, 49 BUFF. L. REV. 683, 686 (2001)).
12 Id. § 1002(2)(A).
13 Id. § 1003(b)(1)–(3).
14 Id. § 1003(b)(4)–(5).
15 See generally id. § 1001(a)–(c).
16 Id. § 1001(b).
A. **Who is A Fiduciary?**

ERISA reserves liabilities for both named fiduciaries and functional fiduciaries. A named fiduciary has the authority to manage plan operations and is specifically listed as a fiduciary in the plan documents.\(^\text{17}\) A functional fiduciary, however, is not listed in the plan documents. Similar to the authority exercised by a named fiduciary, a person is a functional fiduciary to the extent that he (i) exercises discretionary authority or control regarding the management of an employee benefit plan or the disposition of its assets; (ii) provides investment advice regarding plan assets for compensation or has any authority to do so; or (iii) has discretionary authority in the administration of the plan.\(^\text{18}\) As fiduciary status is not only determined by formal designations, courts must carefully evaluate all of the facts and circumstances surrounding the individual’s relationship with the plan. The key to determining fiduciary status is primarily based on whether the person exercises discretion over the plan’s assets.\(^\text{19}\) If an individual is deemed to be a fiduciary, then he or she will be subject to numerous duties and liabilities.

B. **Fiduciary Liability**

Fiduciaries are subject to various standards of conduct because they act on behalf of plan participants and beneficiaries.\(^\text{20}\) These duties primarily include (1) the duty of loyalty, (2) the duty of prudence, (3) the duty of diversification, and (4) the duty to follow plan

\(^{17}\) *Id.* § 1102(a)(2).
\(^{18}\) *Id.* § 1002(21)(A).
\(^{19}\) See Chesemore v. All. Holdings, Inc. ("Chesemore I"), 886 F. Supp. 2d 1007, 1040 (W.D. Wis. 2012).
documents. As detailed below, a breach of any of these duties will generally subject a fiduciary to liability.

1. Duty of Loyalty

A fiduciary’s duty of loyalty consists of acting solely in the interest of plan participants and beneficiaries. This duty requires fiduciaries to act with “complete and undivided loyalty” with an “eye single to the interests of the participants and beneficiaries.” Moreover, this duty requires fiduciaries to act for the exclusive purpose of providing benefits to participants and beneficiaries, as well as to settle reasonable expenses for administering the benefit plan. Additionally, the duty of loyalty requires fiduciaries to avoid placing themselves in situations where a substantial conflict of interest between the fiduciary and the participant may arise. The classic example of a fiduciary breaching the duty of loyalty is where the interests of the employer are at odds with the interests of the beneficiaries, and the fiduciary subsequently acts in a way that places the employer’s interests above the beneficiaries—e.g., self-dealing, acting contrary to the interests of the plan, or kickbacks.

27 Martin et al., supra note 21, at 608; see 29 U.S.C. § 1106 (2012) (describing transactions that are prohibited between a fiduciary’s plan and a party of interest).
2. Duty of Prudence

The duty of prudence, otherwise known as the duty of care, is an objective standard.28 A fiduciary must act with the same care, skill, prudence, and diligence as an objectively prudent fiduciary acting under the same circumstances.29 This fiduciary duty is intended to be very stringent.30 As such, federal courts have generally required plan fiduciaries to perform adequate investigations related to any substantive decisions affecting the plan, such as the risks of an investment, the qualifications of an investment advisor, and all other facts that would be deemed relevant from an objectively prudent fiduciary’s point of view.31 Moreover, the duty of care requires a fiduciary to understand the surrounding facts and circumstances relevant to the investment plan or the investment course of actions.32 If a fiduciary lacks the requisite knowledge to assess the prudence of an investment decision, then the duty of care may require the fiduciary to hire an independent professional advisor.33 Accordingly, the fiduciary should ask questions, consider the professional advisor’s suggestions, and then continue to act prudently when exercising his duty of care. The completion of a careful and impartial investigation prior to making an investment decision provides an adequate basis for a fiduciary’s defense.34

29 Id.
30 Susan J. Stabile, Pension Plan Investments in Employer Securities: More is Not Always Better, 15 YALE J. ON REG. 61, 71 (1998); see Donovan v. Mazzola, 716 F.2d 1226, 1231 (9th Cir. 1983) (interpreting the prudent person test under both trust law and the significance of employee benefits).
31 See Donovan v. Cunningham, 716 F.2d 1455, 1467 (5th Cir. 1983); Donovan v. Mazzola, 716 F.2d 1226, 1232–33 (9th Cir. 1983); see also, Martin et al., supra note 21, at 608.
33 See id. § 2550.404a–1(b)(3)(i).
3. Duty of Diversification

Beyond the fiduciary duties of loyalty and care, ERISA fiduciaries must also exercise the duty of diversification. 35 This duty requires fiduciaries to diversify the investments of a benefit plan for the purpose of minimizing the risk of loss, unless exercising such authority would violate a fiduciary’s duty of care. 36 Although ERISA does not detail actual percentage limits for fiduciaries to abide by when diversifying their investments, this duty prohibits fiduciaries from investing disproportionately in a particular venture. 37 A Congressional Committee report on the Act’s diversification provision stated:

A fiduciary usually should not invest the whole or an unreasonable large proportion of the trust property in a single security. Ordinarily the fiduciary should not invest the whole or an unduly large proportion of the trust property in one type of security or in various types of securities dependent upon the success of one enterprise or upon conditions in one locality, since the effect is to increase the risk of large losses. 38

Notably, there is no per se violation under the duty of diversification. Each case depends on its own unique facts and circumstances. 39

36 Id.
37 In re Unisys Sav. Plan Litig., 74 F.3d 420, 438 (3d Cir. 1996).
4. Duty to Follow Plan Documents

Finally, fiduciaries have a duty to act in accordance with plan documents insofar as such documents are consistent with ERISA. \(^{40}\) In other words, fiduciaries cannot implement plan provisions that violate ERISA. Additionally, every benefit plan must be in writing \(^{41}\) and must (1) provide a procedure for implementing a funding policy that is consistent with the plan’s objectives, (2) describe the procedure for allocating fiduciary responsibilities, (3) identify who can amend the plan and provide the procedure for amending the plan, and (4) specify how payments are made to and from the plan. \(^{42}\)

C. Co-Fiduciary Liability

ERISA fiduciaries may also be liable for the actions of other fiduciaries—otherwise known as “co-fiduciaries.” \(^{43}\) A co-fiduciary can either be appointed by another fiduciary or appointed by the plan. \(^{44}\) A fiduciary may be liable for another fiduciary’s breach if the fiduciary (1) knowingly conceals the other’s breach, (2) enables the other’s breach, or (3) does not make reasonable efforts to remedy the other’s breach if he was aware of it. \(^{45}\) As co-fiduciaries are jointly and severally liable for breaches of duty, \(^{46}\) federal courts encourage ERISA fiduciaries to take affirmative steps in remedying perceived issues that are related to plan operations. \(^{47}\) That is, a fiduciary cannot avoid

\(^{41}\) Id. § 1102(a)(1).
\(^{42}\) Id. § 1102(b)(1)–(4).
\(^{43}\) See id. generally § 1105.
\(^{46}\) Id. § 1105(b)(1).
liability by simply doing nothing in the wake of another’s breach of duty.\footnote{48}

\textbf{D. The Arising Issue: Indemnification and Contribution}

The aforementioned provisions establish that fiduciaries are obliged to act in the best interest of plan participants and are jointly and severally liable for breaching their duties. Nevertheless, although ERISA expressly assigns liabilities to plan fiduciaries, the Act is silent as to whether liabilities may be allocated between two or more fiduciaries in relation to a single judgment. Section 1132 states that “[a] civil action may be brought . . . by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under Section 1109.”\footnote{49} Moreover, Section 1109 provides:

Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries . . . shall be personally liable to make good to such plan . . . and shall be subject to such other \textit{equitable or remedial relief} as the court may deem appropriate, including removal of such fiduciary . . . \footnote{50}

Based on this language, courts are left to interpret fiduciary liabilities in light of the phrase “other equitable or remedial relief.”\footnote{51}

\footnotetext[48]{\textit{See}, e.g., \textit{Free}, 732 F.2d at 1336 (trustee of plan was liable under ERISA for co-fiduciary’s breach where at no time did trustee take any action to determine assets of plan to asset control over plan assets or to assure that plan assets would be protected from losses); \textit{In re CMS Energy ERISA Litig.}, 312 F. Supp. 2d 898, 909–10 (E.D. Mich. 2004) (ERISA fiduciaries who did not allegedly participate in co-fiduciaries’ breaches may still be liable if they have knowledge of, but took no action to prevent, co-fiduciaries’ acts); \textit{In re Enron Corp. Sec., Derivative & ERISA Litig.}, 284 F. Supp. 2d 511, 661–62 (S.D. Tex. 2003) (ERISA fiduciaries may be liable for failing to investigate the propriety of investments of plan funds made by co-fiduciaries).}

\footnotetext[49]{29 U.S.C. § 1132(a) (2012).}

\footnotetext[50]{\textit{Id.} § 1109(a) (emphasis added).}

\footnotetext[51]{\textit{Id.}}

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Although courts have considered whether fiduciaries can seek indemnification or contribution as equitable remedies, the federal courts of appeal have taken various and inconsistent positions as to whether such remedies are available under ERISA. As described below, this contention is fundamentally based on how courts have answered the following two questions: (1) when should a right be implied under a federal statute; and (2) to what degree does ERISA incorporate common law trust principles.  

1. The Implied Cause of Action Theory

The Supreme Court has recognized a right of contribution under a federal statute where (1) Congress created an express right of action or (2) through the power of the federal courts. As Congress never expressly addressed contribution or indemnification under ERISA, the question is whether this right should be implied through the power of the federal courts. In Cort v. Ash the Supreme Court devised a four-part analysis for determining whether a right can be implied under a federal statute: (1) whether the party seeking the remedy is a class member for whose benefit the statute was enacted; (2) whether there is legislative intent to create or deny the implicit cause of action; (3) whether the cause of action is consistent with the underlying purpose of the legislative scheme; and (4) whether the cause of action is one traditionally relegated to state law.

The Supreme Court relied on the aforementioned analysis in Massachusetts Mutual Life Insurance Co. v. Russell when it considered whether a fiduciary to an employee benefit plan was liable

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56 Id. at 78.
to a plan participant for punitive damages caused by improper handling of benefit claims. In Russell, a beneficiary of an employee benefit plan brought an action to recover damages for improperly processing her disability benefit claim. The beneficiary argued that the fiduciary deliberately delayed processing her request, thereby aggravating a psychological condition that caused her back ailment. The beneficiary then filed an action against the fiduciary seeking extra-contractual and punitive damages.

The Supreme Court held that Section 409 of ERISA entitles claimants to equitable relief, but does not allow parties to recover for extra-contractual damages. Based on ERISA’s statutory language, the Supreme Court emphasized that a fiduciary’s liability is “to make good to such plan” for breaching his duties. The Court noted that nothing under ERISA supported the conclusion that a delay in processing a disability claim gave rise to a right of action for punitive relief. Rather, the Court reasoned that the statute’s language only concerned the misuse of plan assets, as well as remedies that would protect the plan, not the rights of an individual beneficiary. Furthermore, the Court stated that it was “reluctant to tamper with an enforcement

58 Id. at 136.
59 Id. at 134.
60 Id. at 136–37.
61 Id.
62 29 U.S.C. § 1109(a) (2012) (“Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.”).
64 Id. at 140 (quoting 29 U.S.C. § 1109(a) (2012)).
65 Id. at 144.
66 Id. at 142.
scheme crafted with such evident care as the one in ERISA.” 67 The Supreme Court also noted that courts should be cautious about reading remedies into a statute that Congress deliberately chose not to include. 68

Although the Russell decision suggests that implied remedies under ERISA are rarely found, the Court never expressly banned implied remedies beyond extra-contractual or punitive damages. As a result, the Russell decision stands as a pillar, as well as a point of contention, for the federal courts of appeal in determining whether co-fiduciaries can seek contribution or indemnification under ERISA.

1. The Incorporation of Common Law Trust Principles

A trustee is generally responsible for expenses improperly incurred by him on behalf of administering a trust. 69 In the event two trustees are liable for a breach of trust, both trustees are entitled to contribution from the other. 70 However, if one of the two trustees is substantially more at fault than the other, traditional trust law allows for the trustee who is not substantially more at fault to seek indemnification from the other. 71 In other words, traditional trust law uses indemnification as a means to fully compensate a paying trustee where the other trustee is primarily responsible for the breach of trust. 72

The degree in which common law trust principles are incorporated under ERISA is heavily contested among the federal courts of appeals.

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67 Id. at 147.
68 Id. (citing Transamerica Mortg. Advisors, Inc. (TAMA) v. Lewis, 444 U.S. 11, 19 (1979)).
69 See RESTATEMENT (SECOND) OF TRUSTS § 224 (AM. LAW INST. 1959).
70 RESTATEMENT (SECOND) OF TRUSTS § 258 (AM. LAW INST. 1959). For example, A and B are trustees for C. Both trustees participate in a breach of trust, resulting in a $1000 loss to C. If A paid C $1000 for the loss, A would be entitled to recover $500 from B.
71 RESTATEMENT (SECOND) OF TRUSTS § 258 (AM. LAW INST. 1959).
This point of contention is, in part, fueled by ERISA’s legislative history, which provides that “[t]he fiduciary responsibility section . . . makes applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts.” Although these principles apply to the fiduciary duties of care and loyalty, the duties of diversification and adherence to plan documents represent new obligations that have been altered to the needs of benefit plans. In light of such legislative ambiguity, the federal courts of appeal dispute whether the rights of indemnification and contribution should also be implied under ERISA based on common law trust principles.

THE CIRCUIT SPLIT

A. The Seventh Circuit

The Seventh Circuit was one of the first circuit courts to issue an opinion supporting indemnification or contribution under ERISA; however, the court sidestepped analyzing this issue under federal common law. In *Free v. Briody*, the Seventh Circuit addressed whether ERISA provides indemnification and contribution rights to fiduciaries. This case is an illustrative example of a fiduciary allowing a co-fiduciary to injure participants of a plan by failing to

74 See RESTATEMENT (SECOND) OF TRUSTS § 174 (AM. LAW INST. 1959) (“The trustee is under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property . . . .”); RESTATEMENT (SECOND) OF TRUSTS § 170(1) (AM. LAW INST. 1959) (“The trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary.”).
78 Id. at 1336.
take action, rendering both fiduciaries jointly and severally liable for breaching their fiduciary duties.\textsuperscript{79}

*Free* involved a corporation’s profit-sharing plan and two trustees.\textsuperscript{80} At one point, the primary trustee transferred plan assets to a purported financial adviser after being warned to exercise greater care over the plan’s assets by the trustee’s accountant.\textsuperscript{81} The primary trustee also withdrew securities from the profit-sharing plan to satisfy outside obligations.\textsuperscript{82} Throughout the course of these transactions, the co-trustee did not monitor the plan assets and did nothing to protect the plan from losses.\textsuperscript{83} Thereafter, both the corporation and the primary trustee declared bankruptcy and the assets that were transferred to the financial advisor were never returned to the profit-sharing plan.\textsuperscript{84} The co-trustee appealed the district court’s decision, which held (1) both trustees were jointly and severally liable for the losses incurred by the profit-sharing plan and (2) denied the co-trustee’s claim for indemnification against the other fiduciary.\textsuperscript{85}

As for the liability issue, the Seventh Circuit affirmed that the co-trustee was jointly and severally liable for the plan’s losses.\textsuperscript{86} The court noted that the co-trustee could have easily taken action while the primary trustee was misappropriating plan assets.\textsuperscript{87} On the second question, the Seventh Circuit held that “ERISA grants the courts the power to shape an award so as to make the injured plan whole while at the same time apportioning the damages equitably between the wrongdoers.”\textsuperscript{88} The courts reading of Section 1109 was based upon

\textsuperscript{79}See *id.* at 1333–34.
\textsuperscript{80}*Id.* at 1333.
\textsuperscript{81}*Id.*
\textsuperscript{82}*Id.*
\textsuperscript{83}*Id.*
\textsuperscript{84}*Id.*
\textsuperscript{85}*Id.* at 1331.
\textsuperscript{86}*Id.* at 1336.
\textsuperscript{87}*Id.* at 1335.
\textsuperscript{88}*Id.* at 1337.
ERISA’s legislative history. The court noted, “Congress intended to codify the principles of trust law with whatever alterations were needed to fit the needs of employee benefit plans.” Because the general principles of trust law provide for indemnification under certain circumstances, the court was able to extend its holding and indemnify the primary trustee under ERISA.

B. The Ninth Circuit

After the Seventh Circuit’s decision, the Ninth Circuit was the first federal court of appeal to definitively rule against allowing co-fiduciary indemnification rights under ERISA. In Kim v. Fujikawa, Rodney Kim (“Kim”) was an official of the Pacific Electrical Contractors Association (“PECA”), a multi-employer bargaining representative. PECA entered into a collective bargaining agreement with the International Brotherhood of Electrical Workers Local No. 1186 (“the Union”), which required employers to contribute to a benefit plan that was jointly administered by Kim and a union official. At one point, the union official improperly withdrew plan assets to pay Union-related expenses. Kim filed an action to recover all related payments, and the union official sought contribution under ERISA against Kim. The district court held that ERISA did not provide the union official a right of contribution against Kim, and the Ninth Circuit affirmed.

The Ninth Circuit heavily relied on the Russell decision, holding that Section 409 of ERISA only establishes remedies for the benefit of

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89 Id.
90 Id. at 1337–38.
91 Id. at 1338.
92 871 F.2d 1427 (9th Cir. 1989).
93 Id. at 1428-29.
94 Id. at 1429.
95 Id.
96 Id.
97 Id. at 1432.
a plan.\textsuperscript{98} “Therefore, this section cannot be read as providing for an equitable remedy of contribution in favor of a breaching fiduciary.”\textsuperscript{99} Unlike Free’s broad interpretive reading of ERISA’s legislative history, the court reasoned there was no indication in ERISA’s legislative history “that Congress was concerned with softening the blow on joint wrongdoers.”\textsuperscript{100} Moreover, the court reasoned that implying a right of contribution is inappropriate where the seeking party is a member of the class that Congress intended to regulate for purposes of protecting an entirely distinct class—e.g., ERISA plans.\textsuperscript{101}

C. The Second Circuit

The Second Circuit was the first federal court of appeals to rule in favor of indemnifying ERISA fiduciaries under the federal common law, thereby forming the circuit split. In \textit{Chemung Canal Trust Co. v. Sovran Bank/Maryland},\textsuperscript{102} Fairway Spring Company, Inc. (“Fairway”) established a retirement plan for its employees.\textsuperscript{103} The plan allowed Fairway to appoint a trustee to exercise fiduciary authority over the plan and its assets.\textsuperscript{104} Chemung, the plan’s trustee, sued the plan’s former fiduciary, Sovran, alleging that Sovran breached its duty of care by continuing imprudent investments that were previously made by the plan trustee who preceded Sovran.\textsuperscript{105} Sovran requested contribution or indemnity, alleging that Chemung adequately failed to evaluate the plan, thereby contributing to the losses that were subject to the lawsuit against Sovran.\textsuperscript{106}

\begin{itemize}
\item \textsuperscript{98} Id.
\item \textsuperscript{99} Id.
\item \textsuperscript{100} Id. at 1433 (quoting Tx. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 639 (1981)).
\item \textsuperscript{101} Id.
\item \textsuperscript{102} 939 F.2d 12 (1991).
\item \textsuperscript{103} Id. at 13.
\item \textsuperscript{104} Id.
\item \textsuperscript{105} Id.
\item \textsuperscript{106} Id. at 14.
\end{itemize}
The Second Circuit first addressed whether ERISA permitted a claim for contribution or indemnity.\(^{107}\) After noting that Congress did not expressly provide for either remedy under ERISA, the Second Circuit quickly dismissed the implied action test devised under *Cort v. Ash*.\(^{108}\) The Second Circuit held that applying the *Cort* test would automatically dismiss Sovran’s claim because ERISA was enacted to protect plan participants and not former fiduciaries, such as Sovran.\(^{109}\) As a result, the court addressed whether contribution or indemnification were available under the federal common law.\(^{110}\)

By incorporating the common law trust principles referenced in ERISA’s legislative history, the court held that the right to contribution was recognized under ERISA.\(^{111}\) Although the Supreme Court in *Russell* dismissed a plan beneficiary’s action to recover damages that were not expressly authorized under ERISA, the Second Circuit distinguished *Russell* on the grounds that the Court did not discuss the availability of federal common law remedies.\(^{112}\) The Second Circuit reasoned that Congress’s failure to articulate certain remedies did not necessarily mean Congress intentionally precluded such remedies.\(^{113}\) Rather, it was more likely Congress simply lost focus of those beyond the protection of plan participants and beneficiaries.\(^{114}\) Based on these principles, the court held there was “no reason why a single fiduciary who [was] only partially responsible for a loss should bear its full brunt.”\(^{115}\)

\(^{107}\) *Id.* at 15.

\(^{108}\) *Id.*

\(^{109}\) *Id.* In determining whether a private cause of action is implicit under a federal statute, recall that the first part of the *Cort* test asks whether the party seeking the remedy is a member of the class whose benefit the statute was intended to protect.

\(^{110}\) *Id.* at 16.

\(^{111}\) *Id.*

\(^{112}\) *Id.* at 17-18.

\(^{113}\) *Id.* at 18.

\(^{114}\) *Id.*

\(^{115}\) *Chemung Canal Tr. Co.*, 939 F.2d at 16.
D. The Eighth Circuit

The Eighth Circuit, in *Travelers Casualty & Surety Co. of America v. IADA Services, Inc.*, 116 is the most recent federal court of appeals to deny a fiduciary’s right to contribution under ERISA. In that case, IADA Services, Inc. (“IADA Services”) performed administrative and investment services on behalf of an association’s employee benefit plan. 117 After the Department of Labor (“DOL”) conducted an audit, the DOL alleged that IADA Services violated its fiduciary duty by charging fees in excess of the plan’s direct expenses. 118 The DOL claimed that IADA Services was a plan fiduciary because several trustees of the plan also served as directors for IADA Services. 119 Travelers Casualty and Surety Company of America (“Travelers”), the insurer for the trustees of the plan, settled the claim on behalf of the trustees. 120 Travelers then sued IADA Services, asserting claims for indemnification and contribution under ERISA. 121

The Eighth Circuit agreed with the Ninth Circuit in *Kim v. Fujikawa*, holding that Section 409 of ERISA does not provide an equitable remedy of contribution in favor of a breaching fiduciary. 122 While the statute indicates that a breaching fiduciary “shall be subject to such other equitable or remedial relief as the court may deem appropriate,” 123 the Eighth Circuit held that the remedies under this provision are to the ERISA plan. 124 Similar to the Supreme Court’s reasoning in *Russell*, the court reasoned that the Act only allows for the possibility of “other equitable or remedial relief” after it declares a...
fiduciary liable “to make good to such plan” and “to restore to such plan” any lost profits.\textsuperscript{125} Hence, ERISA could not be read to provide contribution in favor of a breaching fiduciary.\textsuperscript{126} Moreover, the Eighth Circuit noted that the statute’s “carefully crafted and detailed enforcement scheme provide[d] strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.”\textsuperscript{127} Notwithstanding the authority to create federal common law under ERISA, the court was reluctant to alter a reticulated statute that is backed by a decade of congressional scholarship.\textsuperscript{128}

**Chesemore v. Fenkell**

**A. Factual Background**

In the 1990’s, David Fenkell and the companies he controlled—i.e., Alliance Holdings, Inc. (“Alliance”), A.H.I., Inc. (“AHI”), and AH Transitions—were in the business of buying and selling companies with an employee stock ownership plan (“ESOP”).\textsuperscript{129} In a standard transaction, Fenkell would fold an acquired company’s ESOP into Alliance’s ESOP, hold the company for a brief period of time, and then flip the company at a profit.\textsuperscript{130} Fenkell’s business model was entirely legal, assuming he complied with his ERISA fiduciary duties.\textsuperscript{131} Nevertheless, Fenkell breached his fiduciary duties in a particular

\textsuperscript{125} *Id.* (quoting 29 U.S.C. § 1109(a) (2012)).
\textsuperscript{126} *Id.*
\textsuperscript{127} *Id.* (quoting Great--West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 209 (2002)).
\textsuperscript{128} See *id.* at 865.
\textsuperscript{129} Chesemore v. All. Holdings, Inc. (‘‘Chesemore I’’), 886 F. Supp. 2d 1007, 1012 (W.D. Wis. 2012); *Employee Stock Ownership Plans (ESOPs)*, U.S. SEC. & EXCH. COMM’N, https://www.sec.gov/answers/esops.htm (last updated Nov. 5, 2012) (“An employee stock ownership plan (ESOP) is a retirement plan in which the company contributes its stock (or money to buy its stock) to the plan for the benefit of the company’s employees.”).
\textsuperscript{130} *Chesemore I*, 886 F. Supp. 2d at 1012.
\textsuperscript{131} *Id.*
transaction, where he methodically flipped Trachte Building Systems, Inc. ("Trachte") shortly before the company’s stock became worthless.\footnote{132}{Id.}

In 2002, Alliance purchased Trachte, a manufacturer of self-storage systems, for $24 million and merged its ESOP into Alliance’s ESOP (the “2002 Transaction”).\footnote{133}{Chesemore v. Fenkell, 829 F.3d 803, 808 (7th Cir. 2016).} All of the Trachte common stock that was held in the former ESOP (“Old Trachte ESOP”) was swapped for Alliance common stock, and the Old Trachte ESOP was dissolved.\footnote{134}{Chesemore I, 886 F. Supp. 2d at 1017.} In exchange, the Trachte employees became participants of the Alliance ESOP, with accounts equal in value to their previous accounts.\footnote{135}{Id.} Fenkell projected that he could later sell Trachte for roughly $50 million in five years.\footnote{136}{Fenkell, 829 F.3d at 806.}

By the time Fenkell was prepared to sell, however, Trachte’s overall profitability was flat.\footnote{137}{Id. at 806.} By the end of 2006 and early 2007, Trachte’s sales revenues were steadily declining and no independent buyer would purchase Trachte on the open market.\footnote{138}{Id. at 808.} As a result, Fenkell offloaded Trachte in a leveraged buyout (the “2007 Transaction”).\footnote{139}{Id.} Fenkell created a new Trachte ESOP, where the new Trachte ESOP bought back the Trachte shares from Alliance in exchange for a promissory note.\footnote{140}{Id.} Next, the Trachte employee accounts in the Alliance ESOP were spun off to the new Trachte ESOP.\footnote{141}{Id.} The new Trachte ESOP then repaid the promissory notes by transferring back the Alliance stock to Alliance.\footnote{142}{Id.} Fenkell essentially designed the transaction so that the accounts of the Trachte employees

\begin{footnotes}
\item[132] Id.
\item[133] Chesemore v. Fenkell, 829 F.3d 803, 808 (7th Cir. 2016).
\item[134] Chesemore I, 886 F. Supp. 2d at 1017.
\item[135] Id.
\item[136] Fenkell, 829 F.3d at 806.
\item[137] Id.
\item[138] Id. at 808.
\item[139] Id.
\item[140] Chesemore I, 886 F. Supp. 2d at 1037-38.
\item[141] Id.
\item[142] Id.
\end{footnotes}
in the Alliance ESOP were used as leverage to purchase Trachte from Alliance.\footnote{Id. at 1054.} By the end of the 2007 Transaction, the new Trachte ESOP had paid $45 million for 100\% of Trachte’s equity and incurred roughly $36 million in debt.\footnote{Fenkell, 829 F.3d at 807.} Trachte was unable to sustain the debt load that it incurred as a result of the 2007 Transaction.\footnote{Chesemore I, 886 F. Supp. 2d at 1040.} Trachte projected six months after the 2007 Transaction that it was unable to meet its loan covenants.\footnote{Id.} By the end of 2008, Trachte’s equity was worthless.\footnote{Id. at 1054–57.}

B. Procedural History

A group of current and former Trachte employees filed a class-action lawsuit under ERISA, alleging numerous breaches of fiduciary duties by Alliance, Fenkell, the Trachte Trustees, and several other entities.\footnote{Id. at 1013.} The U.S. District Court for the Western District of Wisconsin found the defendants liable.\footnote{Id. at 1052.} Alliance and Fenkell argued they were only fiduciaries during the spin-off and, therefore, should not be held accountable.\footnote{Id. at 1054–57.} This made Trachte responsible for any decisions made with respect to the plaintiff’s accounts after the spin-off.\footnote{Id.} Nevertheless, the court found Alliance and Fenkell acted in fiduciary capacities throughout the entire 2007 Transaction.\footnote{Id. at 1054.}

The court reasoned that Alliance and Fenkell (1) arranged the 2007 Transaction so that it would only benefit them, (2) ensured no one on the opposite side of the transaction looked out for the new Trachte ESOP participants, and (3) ensured that those on the opposite
side of the transaction would remain liable to Alliance and Fenkell should they not go through with the 2007 Transaction. Moreover, Alliance and Fenkell made no effort in determining whether the 2007 Transaction was in the best interest of the Trachte employees. In short, the court stated it was a typical example of “heads I win, tails you lose.” As a result, the court held Alliance and Fenkell violated their fiduciary duties owed to the Trachte employee participants in the Alliance ESOP.

After an additional hearing, the judge ordered Alliance and Fenkell to indemnify the Trachte trustees because Alliance and Fenkell’s culpability greatly exceeded that of the Trachte trustees. The court found that Alliance and Fenkell orchestrated the 2007 Transaction and used their position of authority over the trustees. The judge analogized: “Fenkell was the unquestioned conductor and the Trachte Trustees mere musicians.” The Trachte trustees were subsequently indemnified for any compensatory relief they were required to pay. Fenkell appealed to the Seventh Circuit, mainly contesting that ERISA did not permit the court to order indemnification among co-fiduciaries.

C. The Seventh Circuit’s Decision

In addressing whether indemnification and contribution are equitable remedies under ERISA, the Seventh Circuit first acknowledged that the Supreme Court has previously incorporated

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153 Id. at 1052.
154 Id. at 1054–55.
155 Id. at 1052.
156 Id. at 1055.
158 Id. at 949.
159 Id.
160 Id. at 950.
161 Chesemore v. Fenkell, 829 F.3d 803, 807 (7th Cir. 2016).
trust principles under ERISA.\textsuperscript{162} The Supreme Court has defined “appropriate equitable relief” as “those categories of relief that, traditionally speaking (i.e., prior to the merger of law and equity) were typically available in equity.”\textsuperscript{163} Based on this definition, the Seventh Circuit held the district court’s remedial authority under ERISA incorporated the law of trusts, which subsequently encompasses the power to fashion “traditional equitable remedies.”\textsuperscript{164} Based on this context, the Seventh Circuit quickly concluded that indemnification and contribution were among those remedies.\textsuperscript{165}

Moreover, the Seventh Circuit noted that it already addressed this issue long ago in \textit{Free}, where the court held that the protections of Section 1105(b)(1)(B) were not exclusive remedies under ERISA.\textsuperscript{166} \textit{Free} recognized that “Congress intended to codify the principles of trust law with whatever alternations were needed to fit the needs of employee benefit plans,” which included the right to indemnification under appropriate circumstances.\textsuperscript{167} In response, Fenkell argued that \textit{Free} was “implicitly overturned” in \textit{Summers v. State Street Bank & Trust Co.},\textsuperscript{168} where the Seventh Circuit noted in passing that “a right of contribution” under ERISA “remains an open [question] in this circuit.”\textsuperscript{169} Nevertheless, the Seventh Circuit rejected Fenkell’s

\textsuperscript{162} \textit{Id.} at 811; see CIGNA Corp. v. Amara, 563 U.S. 421, 439 (2011) (noting that ERISA commonly treats a plan as a trust and a plan fiduciary “as a trustee”); see also Tibble v. Edison Intern., 135 S.Ct. 1823, 1828 (2015) (In determining the contours of an ERISA fiduciary’s duty, courts often must look to the law of trusts.”); Varity Corp. v. Howe, 516 U.S. 489, 497 (1996) (“[W]e believe that the law of trusts often will inform, but will not necessarily determine the outcome of, an effort to interpret ERISA’s fiduciary duties.”).

\textsuperscript{163} \textit{Fenkell}, 829 F.3d at 811 (citing \textit{CIGNA Corp.}, 563 U.S. at 439).

\textsuperscript{164} \textit{Id.} (citing \textit{CIGNA Corp.}, 563 U.S. at 440).

\textsuperscript{165} \textit{Id.} at 812.

\textsuperscript{166} \textit{Id.}


\textsuperscript{168} 453 F.3d 404 (7th Cir. 2006).

\textsuperscript{169} \textit{Fenkell}, 829 F.3d at 812 (citing \textit{Summers}, 453 F.3d 404, 413 (7th Cir. 2006)).
argument, holding that Summers never mentioned Free, let alone overturned it.\(^{170}\)

The Seventh Circuit continued by distinguishing Chesemore from the Supreme Court’s holding in Russell, where the Supreme Court held that ERISA does not entitle claimants to punitive damages.\(^{171}\) Although Free and Russell both interpreted Section 409 of ERISA, the Seventh Circuit held that Russell did not undermine Free.\(^{172}\) The court greatly simplified its reasoning, noting that an ERISA fiduciary seeking a right of indemnification is not equivalent to a plan participant seeking punitive damages under an implied right of action theory.\(^{173}\) Despite acknowledging the differences between Free and Russell, the Seventh Circuit failed to explain the distinction and quickly affirmed that the district court had the authority to indemnify the Trachte ESOP trustees.\(^{174}\)

ARGUMENT

Although the Seventh Circuit has supported the accessibility of indemnification and contribution as equitable remedies under ERISA, the court has never explicitly scrutinized this issue under the federal common law.\(^{175}\) Instead, the Seventh Circuit has analyzed this issue based on the lower court’s remedial authority. Recall that in Free v. Brody, the Seventh Circuit held “ERISA grants the courts the power to shape an award so as to make the injured plan whole while at the same time apportioning the damages equitably between the wrongdoers.”\(^{176}\) Similarly, in Chesemore v. Fenkell, the court held “the district court had the authority to order Fenkell to indemnify the new Trachte ESOP

\(^{170}\) Id.

\(^{171}\) Id. at 813 (citing Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 144 (1985)).

\(^{172}\) Id.

\(^{173}\) Id.

\(^{174}\) Id.

\(^{175}\) Thomsen & Smith, supra note 77, at 756.

trustees.” This is unlike the Ninth Circuit, which definitively held that contribution and indemnification are not available remedies under ERISA. Although this distinction is subtle, it is important because the Seventh Circuit has not explicitly addressed whether there is an implied right of indemnification or contribution under ERISA.

The Seventh Circuit in *Fenkell* incorrectly held that the lower court had the authority to indemnify a co-fiduciary in accordance with the background principles of trust law. Allowing a breaching fiduciary, which has exploited his position of power to the detriment of benefit plan participants, to seek equitable remedies is not only unjust, but contrary to ERISA’s purpose. As described below, the Seventh Circuit’s holding in *Fenkell* is improper for two reasons: (1) Congress did not intend to incorporate such equitable remedies; and (2) contribution is an inefficient remedy that increases the cost of litigation but not the deterrence for breaching fiduciaries.

A. Congressional Intent: A Closer Look at ERISA’s Language and Legislative History

In *Cort v. Ash*, the Supreme Court looked to congressional intent for purposes of creating or denying an implicit right within a federal statute. The Supreme Court stated that a right could only be implied under a federal statute if congressional intent can be inferred from the statute’s language, the statutory structure, or from some other source. Therefore, federal courts can only provide ERISA co-fiduciaries the equitable right to indemnification or contribution if Congress intended to incorporate such rights. Analyzing ERISA’s language and legislative history makes it abundantly clear that Congress did not intend to extend such privileges to co-fiduciaries.

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177 *Fenkell*, 829 F.3d at 813 (emphasis added).
178 *Kim v. Fujikawa*, 871 F.2d 1427, 1432 (9th Cir. 1989).
179 *See Fenkell*, 829 F.3d at 813.
A review of the statute’s express language is crucial to this analysis. The relevant language under ERISA provides that any breaching fiduciary “with respect to a plan . . . shall be personally liable to make good to such plan . . . and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.”\(^{182}\) Although the statute does not explicitly define “other equitable or remedial relief,” examining the entirety of this provision illustrates that Congress is emphasizing the relationship between the fiduciary and the plan, not the relationship among co-fiduciaries.\(^{183}\)

Specifically, the statute expressly characterizes a fiduciary’s relationship as one “with respect to a plan” where a fiduciary is liable “to such plan.”\(^{184}\) Immediately thereafter, Section 1109(a) provides that a liable fiduciary may be liable for other relief, such as removal from the fiduciary’s position.\(^{185}\) By reading Section 1109(a) in its totality, it seems clear that Congress included the “removal of such fiduciary” as one example of a plan-related remedy that is permitted under ERISA, not a remedy among co-fiduciaries.\(^{186}\) Moreover, nothing under Section 1109(a) expressly indicates that Congress intended to apportion relief among co-fiduciaries in the form of indemnification or contribution.

Nevertheless, the Seventh Circuit incorrectly held that the lower court had the authority to indemnify a co-fiduciary in accordance with the background principles of trust law.\(^{187}\) Although ERISA’s fiduciary responsibility provisions are shaped by the common law of trusts, the Seventh Circuit in *Fenkell* mistakenly assumed that Congress inadvertently omitted a co-fiduciary’s equitable right to contribution and indemnification. ERISA is the product of over ten years of congressional scholarship, making it highly unlikely that Congress

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\(^{183}\) *Russell*, 473 U.S. at 139.


\(^{185}\) *Id.*

\(^{186}\) *Russell*, 473 U.S. at 142.

\(^{187}\) Chesemore v. Fenkell, 829 F.3d 803, 813 (7th Cir. 2016).
simply neglected to include equitable remedies under the statute. The Supreme Court has repeatedly supported this argument, noting that the statute’s “carefully crafted and detailed enforcement scheme provides ‘strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.’”\(^{188}\) Moreover, the reasons for including some equitable remedies while excluding others—i.e., the right to contribution and indemnification—would be completely undermined if courts were free to supplement remedies under state law that Congress deliberately chose not to include. Given that Congress deliberately excluded a co-fiduciary’s right to indemnification and contribution, the Seventh Circuit failed to adequately consider ERISA’s congressional intent in reaching its decision.

Regardless of the statute’s congressional intent, however, one may assert that if such equitable remedies are not implied, then co-fiduciaries run the risk of sustaining liability that is unequal to their share of wrongdoing.\(^{189}\) Nevertheless, recall that in determining whether a right should be implied under a federal statute, the Supreme Court’s four-part test considers whether the action is consistent with the underlying purpose of the legislative scheme.\(^{190}\) Here, not only does ERISA’s legislative history fail to address equitable remedies among co-fiduciaries, but implying such remedies in favor of a breaching fiduciary would directly undermine ERISA’s purpose. The statute was specifically designed to protect plan participants from the mismanagement of plan assets by requiring fiduciaries to adhere to various standards of conduct.\(^{191}\) Moreover, fiduciaries are subject to such liabilities because they act on behalf of plan participants and


\(^{189}\) See, e.g., Chemung Canal Tr. Co. v. Sovran Bank/Md., 939 F.2d 12, 16 (2d Cir. 1991) (“There is no reason why a single fiduciary who is only partially responsible for a loss should bear its full brunt.”).


\(^{191}\) See 29 U.S.C. § 1001(b) (2012).
beneficiaries.\textsuperscript{192} It is the plan participant that suffers as a result of a fiduciary’s breach of duty, not the co-fiduciary. Therefore, granting equitable remedies in favor of co-fiduciaries would tilt the scale and contradict the purpose of ERISA.

\textbf{B. The Seventh Circuit Failed to Consider the Economic Inefficiencies of Contribution}

At its core, the right of contribution allows a liable defendant to recover damages from other liable parties.\textsuperscript{193} If exercised in \textit{Chesemore v. Fenkell}, for example, Fenkell would have had the opportunity to recover damages from the other breaching fiduciaries, such as the new Trachte ESOP trustees. Although this remedy was not ordered by the court, the Seventh Circuit held the district court had the authority to order ERISA fiduciaries to provide indemnification and contribution to co-fiduciaries in accordance with trust law principles.\textsuperscript{194} From a policy standpoint, however, one major efficiency-based criticism with this holding is that allowing contribution among liable co-fiduciaries increases the cost of litigation without simultaneously increasing deterrence.\textsuperscript{195}

As previously mentioned, ERISA fiduciaries must comply with their primary duties—i.e., the duty of loyalty, the duty of prudence, the duty of diversification, and the duty to follow plan documents—for purposes of avoiding liability.\textsuperscript{196} A fiduciary may nonetheless be liable for another fiduciary for (1) knowingly concealing the other’s breach, (2) enabling the other’s breach, or (3) not making reasonable efforts to

\begin{itemize}
\item[\textsuperscript{194}] Chesemore v. Fenkell, 829 F.3d 803, 813 (7th Cir. 2016).
\item[\textsuperscript{195}] See Di Cola, supra note 52, at 1553.
\item[\textsuperscript{196}] 29 U.S.C. § 1104 (2012) (outlining the various fiduciary duties under ERISA).
\end{itemize}
remedy the other’s breach if he has knowledge of it. Hence, once one fiduciary complies with his statutory obligations, the other fiduciaries are encouraged to comply because any fiduciary that is subsequently liable for a breach would have to bear 100% of the damages.

Notably, providing a co-fiduciary the right to contribution under ERISA does not change this outcome. "So long as the sum of all tortfeasors’ expected shares of the total loss is 100%, the incentives for efficient accident avoidance are the same under contribution or no-contribution." In other words, the total damage or loss resulting from a breaching fiduciary or fiduciaries is always the same, regardless of whether the damages are apportioned by contribution. By analogy, it would be the same thing as asking whether one prefers eating a whole pizza, or the same pizza cut into eight different slices. Regardless of what you choose, the amount of pizza is the same, just as the loss is the same. Because each fiduciary will theoretically still comply with his statutory obligations for purposes of avoiding liability, contribution does not change the overall level of deterrence. The only thing that does change, however, is the transaction costs among multiple injurers. Nevertheless, the Seventh Circuit did not take this into consideration in reaching its decision.

SUMMARY AND CONCLUSION

The issue of whether ERISA co-fiduciaries can seek contribution and indemnification as equitable remedies is a question of statutory interpretation. ERISA expressly assigns liabilities to plan fiduciaries, yet fails to include whether fiduciary liabilities may be allocated among other parties in relation to a single judgment. ERISA’s legislative history similarly lacks any explanation or reference to this

197 Id. § 1105(a).
198 See Di Cola, supra note 52, at 1553.
199 See id.
200 Id.
201 Id.
issue. Moreover, the few federal courts of appeal that have addressed this issue have taken various and inconsistent positions as to whether such remedies should be implied.

The Seventh Circuit in *Fenkell* recently ruled on this issue, where it incorrectly held that the lower court had the authority to indemnify co-fiduciaries under ERISA.\(^{202}\) Although ERISA incorporates certain aspects of trust law principles, it does not include all of them—i.e., the right to contribution and indemnification. The statute was objectively designed to protect participants and beneficiaries in employee benefit plans from fiduciary mismanagement. A plain reading of the statute further supports this argument, where Congress clearly highlighted the relational concern between fiduciaries and their respective plans, rather than the relationship between co-fiduciaries. The fact that Congress chose to include some equitable remedies and not others is further evidence that such remedies were purposely omitted.\(^{203}\) As a result, the Seventh Circuit’s failure to properly incorporate the meaning of ERISA’s language and legislative history contravenes Congress’s intent and risks subjecting lower courts to unnecessary litigation costs in the future.

\(^{202}\) *See* Chesemore v. Fenkell, 829 F.3d 803, 813 (7th Cir. 2016).

\(^{203}\) *See generally* 29 U.S.C. § 1109(a) (2012).
THE SOCIAL COST OF CARBON:
CAN WE AFFORD IT?

MATTHEW KITA*


INTRODUCTION

The Social Cost of Carbon (SCC) is a phrase that many people have never heard. This phrase, however, represents one of the most important calculations in environmental and energy regulation. The SCC is defined by the Environmental Protection Agency as “an estimate of the economic damages associated with a small increase in carbon dioxide (CO2) emissions, conventionally one metric ton, in a given year.”1 The SCC allows climate change policymakers to calculate the benefit in regard to the reduction of CO2 emissions.2 The calculation of the SCC has allowed federal agencies to conduct a proper cost-benefit analysis (CBA) of environmental regulatory

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actions. The Department of Energy (DOE) is responsible for imposing mandatory energy conservation standards to decrease energy consumption and decrease CO2 emissions. A central policy of the DOE is to ensure national safety by addressing its “energy, environmental and nuclear challenges through transformative science and technology solutions.”

The DOE is responsible for imposing mandatory energy conservation standards. In doing so, the agency must review these standards and, when necessary, implement new standards. The implementation of new standards requires the DOE to abide by certain statutory requirements. One statutory requirement mandates that the agency to ensure the standards are technologically feasible and economically justified. This economic justification requirement tasks the DOE with conducting a cost-benefit analysis.

In Zero Zone, Inc. v. United States Department of Energy (Zero Zone), the Seventh Circuit addressed a case involving a CBA performed by the DOE, in which the agency used the SCC as a factor in its analysis. The DOE implemented new regulations, known as The New Standards Rule which reduced the standard of energy allowance for commercial refrigeration equipment (CRE). The DOE performed a cost-benefit analysis to ensure the New Standards Rule satisfied the statutory framework by being economically justified. Policies are considered to be economically justified when the benefits

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3 Id.
4 Zero Zone, Inc. v. U.S. Dep’t of Energy, 832 F.3d 654, 662 (7th Cir. 2016).
6 Zero Zone, Inc., 832 F.3d at 662.
7 Id.
8 Id.
9 Id.
10 Id.
11 Id.
12 Id. at 664.
13 Id. at 666.
of the standard exceed its burdens.\textsuperscript{14} While the benefit of the standard may exceed the burden, the burden can still result in a staggering figure that will fall on the shoulders of manufacturers.\textsuperscript{15} However, on the opposite end of the spectrum, the benefit can outweigh the cost by providing a net benefit to consumers; which was precisely what the New Standards Rule accomplished by providing a benefit between $4.93 and $11.74 billion.\textsuperscript{16} The DOE must balance the costs and the benefits to ensure the burden is not too great for manufacturers, which will likely then be transferred onto consumers.

However, the benefit may exceed the burden even though some manufacturers may be unable to bear the costs.\textsuperscript{17} In \textit{Zero Zone}, Zero Zone, Inc., Heating Refrigeration Institute, and North American Association of Food Equipment Manufacturers (collectively, Petitioners) challenged the regulations imposed by the DOE, as well as the inclusion of the SCC when conducting a cost-benefit analysis.\textsuperscript{18} The Seventh Circuit agreed with the DOE and upheld the use of the SCC to project the harms caused by carbon dioxide emissions.\textsuperscript{19}

Part I of this article provides an overview of the SCC. Part II provides an overview of relevant statutes and case law that provides a foundation for agencies to consider the SCC. Part III examines the facts of \textit{Zero Zone} and the court’s reasoning in upholding the use of SCC. Finally, Part IV will explain why the Seventh Circuit’s use of the SCC in a regulatory cost-benefit analysis was appropriate.

\textsuperscript{15} \textit{See Zero Zone, Inc.}, 832 F.3d at 666 (“DOE then determined that the development of new CRE would cost manufacturers between $93.9 and $165 million”).
\textsuperscript{16} \textit{Id.} at 666.
\textsuperscript{17} \textit{Id.} at 683. The DOE concluded that “small businesses will likely have greater increases in component costs than large businesses, and may have greater difficulty obtaining credit.” \textit{Id.}
\textsuperscript{18} \textit{Id.} at 667.
\textsuperscript{19} \textit{Id.} at 660.
The Social Cost of Carbon

The SCC has become one of the most important potential factors in an environmental cost-benefit analysis. The SCC has the ability to tip the scales in favor of a standard or regulation being considered beneficial as opposed to burdensome. For example, in 2006 the Environmental Protection Agency estimated the industry cost of its greenhouse gas tailpipe regulation for light-duty gasoline-powered cars and trucks to be around $350 billion.\(^\text{20}\) The agency concluded that the regulation would result in a $280 billion public benefit.\(^\text{21}\) At this point the burden outweighed the benefit, which rendered the regulation as economically unjustified. However, the Environmental Protection Agency then added the SCC as a potential benefit that can be quantified.\(^\text{22}\) The regulation’s net cost of $70 billion was suddenly extinguished, and the regulation resulted in a net public benefit of $100 billion.\(^\text{23}\) Thus, the SCC has the potential to make a major impact when evaluating the effectiveness of environmental and energy regulations. The following section analyzes the development of the SCC and how it is calculated.

A. The Ninth Circuit Requires Administrative Agency to Consider CO2 Emissions

In 2008, the Ninth Circuit reviewed a petition by eleven states, District of Columbia, the City of New York, and four public interest organizations that challenged a rule issued by the National Highway Traffic Safety Administration.\(^\text{24}\) The rule set corporate average fuel economy standards for light trucks, minivans, and pickup trucks.\(^\text{25}\) The

\(^{20}\) Johnston, supra note 2, at 36.
^{21} Id.
^{22} Id.
^{23} Id.
^{24} Ctr. for Biological Diversity v. NHTSA, 538 F.3d 1172, 1181 (9th Cir. 2008).
^{25} Id.
petitioners argued the rule was arbitrary, capricious, and contrary to the Energy Policy and Conservation Act because:

(a) the agency’s cost-benefit analysis does not set the [corporate average fuel economy] standard at the maximum feasible level and fails to give consideration to the need of the nation to conserve energy; [and] (b) its calculation of the costs and benefits of alternative fuel economy standards assigns zero value to the benefit of CO2 emissions reduction.26

The National Highway Traffic Safety Administration argued that there is an “extremely wide variation in published estimates of damage costs from greenhouse gas emissions, costs for controlling or avoiding their emissions, and costs of sequestering emissions that do occur, the three major sources for developing estimates of economic benefits from reducing emissions of greenhouse gases.”27 In other words, the parties disagreed on whether calculating the cost of reducing CO2 emissions was necessary and reliable.

The Ninth Circuit held that the National Highway Traffic Safety Administration’s reasoning was arbitrary and capricious.28 The Court conceded that the value of carbon emissions reduction may be difficult to ascertain because the value may have a wide range of values.29 However, the Court concluded that the value of carbon emissions reduction is “certainly not zero.”30 The Ninth Circuit agreed with the petitioners that the scientifically supported values of carbon emission reduction demonstrated that it is possible to monetize the benefit of reducing carbon emission.31 The Ninth Circuit determined that the cost of carbon emissions reduction can, and should, be calculated.

26 Id.
27 Id. at 1192.
28 Id. at 1199.
29 Id. at 1200.
30 Id.
31 Id. The court noted that the range of values does not begin at $0 so there must be some calculable value. Id.
B. 2010 Technical Support Document

The Obama administration established the SCC. The administration published the Technical Support Document (“Support Document”) which provides an overview of the SCC. The Support Document states that the purpose of the SCC is to “allow agencies to incorporate the social benefits of reducing [CO2] emissions into a cost-benefit analysis of regulatory actions that have small, or marginal, impacts on cumulative global emissions.” However, the Support Document concedes that uncertainties and model differences result in a range of SCC estimates.

The Support Document defines the SCC as “an estimate of the monetized damages associated with an incremental increase in carbon emissions in a given year.” The SCC is intended to account for the changes in net agriculture productivity, human health, property damages from increased flood risk, and the value of ecosystem services due to climate change. However, the SCC is still considered to be provisional. The Support Document includes recognition that a number of key uncertainties remain regarding the current SCC estimates; however, these estimates are predicted to evolve with improved understanding of the scientific and economic factors involved in determining the SCC.

34 Id.
35 Id.
36 Id.
37 Id. at 2.
38 Id. at 4.
39 Id.
must periodically review and reconsider estimates of the SCC used for cost-benefit analyses to ensure the SCC value is accurate based on scientific development.\(^ {40}\)

There are three integrated assessment models (IAMs) used to estimate the SCC,\(^ {41}\) which combine “climate processes, economic growth, and feedbacks between the climate and the global economy into a single modeling framework.”\(^ {42}\) Some may view use of global factors in determining the SCC as controversial. However, any international concerns are moot because the SCC does not give extraterritorial effect to a federal law and “hence does not intrude on such interests,” meaning the SCC does not impose any costs or regulations on foreign sovereigns.\(^ {43}\) Additionally, the SCC considers many other additional factors such as: the valuing of non-CO2 emissions, equilibrium climate sensitivity, socio-economic and emissions trajectories, and discount rates.\(^ {44}\)

C. Calculating the SCC

IAMs are used to establish the SCC estimates that are used in rule making.\(^ {45}\) The three models that are used to compute the SCC were academically developed and are widely used in estimating future climate harms.\(^ {46}\) These models allow a user to enter a set of economic

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\(^ {40}\) Id.

\(^ {41}\) Id. at 5. The three models used to formulate the SCC are: DICE (Dynamic Model of Integrated Climate and the Economy), PAGE (Policy Analysis of the Greenhouse Effect), and FUND (Climate Framework for Uncertainty, Negotiation, and Distribution).

\(^ {42}\) Id.

\(^ {43}\) Id. at 10 (referencing to the fact that the United States cannot enact federal statutes that have an extraterritorial effect to ensure that U.S. laws respect the interests of foreign sovereigns).

\(^ {44}\) See id. at 13–23.

\(^ {45}\) Johnston, supra note 2, at 36.

parameters, which includes projections about future greenhouse gas emissions. The models use the projected emissions to predict changes in the concentration of greenhouse gases in the atmosphere. The changes in greenhouse gases are used to predict changes in the temperature, which in turn allow the models to project economic harms from the expected temperature increases.

The Interagency Work Group (IWG), which was formed to create the SCC, ran these three models and used standard baseline projections of economic growth and technological development to determine the predicted effects that warming has on the nation’s gross domestic product. The IWG obtained the mean outcome for each model and averaged the three results together which resulted in the baseline average reduction in gross domestic product. The IWG re-ran the models, but did so with one additional ton of carbon emissions to determine the marginal effect on global gross domestic product of the additional unit of carbon. The result of the equation was then subtracted from the baseline which resulted in the SCC. For an agency to calculate the benefits of carbon reduction in federal regulations, it would multiply the emissions avoided by the price of a ton of emissions for the appropriate year.

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47 Id. at 1578. The economic parameters include preexisting baseline projections of economic growth and technological improvement. Id.
48 Id.
49 Id.
50 Id.
52 Masur, supra note 47, at 1578.
53 Id.
54 Id.
55 Id. at 1579 (“[T]he social cost of carbon: the amount of money saved for every marginal ton of carbon that is not emitted.”).
56 Id.
BACKGROUND

The creation of the SCC arose from the need to calculate the cost of CO2 reduction to have a proper CBA. However, agencies cannot simply create the SCC and apply without statutory authority.

A. Administrative Procedure Act

A court must look to the Administrative Procedure Act (APA) when deciding relevant questions of law and determining the meaning or applicability of the terms of an agency action. The reviewing court must hold unlawful and set aside any agency action, findings, and conclusions that are found to be (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (b) contrary to constitutional right, power, privilege, or immunity; (c) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (d) without observance of procedure required by law; and (e) unsupported by substantial evidence. Courts determine whether an agency’s decision is arbitrary or capricious by inquiring whether the agency “has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that is counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” Agencies must follow the APA when implementing new regulations.

B. Chevron Doctrine

“The power of an administrative agency to administer a congressionally created...program necessarily requires the

57 Ctr. for Biological Diversity v. NHTSA, 538 F.3d 1172, 1181 (9th Cir. 2008).
59 Id.
60 Zero Zone, Inc. v. U.S. Dep’t of Energy, 832 F.3d 654, 668 (7th Cir. 2016).
formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.\textsuperscript{61}

Congress cannot account for every possible gap in the formulation of a policy or the making of a rule. Congress may explicitly delegate for an agency to clarify or fill any provisional gaps.\textsuperscript{62} Congress may also implicitly delegate authority to an agency.\textsuperscript{63} The Chevron Doctrine, announced in \textit{Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.}, refers to a defense by a governmental agency which allows the court to show deference to the agency’s interpretation of a law it administers.\textsuperscript{64} The court must perform a two-part test when reviewing an agency’s construction of a statute.\textsuperscript{65} The first step is to determine whether Congress has spoken directly regarding the precise question at issue.\textsuperscript{66} The court and agency must adhere to the express intent of Congress if the intent is unambiguous and clear.\textsuperscript{67} However, if a court determines that Congress did not directly address the precise question at issue, the court will then examine whether the agency’s answer is based on a permissible construction of the statute.\textsuperscript{68} The court should not impose its own construction on the statute if an agency has already done so.\textsuperscript{69} An agency’s regulations are given controlling weight unless the regulations are arbitrary, capricious, or manifestly contrary to the statute.\textsuperscript{70} Courts have generally held that there should be considerable

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 844.
\item \textit{Id.} at 842.
\item \textit{Id.}
\item \textit{Id.} at 842–43.
\item \textit{Id.}
\item \textit{Id.} at 843.
\item \textit{Id.}
\item \textit{Id.} at 844.
\end{enumerate}
\end{footnotesize}
weight attributed to an executive department’s construction of a statutory scheme.\textsuperscript{71}

C. EPCA and Regulating CRE’s

Congress has been active in pursuing the protection of the environment. The Energy Policy and Conservation Act (EPCA) authorizes the DOE to impose mandatory energy conservation standards.\textsuperscript{72} The EPCA creates certain parameters that the DOE must abide by to properly establish energy conservation standards that will satisfy statutory requirements.\textsuperscript{73} One primary purpose of the EPCA is to improve the energy efficiency of equipment and appliances.\textsuperscript{74} The EPCA directs the DOE to review energy conservation standards and to implement new ones when it is appropriate.\textsuperscript{75}

Congress has established a framework that the DOE must follow when establishing new energy conservation standards.\textsuperscript{76} First, the DOE may not impose standards that increase the maximum allowable energy use of any individual unit.\textsuperscript{77} Second, the standards must be designed to achieve the “maximum improvement in energy efficiency”, and the standards must be “technologically feasible and economically justified.”\textsuperscript{78} The EPCA also requires that the DOE establish testing procedures that will measure the energy use of any covered equipment.\textsuperscript{79} The result of these measures will require the DOE to conduct a cost-benefit analysis that will measure the burden placed on manufacturers versus the benefit gained by the public by

\textsuperscript{71} Id.
\textsuperscript{72} 42 U.S.C.A. § 6295(a) (West, Westlaw through Pub. L. No. 114-244).
\textsuperscript{73} Id.
\textsuperscript{74} Id.
\textsuperscript{75} Id.
\textsuperscript{76} Zero Zone, Inc. v. U.S. Dep’t of Energy, 832 F.3d 654, 663 (7th Cir. 2016)
\textsuperscript{77} 42 U.S.C.A. § 6295(o)(1).
\textsuperscript{78} Id. § 6295(o)(2).
\textsuperscript{79} Zero Zone, Inc., 832 F.3d at 663.
reducing carbon. Congress amended the EPCA in 2005 to specifically include CRE’s in the industrial equipment category.\textsuperscript{80}

The Energy Policy Act of 2005 created standards for different classes of CRE.\textsuperscript{81} The act also called for the DOE to set standards for any additional classes of CRE that the EPCA did not address.\textsuperscript{82} Thus, congress gave the DOE clear instructions to prescribe standards regarding CRE. In 2009, the DOE added 39 more CRE classes that were defined by a combination of the equipment’s geometry, door type, condensing-unit configuration, and its operating temperature.\textsuperscript{83} Congress further amended CRE requirement under the American Energy Manufacturing Technical Corrections Act. The act implemented specific standards for self-contained commercial refrigerators with transparent doors.\textsuperscript{84} The DOE must set standards for CRE that Congress does not explicitly set a standard for, and that require regulation to conserve energy.

D. Executive Order 12866

Executive order 12866 was issued by President Clinton in 1993.\textsuperscript{85} The order requires agencies to design regulations in the most cost-effective manner to achieve the regulatory objective.\textsuperscript{86} In doing so, each agency must access both the costs and the benefits of the intended regulation.\textsuperscript{87} The order recognizes that some of these costs and benefits may be difficult to quantify.\textsuperscript{88} Each agency should

\begin{flushright}
\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} Id. at 663–64.
\textsuperscript{87} Id.
\textsuperscript{88} Id.
\end{flushright}
propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.\textsuperscript{89}

\textbf{E. Colorado District Court Requires Agency to Use SCC}

In July 2013, environmental organizations sought judicial review of three agency decisions by the Bureau of Land Management that, when taken together, authorized on-the-ground mining exploration activities in a part of the North Fork Valley, located in western Colorado.\textsuperscript{90} Plaintiffs alleged that the agency decisions failed to comply with the National Environmental Policy Act (NEPA) and the APA.\textsuperscript{91} The agency provided “an adequate disclosure of effects on adjacent lands.”\textsuperscript{92} However, the issue stemmed from the agency’s treatment of the costs associated with greenhouse gas emissions, which the court held to be arbitrary and capricious.\textsuperscript{93} The agency failed to evaluate all of the effects of a proposed action which includes analyzing direct, indirect, and cumulative effects as is required to be done under NEPA.\textsuperscript{94}

The agency quantified the amount of emissions relative to state and national emissions; however the agency failed to quantify the impacts on global climate change.\textsuperscript{95} Instead, the agency simply provided an explanation as to why the analysis would be impossible.\textsuperscript{96} The United States District Court for the District of Colorado rejected the argument because such a tool was available.\textsuperscript{97} The SCC was designed to quantify a project’s contribution to costs associated with

\begin{itemize}
\item \textsuperscript{89} Id.
\item \textsuperscript{90} High Country Conservation Advocates v. U.S. Forest Serv., 52 F. Supp. 3d 1174, 1181 (D. Colo. 2014).
\item \textsuperscript{91} Id.
\item \textsuperscript{92} Id. at 1189.
\item \textsuperscript{93} Id.
\item \textsuperscript{94} Id. at 1190.
\item \textsuperscript{95} Id.
\item \textsuperscript{96} Id.
\item \textsuperscript{97} Id.
\end{itemize}
global climate change. The court provided further support for the validity of the SCC by referencing the Environmental Protection Agency’s support and use of it. Plaintiff’s petition for review of the agency action was granted and sustained, and the court immediately enjoined the defendants from proceeding in any manner that included construction. The court reasoned that the environmental impact statement contained a factually inaccurate justification by omitting the SCC. However, the court noted that agencies do not always have to use the SCC as they may have a justifiable reason for not doing so.

F. D.C. Circuit Upholds Agency’s Decision to Ignore SCC

Several environmental organizations petitioned to the Court of Appeals for the District of Columbia for review of the Federal Energy Regulatory Commission’s (FERC) “conditional authorization of the Cove Point liquefied natural gas facility from an import maritime terminal to a mixed-use, import and export terminal.” Petitioners argued that FERC failed to consider several possible environmental impacts that the Cove Point conversation project may have. In particular, petitioners challenged FERC’s failure to use an SCC analysis or a similar analytical tool to analyze the environmental impacts of greenhouse gas emissions from the construction, operation, and conversation of the Cove Point facilities. The court denied the petitioners relief and held that FERC was not required to consider climate impacts under NEPA.

98 Id.
99 Id.
100 Id. at 1201.
101 Id.
102 Id. at 1193.
104 Id. at 951–52.
105 Id. at 956.
NEPA requires federal agencies to “include an environmental impact statement in every recommendation or report on proposals for… major Federal actions significantly affecting the quality of the human environment…” 106 Agencies whose procedures do not require preparation of an environmental impact statement must first prepare an environmental assessment. 107 An environmental assessment briefly provides sufficient evidence and analysis for determining whether to prepare an environmental impact statement. 108

FERC acknowledged the availability of the SCC but concluded that, “it would not be appropriate or informative to use for this project.” 109 The agency provided three reasons: (1) the lack of consensus on the appropriate discount rate leads to significant variation in output, (2) the tool does not measure the actual incremental impacts of a project on the environment, and (3) there are no established criteria identifying the monetized values that are to be considered significant for NEPA purposes. 110 Petitioners disagreed with FERC’s assessment, but the court dismissed their argument stating that the petitioners failed to identify another method other than using the SCC that FERC could have used to determine how the “project’s incremental contribution to [greenhouse gas emissions] would result in physical effects on the environment, either locally or globally.” 111 The court determined that the petitioners failed to provide a reason to doubt the reasonableness of FERC’s conclusion that applying the SCC was not appropriate. 112

106 Id. at 953.
107 Id.
108 Id.
109 Id. at 956.
110 Id.
111 Id.
112 Id.
In *Zero Zone*, Petitioners challenged the substance of the rules set forth by the DOE regarding CREs and the decision-making process. The Air-Conditioning, Heating and Refrigeration Institute is a trade association of CRE manufacturers. Both parties petitioned for review of the New Standards and the 2014 Test Procedure Rule (“Test Procedure”). The motion was granted by the Seventh Circuit for review. The Seventh Circuit determined that the DOE acted in a manner that was worthy of court deference. The New Standards Rule was premised on analytical models that were considered to have substantial evidence in support of it. As a result, the New Standards Rule was not arbitrary nor capricious. This section reviews the facts of *Zero Zone* and the Seventh Circuit’s reasoning for their holding.

A. The New Standards Rule

In 2010, the DOE began the process of revising CRE energy efficiency standards. The agency published a sixty-page framework and a notice regarding the proposal of new CRE energy efficiency

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113 *Zero Zone*, Inc. v. U.S. Dep’t of Energy, 832 F.3d 654, 660 (7th Cir. 2016). The EPCA grants the Seventh Circuit jurisdiction to hear the case. *Zero Zone* was petitioned directly to the Seventh Circuit. 42 U.S.C.A. 6311(9)(A) (West, Westlaw through Pub. L. No. 114-224) (“Any person who will be adversely affected by a rule prescribed under section 6293, 6294, or 6295 of this title may, at any time within 60 days after the date on which such rule is prescribed, file a petition with the United States court of appeals for the circuit in which such person resides or has his principal place of business, for judicial review of such rule.”).

114 *Id.*

115 *Id.*

116 *Id.*

117 *Id.*

118 *Id.*

119 *Id.*

251
standards. Additionally, the DOE published a technical support document for the proposed rule, and also held a public meeting to solicit feedback and provide preliminary responses regarding the proposed rules.

The proposal listed new standards for forty-nine classes of CRE. The classes were defined by a combination of the equipment’s geometry, door type, condensing-unit configuration, and operating temperature. The proposed rule established the maximum daily energy consumption for each class of CRE which would be determined by either the unit’s refrigerated volume or by the unit’s total display area (TDA). The DOE set forth higher standards for energy consumption that applied to forty-one equipment classes which they determined were both technologically feasible and economically justified.

The DOE determined the appropriate standard for each class by using a design-option engineering analysis. Here, the DOE chose to use a representative unit from each class of CRE. Then, the DOE calculated how much it would cost manufacturers to implement more efficient components into their CRE units. The DOE also calculated the daily energy consumption that would result from manufactures implementing the more efficient components. The DOE used these calculations to determine what would be a feasible maximum energy

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120 Id. at 667. The notice of proposed rulemaking for the New Standards Rule was issued on September 11, 2013. Id. at 667 n. 9.
121 Id. at 667.
122 Id.
123 Id.
124 Id. The DOE did not make any changes regarding eight equipment classes and the standards for aforementioned classes remained consistent with the 2009 Final Rule. Id.
125 Id.
126 Id. The DOE chose a unit that was toward the larger end of that class. Id.
127 Id.
128 Id.
consumption level for a unit of that size. The calculation served as a launching point for the DOE, which it used to establish an equation to determine a CRE unit’s maximum energy consumption level. This standard was meant to be used in the 2009 Final Rule; however, the DOE received negative feedback regarding the effect their equation would have on smaller units. Thus, the DOE decided to allow manufacturers to use any design path that was most convenient for them.

The DOE, in order to satisfy statutory requirements, considered whether the New Standards were economically justified. To do so, the agency created five potential trial standard levels of energy efficiency that would be required by each class. It then conducted a cost-benefit analysis for each level, and concluded that the third-highest level would offer the maximum improvement in efficiency that is technologically feasible and economically justified while still resulting in significant energy conservation. Per requirement, the DOE requested a letter from the United States Department of Justice wherein the department determined the New Standards would not have an anticompetitive effect.

The DOE officially put the New Standards into effect after it concluded that the benefits outweighed the costs per the statutorily imposed economic justification requirement.

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129 *Id.* The DOE ranked the components in order of cost and drew a cost-efficiency curve to determine what would be feasible. *Id.*
130 *Id.* at 665.
131 *Id.* The DOE considered the comments and established an “offset” factor for each class. This allowed smaller equipment to consume more energy. *Id.*
132 *Id.* This allowed manufacturers to retain features they found valuable while still manufacturing equipment that fell within the New Standard. *Id.*
133 *Id.*
134 *Id.*
135 *Id.*
136 *Id.* at 666.
137 *Id.* (Development of new CRE would cost manufacturers between $93.9 and $165 million. The benefit to consumers would be between $4.93 and $11.74 billion).
B. The 2014 Test Procedure Rule

The New Standards requires a test procedure to be used in conjunction with the standards.\textsuperscript{138} The Test Procedure includes a method on how to calculate the TDA of CRE.\textsuperscript{139} The equation requires certain measurements of the unit to be entered into a general equation.\textsuperscript{140} One measurement is the “Length of Commercial Refrigerated Display Merchandiser” (LCR). The DOE’s New Standards make the LCR directly proportional to a CRE unit’s maximum energy consumption level.\textsuperscript{141}

The DOE published the proposed method to solicit comments.\textsuperscript{142} The LCR included the total length of the transparent area on CRE, but it did not include any opaque or non-transparent areas.\textsuperscript{143} This irked several manufacturers who submitted comments opposing the definition of the LCR arguing that it went against the common industry standard.\textsuperscript{144} The DOE took these comments into account and revised their testing procedure rule to include the industry standard.\textsuperscript{145}

C. The Seventh Circuit’s Holding

The Seventh Circuit considered the challenges to: (1) the DOE’s engineering analysis; (2) the DOE’s economic analysis; (3) the DOE’s regulatory flexibility analysis regarding the effect the New Standards may have on small businesses; (4) the DOE’s assessment of the cumulative regulatory burden; and (5) the 2014 Test Procedure Rule.

\textsuperscript{138} Id.
\textsuperscript{139} Id.
\textsuperscript{140} Id.
\textsuperscript{141} Id. The longer the display on a CRE unit, the more energy a CRE unit is allowed to consume on a daily basis. Id.
\textsuperscript{142} Id.
\textsuperscript{143} Id.
\textsuperscript{144} Id. The common industry standard measured the LCR by measuring the CRE unit’s inside wall to inside wall, which would “disregard the presence of non-transparent mullions and door frames. Id.
\textsuperscript{145} Id.
1. Engineering Analysis

The Petitioners challenged the DOE’s engineering analysis arguing that the DOE did not provide an opportunity for comments regarding the DOE’s engineering spreadsheet.\textsuperscript{146} The Seventh Circuit rejected this argument because the DOE did provide two technical support documents that presented all of the necessary data regarding the New Standards.\textsuperscript{147} The court held that the data not being organized into a spreadsheet was irrelevant because all of the underlying data contained in the spreadsheet was present in the technical support documents.\textsuperscript{148}

Petitioners also challenged the technologically feasible energy consumption level for each class.\textsuperscript{149} The challenge addressed the DOE’s modeling of compressors.\textsuperscript{150} The DOE concluded that a high efficiency single speed hermetic compressor would be ten percent more efficient than the standard level compressor.\textsuperscript{151} This was challenged by several manufacturers who were able to persuade the DOE that the figure was inaccurate.\textsuperscript{152} The DOE then applied an estimate presented by a single manufacturer and settled on the efficiency being two percent.\textsuperscript{153} Petitioners argued this figure was too inaccurate to rely on the estimate by a single manufacturer.\textsuperscript{154} However, the Seventh Circuit dismissed the Petitioners contention stating that the chosen figure is supported by substantial evidence and was reached through a reasoned decision making process.\textsuperscript{155} Further, the Seventh Circuit stated they have a limited role because courts only

\textsuperscript{146} Id. at 670.
\textsuperscript{147} Id.
\textsuperscript{148} Id.
\textsuperscript{149} Id. at 671.
\textsuperscript{150} Id.
\textsuperscript{151} Id.
\textsuperscript{152} Id.
\textsuperscript{153} Id. at 672.
\textsuperscript{154} Id.
\textsuperscript{155} Id.
require that an agency acknowledge factual uncertainties and identify the considerations it found persuasive in making its decision.\(^{156}\)

Another challenge by Petitioners focused on the insulation foam thickness. Petitioners questioned the validity of the New Standards by arguing that the DOE acted arbitrarily and capriciously when it modeled the insulation component.\(^{157}\) The Petitioners pointed out that the recommended increase in insulation foam thickness would not be possible for certain refrigerators and freezers because of limited floor space.\(^{158}\) The Seventh Circuit once again dismissed Petitioner’s contention stating that the DOE provides manufacturers with the choice to use alternative methods if redesigning the insulation is not an available design option.\(^{159}\) The Seventh Circuit held that this cannot be arbitrary or capricious because it was based on \textit{substantial} evidence.\(^{160}\)

2. Economic Analysis

The EPCA requires that efficiency standards be economically justified.\(^{161}\) Petitioners argued that the economic standards were unjustified.\(^{162}\) First, the Petitioners argued that the DOE acted arbitrarily and capriciously when it assumed that the new CRE standards would not result in “significant changes” in purchasing behavior.\(^{163}\) The DOE treated CRE to be price inelastic.\(^{164}\) The DOE admitted to having inadequate information regarding CRE customer behavior.\(^{165}\) The DOE therefore made a prediction about the CRE

\(^{156}\) \textit{Id.}

\(^{157}\) \textit{Id. at 673.}

\(^{158}\) \textit{Id.}

\(^{159}\) \textit{Id. at 673–74.}

\(^{160}\) \textit{Id. at 674.}


\(^{162}\) \textit{Id.}

\(^{163}\) \textit{Zero Zone, Inc.}, 832 F.3d at 675.

\(^{164}\) \textit{Id. Price inelasticity is when an increase in price does not impact the amount being purchased. Id.}

\(^{165}\) \textit{Id.}

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market, which the Seventh Circuit held was not arbitrary or capricious.\textsuperscript{166} The DOE’s prediction regarding market elasticity was that businesses would continue to purchase CRE regardless of the price because it would be necessary for them to comply with health code regulations.\textsuperscript{167} Businesses must store their food at proper temperatures to comply with health code regulations, which is an example as to why the purchase of CRE would continue.\textsuperscript{168} The DOE’s argument is helped by the fact that there is a lack of alternatives to CRE.

Second, Petitioners challenged the use of SCC in the DOE’s environmental benefits analysis. The Petitioners argue that the EPCA does not allow for the consideration of environmental factors.\textsuperscript{169} Additionally, the Petitioners claimed the DOE’s analysis of the SCC was arbitrary and capricious.\textsuperscript{170} The Seventh Circuit determined that Congress did intend for the DOE to have the ability to consider the reduction in SCC.\textsuperscript{171} The Seventh Circuit reasoned it was reasonable to conclude that the EPCA “requires the DOE to consider the need for national energy…conservation”; the Court went on to say that it is appropriate to measure the expected reduction in environmental costs in a cost-benefit analysis.\textsuperscript{172} The Petitioners also challenge the use of the SCC arguing that: “(1) who exactly worked on the SCC analysis had not been made public; (2) the inputs to the models were not peer reviewed; and (3) the damages functions, or variables based on problems like sea level rise, were determined in an arbitrary manner.”\textsuperscript{173} The DOE admitted that the SCC has limitations.\textsuperscript{174} The DOE cited to multiple parties that referenced the SCC values such as a

\begin{itemize}
\item \textsuperscript{166} Id. at 676.
\item \textsuperscript{167} Id.
\item \textsuperscript{168} Id.
\item \textsuperscript{169} Id.
\item \textsuperscript{170} Id. at 677.
\item \textsuperscript{171} Id.
\item \textsuperscript{172} Id.
\item \textsuperscript{173} Id. at 678.
\item \textsuperscript{174} Id.
\end{itemize}
Petitioners argued that the DOE erroneously considered the global benefits to the environment while only considering the national costs. The EPCA only concerns national energy and water conservation. The DOE responded by noting that climate change policies effect the entire world. The Petitioners argument regarding the lack of consideration for global costs fell short because they do not provide any estimation or example of global costs.

Lastly, Petitioners challenged the anticompetitive effects the New Standards would have. Petitioners argue that the DOJ’s letter was not adequate in its reasoning, and that the submission and publication of the DOJ letter were untimely. The Seventh Circuit dismissed both arguments. First, the Seventh Circuit held that the EPCA places the burden on the DOJ to provide adequate reasoning, not the DOE regarding anti-competitive measures.

The Seventh Circuit denied the Petitioners’ challenge to the DOE’s New Standards and Test Procedure. More importantly, the Seventh Circuit upheld the use of the SCC, holding that the use of the SCC in a cost-benefit analysis is not arbitrary or capricious. This section will present the drawbacks of the SCC. Also, it will discuss

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175 Id.
176 Id.
178 Zero Zone, Inc., 832 F.3d at 679.
179 Id.
180 Id. at 680.
181 Id. at 681–82. The DOE has a “secondary role under the [anti-competitive] provision of the EPCA.” Id.
why the Seventh Circuit was correct in its holding that the SCC is not arbitrary or capricious.

A. The SCC is Not Perfect

The SCC is a useful tool for agencies when creating regulations.\textsuperscript{182} It allows the agency to factor in CO2 costs, which previously agencies were unable to do. However, the SCC is not perfect.

The SCC has been referred to as a “black box” by one member of Congress.\textsuperscript{183} The concern regarding the use of the SCC is that it will continue to be used in a variety of economically significant rules despite the fact that the settled upon figure is highly controversial among experts.\textsuperscript{184} Also, the amount of benefit the SCC may add to a CBA makes it difficult for opponents of a regulation to rebuke the CBA. For example, the Environmental Protection Agency quantified that potential regulations, regarding tailpipe emissions, would result in a $280 billion benefit while being outweighed by a $350 billion cost.\textsuperscript{185} The regulation would have failed, but for the addition of the SCC into the cost-benefit analysis which caused the proposed regulation to result in a net benefit of $100 billion and making the benefit a total of $380 billion.\textsuperscript{186}

The SCC gives agencies a tool that can extrapolate the benefit, thereby allowing regulations in danger of failing a cost-benefit analysis to survive scrutiny. The SCC benefit may vary in different situations, but the SCC can account for over half of the benefit of a regulation. For example, the Environmental Protection Agency published emission guidelines regarding new and existing power

\begin{thebibliography}{99}
\bibitem{184} \textit{See Id.} at 856.
\bibitem{185} Johnston, \textit{supra} note 2, at 36.
\bibitem{186} \textit{Id.}
\end{thebibliography}
plants; the SCC accounted for 40-65% of the projected benefits.  

The application of the SCC can therefore have a great impact on CBA and allow more environmentally friendly regulations to pass. The cost of carbon may be difficult to grasp due to its size, given the industrial-size dollar figures. However, the figure is much easier to comprehend when applied to the average American. For example, the activities of a single American produces roughly eighteen tons of CO2 per year. It is estimated that a third of that comes from transportation. If you multiply the 18 tons by the SCC, the amount comes to $222, which represents how much the daily commute costs in societal damages each year. This figure, however, may be much larger depending on your calculation of the SCC. For example, two Stanford researchers have estimated the SCC to cost $220 per ton. Using this figure, the average daily commute damages come out to be somewhere around $1,320 each year. This illustrates the wide range of results that may occur depending on which calculation of the SCC is used. Additionally, it creates a problem for the government when trying to calculate the SCC. If the government adopted the Stanford figure it would make it nearly impossible for businesses to challenge regulations successfully.

Some experts argue that the SCC uses flawed, or inaccurate, estimates when being calculated. The SCC estimate is based on IAMs. The main issue with the IAM is that the modeler has freedom in choosing the forms, values and inputs that are used to calculate the

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Stirling, supra note 157, at 856.

Wihbey, supra note 1.

Id.

Id.

Id.

Id.

Id. (This is about a $1,100 difference per year).

See supra notes 159-160. The SCC adds to the benefit in a cost-benefit analysis which may result in the benefit surpassing the burden).

The model uses six different elements. Interestingly the application of this model resulted in two significantly outcomes. Two different publications, Nordhaus (2008) and Stern (2007), applied assumptions regarding discount rates, abatement costs, parameters affecting temperature change, and the function determining economic impact to determine what the SCC should be. Nordhaus concluded that the SCC should be around or less than $20 a ton while Stern concluded the SCC should be above $200 a ton. This glaring difference is a result of the assumptions that each person applied. This demonstrates the consistency issue that is present in the SCC. The model depends on assumptions, which is what models do, but the assumptions vary so significantly that one model of the estimated cost of the SCC can be ten times larger than another model.

Environmental and energy regulations attempt to reduce environmental harm by imposing stricter standards on businesses. Agencies who implement these regulations hope to provide a benefit to the public. However, these regulations force businesses to adapt to be in compliance. Compliance costs placed upon manufacturers because of the SCC will likely be transferred onto customers. For instance, the Obama administration estimates that a socially efficient carbon price would be $36 per ton. This tax will translate to $0.36 per gallon at the gasoline pump. This is a significant increase in gas prices that would affect all Americans.

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197 Id.
198 Id.
199 Id.
200 Id.
201 See id.
202 Id.
203 Id.
B. The SCC is a Beneficial Tool to Use in a Cost-Benefit Analysis

The SCC may not be perfect, but it is a useful tool to use a cost-benefit analysis. Agencies should have the ability to utilize the SCC, and if they decide not to, provide a basis as to why they believe the use of it would be inappropriate. Carbon pricing may be the simplest and most transparent way for the public sector to address global warming.\footnote{204}

Despite concerns over the accuracy of the SCC, the IWG continues to study and improve the SCC. For example, in 2010 the IWG calculated the estimates of the SCC for 2020 CO2 emissions as being $7, $26, or $42 per ton emitted.\footnote{205} However, in 2013 the IWG recalculated the 2020 CO2 emissions cost to $12, $42, or $62 per ton respectively.\footnote{206} The SCC is still in its early stages and it will continue to improve and become more accurate as scientific and economic understanding improves.

The arguments against the inaccuracy and weight of the SCC may have merit, but thus far have been inconsequential. Researchers have examined the impact the addition of SCC has on regulations when applied to a cost-benefit analysis.\footnote{207} The results thus far have shown minimal impact.\footnote{208} According to a 2014 paper published by the Brookings Institution, the SCC has been involved in 53 regulatory policies.\footnote{209} The application of the SCC has resulted to be only 14 percent of net benefits, on average, being accounted for reducing carbon.\footnote{210} Further, the application of the SCC has tipped the scales of

\footnote{205} Johnston, supra note 2, at 36.
\footnote{206} Id.
\footnote{207} Wihbey, supra note 1.
\footnote{208} Id.
\footnote{210} Id. at 238.
a cost-benefit analysis in roughly only one out of every eight rule-making scenarios.\footnote{Id. at 244.}

Courts have started to face challenges to the SCC. The Ninth Circuit correctly articulated that agencies must factor in the SCC in cost-benefit analyses because failing to do so would mean the cost of CO2 emissions is $0.\footnote{Ctr. for Biological Diversity v. NHTSA, 538 F.3d 1172, 1200 (9th Cir. 2008).} The cost of CO2 emissions is certainly not $0 evidenced by the fact that there is wide acceptance of the fact that CO2 emissions harm our climate.\footnote{Howard Shelanski & Maurice Obstfeld, Estimating the Benefits from Carbon Dioxide Emissions Reductions, \textsc{The White House} (Dec. 1, 2016), \url{https://www.whitehouse.gov/blog/2015/07/02/estimating-benefits-carbon-dioxide-emissions-reductions}.} Harmful effects to the global climate must be resulting in some sort of cost to the population. The SCC gives agencies and the government an opportunity to measure these harmful effects while also giving them an opportunity to correct the harmful effects.

Without the SCC, agencies would not be able to quantify global environmental harms. The SCC is beneficial and useful as a tool because it mitigates CO2. For example, over the next forty years, three vehicle rulemakings are projected to result in a benefit ranging from $78 billion to $1.2 trillion.\footnote{\textit{The Social Cost of Carbon}, \textsc{Env. Protection Agency}, \url{https://www.epa.gov/climatechange/social-cost-carbon} (last visited Dec. 1, 2016).}

\textbf{C. Courts Should Defer to Agencies Regarding SCC Use}

The use of the SCC is neither arbitrary nor capricious. Courts should use Chevron Doctrine when deciding cases regarding the use, or non-use, of the SCC. In \textit{Zero Zone}, Petitioners argued that that the DOE acted arbitrarily and capriciously when enacting the New Standards Rule by including the SCC in its cost-benefit analysis. The Seventh Circuit correctly held that the DOE acted within its powers.
The scope of review for the arbitrary and capricious standard is narrow. \footnote{Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 103 S.Ct. 2856, 2866–67 (1983).} Courts should not substitute its judgment automatically so as to agree with the agency. \footnote{Id.} Instead, the court must examine the relevant data and articulate as satisfactory explanation as to why the court believes there is a rational connection between the facts found and a choice made regarding the agency’s action. \footnote{Id.}

The arbitrary and capricious standard fails if the agency relies on factors which Congress has not intended for the agency to consider. \footnote{Id.} It may also fail if the agency has “entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” \footnote{Id.}

Agencies that factor the SCC are trying to consider every important factor in a CBA. This, however, does not mean that agencies \textit{must} apply the SCC. \footnote{See High Country Conservation Advocates v. U.S. Forest Serv., 52 F. Supp. 3d 1174, 1193 (D. Colo. 2014).} Agencies must consider the SCC to satisfy statutory requirements. \footnote{5 U.S.C.A. § 706 (West, Westlaw through Pub. L. No. 114-224).} Agencies are mandated by the APA to pass regulations which are not arbitrary or capricious. \footnote{Id.} Furthermore, a regulation may be arbitrary or capricious if the agency fails to consider an important aspect of the problem, or if the agency fails to offer an explanation for its decision that is counter to the evidence before the agency. \footnote{Id.} Greenhouse gas emissions result in detrimental effects on a global scale. Agencies which fail to consider such effects are not considering an important aspect of a global environmental problem.
Additionally, if an agency believes that the SCC would be an inappropriate factor in a cost-benefit analysis, the agency should provide a basis for its conclusion. The *Chevron Doctrine* allows courts to defer to executive agencies in situations where Congress has not directly spoken to an issue. Congress has yet to take action regarding the SCC, and therefore we must defer to agencies.

**CONCLUSION**

The Seventh Circuit was the first federal court to uphold the use of the SCC in a cost-benefit analysis. It is unlikely that this will be the last court to rule on such an issue. The SCC is a controversial concept because of the politics involved. Generally, political liberals hope to preserve the environment and strive to implement ways to reduce global pollution. Political conservatives generally strive to reduce the burdens placed upon businesses. The SCC is likely to allow regulations to survive scrutiny. However, the SCC is not a tool that will allow agencies to pass any regulation they want. Instead, it is a tool that will allow agencies to factor in negative global effects on the environment.

Executive agencies should continue to develop the SCC. With time, the SCC and the scientific and economic estimates behind it will start to gain wide acceptance and, more importantly, consistency. Experts should be striving to continue development of the SCC so the potential per ton costs are not so wide ranging. Development of the SCC is important to developing a functional regulatory framework as well as to preserving the environment. The uncertainty regarding the use of the SCC in a CBA should be resolved by Congressional action.

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INTRODUCTION

Justice Sandra Day O’Conner wrote in *Troxel v. Granville*, “The demographic changes of the past century make it difficult to speak of an average American family.” ¹ When assessing societal trends for cohabiting couples² and their families, Justice O’Connor’s statement rings true.

While the number of adults getting married in the U.S. has been falling, the number of couples living in cohabiting relationships is on the rise.³ Since 1990, the number of households led by persons in cohabiting relationships has nearly doubled from 3.1 million (3.4%) in

² In this article, the term “cohabiting” refers to two unmarried persons who live together and likely engage in a sexual relationship. *E.g.*, *Cohabitation*, BLACK’S LAW DICTIONARY (10th ed. 2014).
1990 to 6.2 million (5.5%) in 2008. In 1990, over 2.1 million children aged seventeen and younger lived with two cohabiting parents. In 2008, this number more than doubled to over 4.5 million children—about 6% of all children in the United States. “[T]wo of every five children in the United States will spend time in a cohabiting household before the age of sixteen.”

In 2015, about 40% of all births in the United States were to unmarried women—up from just 5% in 1960. The total number of births to unmarried women increased from 89,500 in 1940 to 1,601,527 in 2015. Today, the majority of births to unmarried women are to women in cohabiting relationships. The percent of births to cohabiting women increased from 41% in 2002 to 58% in 2010. Nearly half of all births to unmarried, cohabiting women were intended pregnancies.

The trend of fewer couples getting married but still having children poses interesting legal challenges. For example, The Hague Convention on the Civil Aspects of International Child Abduction

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4 Id. at 112.
5 CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW AND PUBLIC POLICY 159 (2010); TAYLOR ET AL., supra note 3, at 113.
6 BOWMAN, supra note 5, at 159.
7 Joyce A. Martin et al., Ctrs. for Disease Control and Prevention, Births: Final Data for 2015, 66 NAT’L VITAL STAT. REP., January 5, 2017, at 1, 8.
9 Sally C. Curtin et al., Ctrs. for Disease Control and Prevention, Recent Declines in Nonmarital Childbearing in the United States, NCHS DATA BRIEF, Aug. 2014, at 1, 2 (noting the number of births to unmarried mothers was 665,747 in 1980; 1,527,034 in 2005; and 1,726,566 in 2008). The report also notes that the nonmarital birth rate has been on the decline for the past five years. Id.
10 Martin et al., supra note 7, at 8.
11 TAYLOR ET AL., supra note 3, at 67.
12 Curtin et al., supra note 9, at 4.
13 Id.
(Hague Convention or Convention) protects parents with primary custody rights from parental abduction or retention of their children in another country.\textsuperscript{14} Under the Hague Convention, courts apply the domestic laws of the child’s country of \textit{habitual residence}—a term described in greater detail below—immediately before the alleged abduction or retention to determine whether one parent has violated the other’s rights of custody.\textsuperscript{15} However, when unmarried couples have children, they do not always obtain court orders identifying each parent’s custody or visitation rights; they instead prefer to follow informal parenting arrangements.\textsuperscript{16}

In light of demographic trends towards fewer marriages, should jurisdictions like Illinois adopt child custody and paternity rules that endow rights of custody to both parents at birth or upon acknowledgement of the child? Two recent Seventh Circuit cases applying The Hague Convention demonstrate what is at stake.

In \textit{Garcia v. Pinelo}, Raul Salazar Garcia (Salazar) and Emely Galvan Pinelo (Galvan) never married nor lived together.\textsuperscript{17} But they did have a son together, D.S., in Mexico in 2002.\textsuperscript{18} In 2013, Galvan married another man, Rogelio Hernandez, and they decided to move to the United States.\textsuperscript{19} Salazar agreed for D.S. to accompany Galvan to Illinois for one year.\textsuperscript{20} After one year, when Galvan refused to return D.S. to Mexico, Salazar filed his petition under the Hague Convention to return his son to Mexico.\textsuperscript{21} In \textit{Garcia}, the child’s habitual residence was Mexico. Applying Mexican domestic law, the Northern District of

\begin{itemize}
\item \textsuperscript{15} Id.
\item \textsuperscript{17} Garcia v. Pinelo, 808 F.3d 1158, 1159 (7th Cir. 2015).
\item \textsuperscript{18} Id.
\item \textsuperscript{19} Id. at 1160.
\item \textsuperscript{20} Id.
\item \textsuperscript{21} Id.
\end{itemize}
Illinois found that Salazar had a right of custody under the Hague Convention and the Mexican law convention of patria potestad (parental authority). Consequently, Galvan violated Salazar’s parental rights by retaining D.S. in Illinois. The Seventh Circuit affirmed this decision.

In *Martinez v. Cahue*, Jaded Ruvalcaba Martinez and Peter Cahue had a son, A.M., in Illinois in 2006. Martinez and Cahue never married. After their relationship ended, Martinez—who was a Mexican citizen—moved to Mexico with A.M. in 2013. In 2014, after Martinez sent A.M. to Illinois to spend his summer break with Cahue, Cahue refused to return A.M. to Mexico. Consequently, Martinez filed emergency proceedings in the Northern District of Illinois under the Hague Convention to return her son to Mexico. The Northern District of Illinois found that because the parents did not have a shared intent for A.M. to relocate to Mexico, A.M.’s habitual residence under the Hague Convention remained Illinois and therefore A.M. should remain in Illinois. However, the Seventh Circuit reversed the Northern District of Illinois. The Seventh Circuit found that before Martinez moved to Mexico, she had sole custody of A.M.

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22 Id. at 1159. In Latin, patria potestas means “power of the father.” Patricia Begné, *Parental Authority and Child Custody in Mexico*, 38 FAM. L. QTRLY 527, 527 (Bruce McCann, trans., 2005). Today, in Mexico, the patria potestas convention, known in Spanish as patria potestad, references “parental authority.” Id. This paper will primarily refer to the parental authority convention by its Latin spelling, patria potestas, since that is how the Seventh Circuit typically references the convention.

23 Garcia, 808 F.3d at 1159.
24 Id.
25 *Martinez v. Cahue*, 826 F.3d 983, 987 (7th Cir. 2016).
26 Id. at 986.
27 Id. at 987.
28 Id. at 988.
29 Id.
30 Id.
31 Id. at 991–92.
under Illinois law and that Cahue had no right of custody to prevent Martinez from moving to Mexico.\textsuperscript{32}

As described above, the domestic relations laws of one country over another can be outcome determinative. In \textit{Garcia}, the Seventh Circuit found that Mexican law provides a right of custody to both parents known as \textit{patria potestas} (parental authority) from the child’s birthdate or acknowledgment of paternity.\textsuperscript{33} In contrast, the Seventh Circuit found in \textit{Martinez} that Illinois law presumes a mother has sole custody of a child born to unmarried parents in the absence of a court order. Unlike the Mexican laws of parental authority, Illinois law does not imbue an unmarried parent—even those who have acknowledged paternity—with custody rights.\textsuperscript{34}

In an era where fewer people are getting married but still having children, should jurisdictions like Illinois adopt child custody and paternity rules that endow rights of custody to both parents at birth or upon acknowledgement of the child? In order to protect children’s best interests and to preserve the status quo before an alleged wrongful retention or abduction, Illinois should not adopt a rule like parental authority laws. Illinois’s presumption requires a court to consider children’s best interests before awarding custody and visitation rights while parental authority laws automatically confers decision-making authority to parents. Children’s best interests are better served when a court protects stability and the status quo in children’s lives rather than enabling a parent to assert parental rights for the first time under a Hague Convention petition.

This Comment will proceed as follows. Part I describes the provisions of The Hague Convention as well as compares the development of custody rights in Illinois and Mexico. Part II reviews the factual and procedural context of \textit{Garcia v. Pinelo} and Part III does the same for \textit{Martinez v. Cahue}. Part IV argues that Illinois’s presumption that an unmarried mother has sole legal custody of her

\begin{footnotesize}
\begin{itemize}
  \item[32] \textit{Id.}
  \item[33] \textit{See Garcia v. Pinelo, 808 F.3d 1158, 1166 (7th Cir. 2015).}
  \item[34] \textit{Martinez}, 826 F.3d at 991.
\end{itemize}
\end{footnotesize}
children in the absence of a court order is a better right of custody rule than the parental authority laws.

I. BACKGROUND

With rapid globalization in the late twentieth century, more people have begun marrying people from other countries.\(^{35}\) One of the challenges of increasingly open borders and easier means of travel is international parental child abduction.\(^{36}\) In order to create streamlined processes for returning children wrongfully removed or retained from their proper home country, more than twenty-three countries gathered in The Hague to create and adopt the Hague Convention on the Civil Aspects of International Child Abduction (the Convention).\(^{37}\) As of March 8, 2017, ninety-seven countries have either ratified or are in the process of being accepted as members to the Convention.\(^{38}\) The following sections will describe the provisions of the Convention as well as differences between the development of child custody laws in the United States and Mexico.

A. The Hague Convention

In 1981, the United States signed The Hague Convention and later implemented it in 1988 when Congress adopted the International Child


\(^{36}\) Winter, supra note 35, at 351.

\(^{37}\) Hague Convention, supra note 14.

Abduction Remedies Act (ICARA).\textsuperscript{39} ICARA “entitles a person whose child has been abducted to the United States to petition in federal court for the return of the child.”\textsuperscript{40}

“[The Convention] is fundamentally ‘an anti-abduction treaty.’”\textsuperscript{41} Its stated purpose is to “secure the prompt return of children wrongfully removed to or retained in any Contracting State” and to guarantee that the “rights of custody and of access” are respected across states that have adopted the convention.\textsuperscript{42}

Several public policies undergird the Convention. First, protecting the interests of children permeates the convention.\textsuperscript{43} Within the goal of protecting children’s interests is the presumption that stability is important to child development.\textsuperscript{44} When children are wrongfully moved from one country to another, they are torn from close-knit family members and friends, school settings, and religious institutions.\textsuperscript{45} The Convention is designed to return children to a status quo where parents can then contest custody rights.\textsuperscript{46}

Second, the Convention deters parents from international forum shopping. In other words, the Convention discourages parents from abducting their children and taking them to a country where the parents believe the country’s courts will be more sympathetic to


\textsuperscript{40} Koch v. Koch, 450 F.3d 703, 711 (7th Cir. 2006) (citing 42 U.S.C. § 11603(b), transferred to 42 U.S.C. § 9003(b) (2012)).

\textsuperscript{41} Martinez v. Cahue, 826 F.3d 983, 989 (7th Cir. 2016) (quoting Garcia v. Pinelo, 808 F.3d 1158, 1162 (7th Cir. 2015)).

\textsuperscript{42} Hague Convention, supra note 14, at art. 3, 1343 U.N.T.S. at 98–99.

\textsuperscript{43} Id. at Preamble, 1343 U.N.T.S. at 98.


granting custody or decision-making rights over the children. Since states that have adopted the Convention agree to respect the “rights of custody and of access” of other member states, parents should have less incentive to engage in international tactical gamesmanship over their children.

The Convention applies only to member countries and to children who have been wrongfully removed or retained in member countries. Pursuant to Article 3 of the Convention, children are wrongfully removed when:

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

In other words, a child is wrongfully removed or retained where the parent who abducts or retains the child violates the “rights of custody” of the other parent who actively asserted his or her rights as a parent.

“Rights of custody” is a term of art in the Convention that is not directly synonymous with child custody jurisprudence in the United States. The Convention defines rights of custody as “rights relating

48 Id.
51 51 Fed. Reg. at 10,506-07; see also Melissa S. Wills, Note, Interpreting the Hague Convention on International Child Abduction: Why American Courts Need to Reconcile the Rights of Non-Custodial Parents, the Best Interests of Abducted
to the care of the person of the child and, in particular, the right to
determine the child’s place of residence."\footnote{52} The Convention also defines “right[s] of access” as “includ[ing]
the right to take the child for a limited period of time to a place other
than the child’s habitual residence.”\footnote{53} The important distinction
between rights of custody and rights of access is that the Convention
only offers a return order for a breach of rights of custody.\footnote{54} In other
words, if a parent only has rights of access, he does not have a return
order remedy under the Convention; he can only request that a
Contracting State protect and enforce his rights of access.\footnote{55}

Courts deciding Convention cases are not to consider the merits of
underlying custody issues between the parties.\footnote{56} Instead, courts are to
focus on deciding where the child should be returned so that the courts
in that jurisdiction can resolve the merits of any underlying custody
disputes.\footnote{57}

As such, courts do not enforce custody orders under the
Convention.\footnote{58} The Convention’s rationale for not enforcing custody
orders is so that persons who wrongfully remove or retain a child
cannot “insulate the child from the Convention’s return provisions
merely by obtaining a custody order in the country of new residence,
or by seeking there to enforce another country’s order.”\footnote{59} The
Convention reduces a parent’s incentives to abduct his children by
requiring courts to apply the domestic laws of the child’s country of

\footnote{52} Hague Convention, \textit{supra} note 14, at art. 5, 1343 U.N.T.S. at 99.
\footnote{53} \textit{Id.}
\footnote{54} \textit{Id.} at art. 3 & 8, 1343 U.N.T.S. at 98–100.
\footnote{55} \textit{Id.} at art. 21, 1343 U.N.T.S. at 102.
\footnote{56} \textit{Id.} at art. 19, 1343 U.N.T.S. at 101.
\footnote{57} Hague International Child Abduction Convention: Text and Legal Analysis,
\footnote{58} 51 Fed. Reg. at 10,504–505.
\footnote{59} \textit{Id.}
habitual residence immediately before the alleged abduction or retention to determine whether one parent has violated the other’s rights of custody.\textsuperscript{60}

The Convention does not define the term “habitual resident.”\textsuperscript{61}

The Convention drafters did not want to bind courts to narrow legal definitions of nationality or domicile in order to give courts greater flexibility and thereby increase their ability to achieve the best interests of children.\textsuperscript{62}

The determination of a child’s habitual residence is often outcome determinative.\textsuperscript{63} For example, if the court finds that the child is presently located in her state of habitual residence, then her presence in the country is not wrongful.\textsuperscript{64} However, if the court finds that the child is not presently located in her country of habitual residence, then her presence in the country is likely wrongful unless the petitioning parent did not exercise his or her rights of custody.\textsuperscript{65}

In determining the location of the child’s habitual residence, the Seventh Circuit looks to whether parental intent to abandon the child’s previous habitual residence exists and whether the child has acclimatized to her new state of residence.\textsuperscript{66} Courts like the Seventh Circuit reason that children, particularly in cases involving young children, are not competent to make decisions about where they should live.\textsuperscript{67} Instead, courts should determine whether there was a settled parental intent to change the child’s habitual residence.\textsuperscript{68} The Seventh

\textsuperscript{60} Hague Convention, supra note 14, at art. 3, 1343 U.N.T.S. at 98-99.

\textsuperscript{61} See Mozes v. Mozes, 239 F.3d 1067, 1071 (9th Cir. 2001); Perez-Vera Report, supra note 44, ¶¶ 66, 83 (“The Convention, following a long-established tradition of the Hague Conference, does not define the legal concepts used by it.”).

\textsuperscript{62} E.g., Mozes, 239 F.3d at 1071–72.

\textsuperscript{63} E.g., Martinez v. Cahue, 826 F.3d 983, 988 (7th Cir. 2016).

\textsuperscript{64} E.g., Id.

\textsuperscript{65} E.g., Id.

\textsuperscript{66} Koch v. Koch, 450 F.3d 703, 713 (7th Cir. 2006) (citing Mozes, 239 F.3d 1067).

\textsuperscript{67} Mozes, 239 F.3d at 1076.

\textsuperscript{68} Id.
Circuit has noted that “[t]he intention or purpose which has to be taken into account is that of the person or persons entitled to fix the place of the child’s residence.”\footnote{Martinez, 826 F.3d at 990 (quoting Redmond v. Redmond, 724 F.3d 729, 747 (7th Cir. 2013)) (emphasis in original).} In this manner, the court must consider whether the intentions of one or both parents regarding where a child will live are legally relevant. Such intent does not have to be preserved in writing but can be inferred under the circumstances of each case.\footnote{Koch, 450 F.3d at 713 (7th Cir. 2006) (citing Mozes, 239 F.3d at 1075–76).} For example, courts can consider whether a family moved together from one country to another, if the one parent unilaterally moved with the child, if the move was for a defined period or indefinite, etc.\footnote{Id.}

The Seventh Circuit also considers the child’s acclimatization to her new environment.\footnote{Id.} Factors indicating a child’s depth of acclimatization to a new environment include establishing friendships, relationships with extended family, “success in school, and participating in community and religious activities.”\footnote{Martinez, 826 F.3d at 992.} However, the Seventh Circuit has found that “in the absence of settled parental intent, courts should be slow to infer from [the child’s] contacts [with a new state] that an earlier habitual residence has been abandoned.”\footnote{Koch, 450 F.3d at 713 (quoting Mozes, 239 F.3d at 1079).}

**B. U.S. v. Mexico: Comparing Custody Laws**

In general, child custody is comprised of two components: legal and physical custody.\footnote{Horvath & Ryznar, supra note 35, at 305.} Legal custody is one or both parents’ ability to make significant decisions on behalf of the child, such as decisions
regarding education, healthcare, and religious upbringing. Physical custody centers on with which parent the child will live.

As discussed above, The Hague Convention secures the prompt return of children wrongfully removed or retained in a Contracting state. Courts determine whether a child was wrongfully removed by determining whether the parent who removed the child violated the petitioning parent’s “rights of custody” under the laws of the child’s state of habitual residence. Article III of the Convention provides in pertinent part:

[R]ights of custody [. . .] may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Because rights of custody may arise from three sources (by operation of law, by judicial or administrative decision, or by effective agreement), understanding the differences in custody laws between Contracting states is crucial. The following sections will briefly describe differences in how the United States and Mexico approach custody law.

1. United States

In the United States, child custody law derives from both statutes and judicially created common law. Historically in the United States, fathers received custody of their children as they were viewed as

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76 Id.
77 Id.
79 Id.
80 Id.
assets to the father’s estate.\textsuperscript{82} By the mid-nineteenth century, societal attitudes began to shift and the “tender years” doctrine emerged where legislatures passed laws to award mothers custody of children if the children were not yet old enough to work.\textsuperscript{83}

Over time, states abandoned “tender years” statutes in favor of those prescribing what is now commonly known as the “best interests of the child” standard.\textsuperscript{84} The purpose of the child’s best interests standard is to foster individualized determinations on a case-by-case basis that consider which or both parents would advance the child’s needs if he or she or both were given authority to make significant decisions for the child.\textsuperscript{85}

In the United States, the best interests of the child standard originated in the English common law as an extension of\textit{ parens patriae} (parent of the country),\textsuperscript{86} a common law doctrine, in part, empowering the State “to substitute its authority for that of natural parents over their children.”\textsuperscript{87} Custody statutes advancing the best interests of the child standard often enumerate factors a judge should consider in determining how to allocate custody to one or both parents.\textsuperscript{88} For example, Section 602.5(c) of the Illinois Marriage and Dissolution of Marriage Act (IMDMA) identifies fifteen best interest factors courts should consider, including “the child’s adjustment to his

\begin{footnotesize}
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\textsuperscript{82} HERBERT JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES 127 (1988). See also Horvath & Ryznar, supra note 35, at 305–06. \\
\textsuperscript{83} JACOB, supra note 82, at 128–29. See also Horvath & Ryznar, supra note 35, at 305–07. \\
\textsuperscript{84} E.g., JACOB, supra note 82, at 130–31 (1988). \\
\textsuperscript{85} Horvath & Ryznar, supra note 35, at 309–10. \\
\textsuperscript{88} E.g., Illinois Marriage and Dissolution of Marriage Act, 750 ILL. COMP. STAT. ANN. 5/602.5(c)(1)–(15) (West, Westlaw through Pub. Act 99-937, 2016 Reg. Sess.).
\end{tabular}
\end{footnotesize}
or her home, school, and community”; “the level of each parent’s participation in past significant decision-making with respect to the child”; and “the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child.”

In Illinois, for children of unmarried parents, the Illinois Parentage Act of 2015 (Parentage Act) defers to the IMDMA regarding custody and visitation proceedings. Section 802(a) of the Parentage Act provides in pertinent part, “In determining the allocation of parental responsibilities, relocation, parenting time, parenting time interference, support for a non-minor disabled child, educational expenses for a non-minor child, and related post-judgment issues, the court shall apply the relevant standards of the [IMDMA].”

Under the Parentage Act, unmarried parents can ask the Court to adjudicate their custody rights in a judgment. However, if unmarried parents have not adjudicated their rights through the courts, then Illinois law presumes, in the absence of a court order, that unmarried mothers have sole legal custody of their children.

92 Id. See, e.g., In re S.L., 765 N.E.2d 82, 85 (Ill. App. Ct. 2002) (holding that an unmarried father who established a father-child relationship could seek custody under the IMDMA and was entitled to a hearing to determine the child’s best interests).
93 720 ILL. COMP. STAT. ANN. 5/10-5(a)(3) (West, Westlaw through Pub. Act. 99-937, 2016 Reg. Sess.) (“It is presumed that, when the parties have never been married to each other, the mother has legal custody of the child unless a valid
Additionally, in the United States, unmarried couples cannot rely on private contracts or agreements related to child custody. In most American jurisdictions, private contracts between parents regarding child custody or support are void against public policy.94 The reason courts refuse to enforce contracts regarding child custody and support is because such contracts may discourage parents from pursuing litigation in their children’s best interests.95

2. Mexico

Unlike the U.S. which follows the English common law tradition, Mexico follows the Roman civil law tradition of codified laws.96 One such Roman civil law tradition followed in Mexico is patria potestas (Latin: power of the father) or, in Spanish, patria potestad.97 Historically, patria potestas gave fathers absolute power over their children and that power endured for life.98 Today, patria potestas—parental authority—has been defined as “the duty and the right of

court order states otherwise. If an adjudication of paternity has been completed and the father has been assigned support obligations or visitation rights, such a paternity order should, for the purposes of this Section, be considered a valid court order granting custody to the mother.”) (emphasis added); Illinois Parentage Act of 2015, § 802(c) (“In the absence of an explicit order or judgment for the allocation of parental responsibilities [formerly custody], the establishment of a child support obligation or the allocation of parenting time to one parent shall be construed as an order or judgment allocating all parental responsibilities to the other parent. If the parentage order of judgment contains no such provisions, all parental responsibilities shall be presumed to be allocated to the mother; however, the presumption shall not apply if the child has resided primarily with the other parent for at least 6 months prior to the date that the mother seeks to enforce the order or judgment of parentage.”) (emphasis added).

95 E.g., In re Marriage of Best, 901 N.E.2d 967, 970 (Ill. App. Ct. 2009).
96 Sedillo López, supra note 81, at 297.
97 Begné, supra note 22, at 527.
98 Id. at 529.
parents to provide assistance and protection to the persons and the
property of their children to the degree necessary to fulfill their
children’s needs. Parental authority gives both parents the right to
care and control their children and their children’s property.
Included within the right to control their children is the right to decide
where the children live.

In Mexico, divorce of married parents or separation of unmarried
parents does not automatically destroy parental authority rights.
Consequently, a Mexican parent should not remove his or her child
without the other parent’s consent because both parents will maintain
parental authority over their child absent a court order saying
otherwise. This contrasts with the presumption in some American
states that in the absence of a contravening court order, an unmarried
mother has sole custody of her children. No such presumption of
custody rights exists for unmarried fathers or partners of natural
mothers.

99 Id. at 528 (citing IGNACIO GALINDO GARGIAS, DERECHO CIVIL MEXICANO
656 (1999)).
100 Código Civil Federal [CC], art. 413, Diario Oficial de la Federación [DOF]
14-05-1928, últimas reformas DOF 24-12-2013 (Mex.) (“La patria potestad se ejerce
sobre la persona y los bienes de los hijos. Su ejercicio queda sujeto en cuanto a la
guarda y educación de los menores, a las modalidades que le impriman las
resoluciones que se dicten, de acuerdo con la Ley sobre Previsión Social de la
Delincuencia Infantil en el Distrito Federal.”). See Sedillo López, supra note 81, at
297.
101 Sedillo López, supra note 81, at 297.
102 Código Civil Federal [CC], art. 416 (“En caso de separación de quienes
ejercen la patria potestad, ambos deberán continuar con el cumplimiento de sus
deberes y podrán convenir los términos de su ejercicio, particularmente en lo relativo
da la guarda y custodia de los menores.”); See Sedillo López, supra note 81, at 297.
103 Sedillo López, supra note 81, at 297.
104 E.g., 720 ILL. COMP. STAT. ANN. 5/10-5(a)(3) (West, Westlaw through Pub.
Act 99-937, 2016 Reg. Sess.); 750 ILL. COMP. STAT. ANN. 46/802(c) (West, Westlaw
II. GARCIA V. PINELO

A. The Facts

Raul Salazar Garcia (Salazar) and Emely Galvan Pinelo (Galvan) dated briefly in 2001.105 They never married and they never lived together.106 Both are Mexican citizens, and, in 2002, both lived in Mexico.107

During their brief relationship, Galvan and Salazar had a son, D.S., who was born in Monterrey, Nuevo León, Mexico in 2002.108 In 2006, a Nuevo León court “entered a custody order recognizing Galvan and Salazar as D.S.’s parents.”109 Galvan was awarded physical custody of D.S. and Salazar was awarded weekly visitation, which he regularly exercised.110

In 2013, Galvan married Rogelio Hernandez, an American citizen.111 In July 2013, Salazar and Galvan met to discuss Galvan’s desire to move to the United States.112 They both agreed that Galvan would move to Chicago, Illinois with D.S. for one school year.113

In August 2013, Galvan and D.S. moved to Chicago and enrolled D.S., now 11 years old, in school.114 Salazar remained in touch with D.S. regularly through Skype and D.S. traveled to Mexico for winter break.115 During this time, D.S. told his father that he would like to

105 Garcia v. Pinelo, 808 F.3d 1158, 1159 (7th Cir. 2015).
106 Id.
107 Id.
108 Id. at 1160.
109 Id.
110 Id.
111 Id.
112 Id.
113 Id.
114 Id.
115 Id.
return to Mexico while simultaneously telling his mother he would like to remain in Illinois.\footnote{Id.}

In July 2014, Salazar traveled to Chicago to take D.S. back to Mexico.\footnote{Id.} Galvan refused to allow D.S. to return to Mexico with Salazar.\footnote{Id.} Consequently, Salazar returned alone to Mexico where he filed his petition under the Convention with the Mexican Central Authority.\footnote{Id.} On December 2, 2014, the U.S. Department of State filed Salazar’s petition in the Northern District of Illinois.\footnote{Id.}

### B. District Court Opinion

The Northern District of Illinois appointed D.S. a guardian \textit{ad litem}.\footnote{Id.} In April 2015, D.S., now age 13, informed his guardian that he would prefer to remain in Chicago.\footnote{Id.} During an \textit{in camera} hearing, D.S. informed the judge that he wanted to remain in Chicago to finish eighth grade and beyond that if he could attend a good high school in Chicago.\footnote{Id.} If he could not attend a good high school in Chicago, then D.S. did not oppose returning to Mexico.\footnote{Id.}

In July 2015, the District Court found that Mexico was D.S.’s country of habitual residence.\footnote{Id.} The Court also found that Salazar had the “right of \textit{patria potestas} over D.S.,” which served as a right of custody for purposes of the Convention.\footnote{Id.} Consequently, the District Court found that Galvan wrongfully detained D.S. in Illinois and that

\footnote{Id.}
\footnote{Id.}
\footnote{Id.}
\footnote{Id.}
\footnote{Id.}
\footnote{Id. at 1160–61.}
\footnote{Id. at 1161.}
\footnote{Id.}
\footnote{Id. at 1161.}
\footnote{Id.}
\footnote{Id.}
\footnote{Id.}
D.S. needed to be returned to Mexico unless D.S. met the “mature-child exception” of the Convention. The District Court found that although D.S. objected to returning to Mexico and was old enough to do so, retaining D.S. in Illinois would undermine the purposes of the Convention. The court reasoned that a primary purpose of the Convention is to deter parents from abducting their children to benefit from another jurisdiction’s laws. Permitting D.S. to remain in the United States would “set a precedent that allows a parent to prevent the return of a child by problems of his or her own making.”

C. Appeal to the Seventh Circuit

Galvan appealed from the judgment of the Northern District of Illinois to the Seventh Circuit. The case was heard by a panel consisting of Chief Judge Wood and Judges Manion and Hamilton. At issue for the court was (1) whether Salazar established his custody rights under the Convention and (2) whether the District Court exceeded its discretion when it refused to “allow D.S. to stay in the United States pursuant to the Convention’s mature-child exception.” On appeal, the parties did not challenge the fact that Mexico is D.S.’s habitual residence.

Writing a unanimous opinion, Chief Judge Wood found that Salazar did have an established right of custody under the Convention through the Mexican law of patria potestas (parental authority).
Moreover, the Seventh Circuit found that the District Court did not exceed its discretion by ordering D.S. to return to Mexico.

1. *Patria Potestas* (Parental Authority)

Chief Judge Wood recognized that the Seventh Circuit previously recognized *patria potestas* as a “right of custody” within the meaning of the Convention. The Court found that pursuant to the Nuevo León laws, parental authority “attaches automatically at birth or acknowledgment.” Since Salazar was D.S.’s acknowledged father since 2006, the parental authority right attached. The Court also found that although Galvan and Salazar entered into a custody agreement in 2006 the agreement did not destroy Salazar’s right to parental authority under Nuevo León law.

2. Mature-Child Exception

The Seventh Circuit lastly considered whether the District Court abused its discretion when it did not permit D.S. to remain in the United States. The Convention’s “mature-child” exception provides that a court “may [ ] refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its

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136 *Id.*

137 *Id.* at 1164 (citing Altamiranda Vale v. Avila, 538 F.3d 581, 587 (7th Cir. 2008)).

138 *Id.* at 1166.

139 *Id.*

140 *Id.* Nuevo León Civil Code identifies events and conditions when the right of *patria potestas* (parental authority) will terminate, including death of the parent, child’s emancipation by marriage, child abuse, etc. Código Civil para el Estado de Nuevo Leon, arts. 443–48, Periódico Oficial 11-05-2016 (Mex.).

141 *Garcia*, 808 F.3d at 1167.
views.” 142 The Seventh Circuit agreed with the District Court that both conditions of the mature-child exception were satisfied in this case, namely D.S. objected to returning to Mexico and he achieved an age and maturity where it was appropriate for the court to consider his views. 143 However, the Seventh Circuit affirmed the District Court’s discretion not to apply the exception. 144 The court reasoned that the longer a child is wrongfully retained the more the child will acclimate to the new country. 145 This can provide perverse incentives for parents to cause delays in Convention proceedings, which would frustrate the Convention’s purpose to “secure the prompt return of children wrongfully removed to or retained.” 146

Underscoring its desire not to undermine the Convention by permitting a child to stay in a country where he was wrongfully retained, the Seventh Circuit found that the District Court did not abuse its discretion in ordering D.S. to return to Mexico despite satisfying the Mature Child exception. 147

In summary, the Seventh Circuit affirmed the judgment of the district court and the district court’s order to return D.S. to Mexico. 148 Galvan did not request rehearing on this case or file a petition for writ of certiorari to the U.S. Supreme Court.

143 Garcia, 808 F.3d at 1167.
144 Id.
145 Id. at 1169.
146 Id.; Hague Convention, art. 1.
147 Garcia, 808 F.3d at 1169.
148 Id.
III. MARTINEZ v. CAHUE

A. The Facts

Jaded Mahelet Ruvalcaba Martinez (Martinez) and Peter Valdez Cahue (Cahue) were in a relationship together, on and off, for nearly ten years. They never married and did not frequently live together. In 2006, Martinez gave birth to a son, A.M., in a suburb near Chicago, Illinois. Cahue voluntarily acknowledged paternity of A.M., and A.M. lived with Martinez from birth. In 2010, Martinez and Cahue signed a private, written custody agreement that provided Cahue liberal parenting time and that Cahue would “NOT fight custody in court for [A.M.].” However, neither Martinez nor Cahue attempted to “memorialize this arrangement in a court order.”

In 2013, Martinez decided to relocate with the parties’ son to Mexico, where she was a citizen. In Mexico, Martinez found employment and enrolled A.M. in private school. A.M. excelled in soccer, “spoke Spanish fluently, attended church regularly, and spent time with extended family.”

While Martinez and A.M. were in Mexico, Cahue consulted an attorney about his rights under The Hague Convention. However, Cahue never filed a petition under the Convention.

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149 Martinez v. Cahue, 826 F.3d 983, 987 (7th Cir. 2016).
150 Id. at 986.
151 Id. at 987.
152 Id.
153 Id.
154 Id.
155 Id.
156 Id.
157 Id.
158 Id.
159 Id.
On October 16, 2013, Martinez “filed a petition against Cahue for child support and an order of protection” in Mexico.\textsuperscript{160} However, Martinez withdrew her petition before the Mexican court ruled on it.\textsuperscript{161} Shortly thereafter, Martinez and Cahue agreed to a visitation plan where Cahue would have parenting time with A.M. during his school vacations in December 2013, April 2014, and July 2014.\textsuperscript{162}

In December 2013, A.M. did not visit Cahue as planned.\textsuperscript{163} Consequently, Cahue began corresponding with the U.S. Department of State.\textsuperscript{164} He was again informed of his rights under The Hague Convention and provided with “a blank petition for relief.”\textsuperscript{165} However, Cahue never filed the petition.\textsuperscript{166}

Cahue’s parenting time with A.M. did proceed as planned in April 2014.\textsuperscript{167} However, in July 2014, Cahue only purchased a one-way ticket for A.M., and Martinez refused to send A.M. to Illinois without a round-trip ticket.\textsuperscript{168} Cahue complied and Martinez sent A.M. to Illinois for the month of July.\textsuperscript{169}

On August 16, 2014, Martinez went to the airport in Mexico to pick up A.M., but he never arrived.\textsuperscript{170} Martinez called Cahue, who claimed he had forgotten about the flight.\textsuperscript{171} Later, Cahue stopped returning Martinez’s calls.\textsuperscript{172} On August 21, Cahue “contacted the
State Department and asked it to put A.M.'s passport “on hold” so that A.M. could not leave the United States.”

On August 25, 2014, Martinez traveled to Illinois to retrieve her son. She took A.M. from Cahue and returned to her parents’ home in Illinois. In the Illinois circuit court, Cahue filed a petition for custody and an emergency motion to prevent Martinez from relocating with A.M. to Mexico. The Illinois circuit court granted Cahue’s emergency motion and police seized A.M. from Martinez. Martinez retained counsel and filed a response to Cahue’s custody petition. After a hearing on September 17, 2014, the Illinois court continued Cahue’s physical possession of A.M. and “ordered the surrender of A.M.’s U.S. and Mexican passports.”

Martinez returned to Mexico. “On February 6, 2015, she filed her petition under the Convention with the Mexican Central Authority.” The U.S. State Department received the petition on March 13, 2015.”

**B. District Court Opinion**

“[O]n December 15, 2015, after she discovered that Cahue had obtained a new U.S. passport for A.M., Martinez commenced emergency proceedings in the district court and filed her verified
petition in the Northern District of Illinois for A.M.’s return to Mexico. 183

The Northern District of Illinois held an evidentiary hearing on the matter. 184 The District Court found “that there was sufficient evidence that A.M. had acclimated to Mexico during the year he lived there with this mother.” 185 However, the District Court also found that the parties did not share an intent for A.M. to relocate to Mexico. 186 Without “shared parental intent,” the District Court held that A.M.’s habitual residence was Illinois, that Cahue’s retention of A.M. in Illinois was therefore lawful, and dismissed Martinez’s petition. 187

C. Appeal to the Seventh Circuit

Martinez appealed from the judgment of the Northern District of Illinois to the Seventh Circuit. 188 The case was heard by a panel consisting of Chief Judge Wood and Judges Bauer and Flaum. 189 At issue for the court was (1) whether the district court properly identified A.M.’s habitual residence and, if not, (2) whether the parties had any defenses. 190 Chief Judge Wood, writing a unanimous opinion, found that Martinez had sole custody over A.M. under Illinois law and held that Mexico was A.M.’s habitual residence. 191 Finding that Cahue’s retention of A.M. was wrongful under the Convention, the Seventh Circuit reversed the district court, ordering A.M. to be returned to Martinez in Mexico. 192

183 Id.
184 Id.
185 Id.
186 Id.
187 Id.
188 Id.
189 Id. at 986.
190 Id. at 989–90.
191 Id. at 994.
192 Id.
1. Habitual Residence

Chief Judge Wood began her opinion underscoring the purpose of the Convention as “an anti-abduction treaty.” She next identified that the habitual residence determination is a mixed question of law and fact and that the standard of review of the district court’s determination is de novo. She noted that de novo review is essential both because the habitual residence determination is often outcome determinative for Convention cases and “to assure both the national and the international uniformity that the Convention was designed to achieve.” The Seventh Circuit reviewed findings of historical fact with deference.

Next, Chief Judge Wood assessed the two primary factors for determining habitual residence: (1) parental intent and (2) child’s acclimatization to the proposed home jurisdiction. She noted that the Seventh Circuit has tended to privilege parental intent but emphasized the fact-specific nature of the inquiry.

Regarding parental intent, the Seventh Circuit found that the district court wrongly considered Cahue’s intent for A.M. to remain in Illinois. Chief Judge Wood noted that “[t]he intention or purpose which has to be taken into account is that of the person or persons entitled to fix the place of the child’s residence.” The Seventh Circuit found that Cahue never asserted his custody rights under the

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193 Id. at 989. See supra Section The Hague Convention.
194 Martinez, 826 F.3d at 989.
195 Id. at 988 (“[I]f a child is currently located in her habitual residence, her presence in the country (whether by removal or retention) is not wrongful.”).
196 Id. at 989.
197 Id.
198 Id. at 990.
199 Id.
200 Id. at 992.
201 Id. at 990 (quoting Redmond v. Redmond, 724 F.3d 729, 747 (7th Cir. 2013)) (emphasis in original).
Convention. Although Martinez and Cahue had written visitation agreements, neither Cahue nor Martinez ever entered them with a court. The court refused to enforce the agreements as against public policy. “In the absence of a court order, Illinois law presumes the mother of a child [of unmarried parents] has sole custody.” As such, “Cahue had no custody rights under Illinois law.”

The Seventh Circuit also found that a noncustodial parent like Cahue “has no right to determine the child’s location; he or she has only the right to ask a court to supervise.” At no point did Cahue invoke the Court’s powers to determine whether it was in A.M.’s best interests to relocate to Mexico. The Seventh Circuit reasoned that because Martinez had sole custody of A.M. under Illinois law and under the Convention, only her intent—to relocate to Mexico—mattered.

Regarding the child’s acclimatization factor, the Seventh Circuit noted that the district court found “A.M. had acclimatized to Mexico” with “all of the indicia of habitual residence, including friends, extended family, success in school, and participating in community and religious activities.” The Seventh Circuit found the district court’s findings were not clearly erroneous. Thus the Seventh

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202 Martinez, 826 F.3d at 990.
203 Id. at 990–91.
204 Id.
205 Id. (citing 720 ILCS 5/10-5(a)(3)(2013) and 750 ILCS 45/14(a)(2) (2013)).
206 Martinez, 826 F.3d at 991.
208 Martinez, 826 F.3d at 991.
209 Id. at 992.
210 Id.
211 Id.
Circuit held that because only Martinez’s intent to relocate to Mexico was of legal significance in this matter and because A.M. had already acclimatized to Mexico, Mexico was A.M.’s habitual residence.\textsuperscript{212}

2. Defenses and Aims of the Convention

The Seventh Circuit noted that because the district court found Illinois to be A.M.’s habitual residence, the district court did not consider the “wrongfulness of Cahue’s 2014 retention of A.M., or any possible defenses that Cahue might have raised.”\textsuperscript{213} The Seventh Circuit decided not to remand the case since the case was sufficiently briefed and time-sensitive.\textsuperscript{214}

The Seventh Circuit first considered whether Cahue violated Martinez’s rights of custody under Mexican law.\textsuperscript{215} Noting that “Cahue admit[ted] that he retained A.M. in Illinois without Martinez’s consent,” the Seventh Circuit found that Cahue indeed violated Martinez’s custody rights.\textsuperscript{216}

Next, the Seventh Circuit considered whether any defenses Cahue raised applied to his wrongful actions: (1) whether Martinez acquiesced to his retention of A.M. or (2) whether “A.M. is now so settled in his new environment that he should not be returned” to Mexico.\textsuperscript{217} First, the Seventh Circuit found that Martinez never acquiesced to Cahue’s retention of A.M. in Illinois because she continuously exercised her custody rights by trying to remain in contact with A.M. and to regain physical possession of A.M.\textsuperscript{218}

\textsuperscript{212} Id.
\textsuperscript{213} Id.
\textsuperscript{214} Id.
\textsuperscript{215} Id. at 992–93.
\textsuperscript{216} Id. at 993.
\textsuperscript{217} Id. (internal quotations omitted).
\textsuperscript{218} Id.
Second, the Seventh Circuit refused to apply the “settled-child” defense for public policy reasons.219 The Seventh Circuit found that Cahue had multiple opportunities to assert his parental rights but never did so before his wrongful retention of A.M.220 Instead, Cahue engaged in “self-help” by retaining A.M. in Illinois without permission and filing a custody petition in Illinois.221 The Seventh Circuit noted that “[t]he Convention achieves its aims both by returning children in individual cases and by deterring future abductions or wrongful retentions.”222 The Seventh Circuit found that returning A.M. to Cahue would “be quite damaging to the deterrent effect of the Convention.”223

In summary, the Seventh Circuit reversed the judgment of the district court and ordered A.M. to be returned to Martinez in Mexico.224 The Seventh Circuit denied rehearing and rehearing en banc on July 29, 2016.225 On October 27, 2016, Cahue filed a petition for writ of certiorari to the U.S. Supreme Court. As of March 11, 2017, the petition for writ of certiorari remains pending and was distributed for conference on March 17, 2017.

219 Id. at 993–94.
220 Id. at 993.
221 Id.
222 Id.
223 Id.
224 Id. at 994.
225 Martinez v. Cahue, 826 F.3d 983 (7th Cir. 2016), petition for cert. filed (U.S. Oct. 27, 2016) (No. 16-582).
IV. ANALYSIS

A. When Decision-making Parental Rights are Conferred

In both Garcia and Martinez, the natural fathers of the children at issue formally acknowledged their paternity. This is important in both the United States and in Mexico. In both countries, a voluntary acknowledgement of paternity will confer rights and duties on the parent.

However, in Mexico, patria potestas [parental authority] laws give parents who have voluntarily acknowledged paternity the right to exercise decision-making over the child’s life. In the United States, no such rights are automatically conferred to a parent who has voluntarily acknowledged paternity. Instead, the voluntary acknowledgement of paternity serves as a basis from which a parent can seek the court’s determination of custody issues. In jurisdictions like Illinois, courts retain the power to make decisions about whether one or both parents shall have custody in order to protect children’s...

226 Martinez, 826 F.3d at 987; Garcia v. Pinelo, 808 F.3d 1158, 1160 (7th Cir. 2015).
228 Código Civil Federal [CC], art. 413; see Sedillo López, supra note 81, at 297.
229 See, e.g., CAL. FAM. CODE § 7573 (West, Westlaw through all 2016 Reg. Sess. Laws, Ch. 8 of 2015-16 2d Ex. Sess.) (“The voluntary declaration of paternity shall be recognized as a basis for the establishment of an order for child custody, visitation, or child support.” (emphasis added)); Illinois Parentage Act of 2015, § 305(a)–(b).
230 See, e.g., CAL. FAM. CODE § 7573; Illinois Parentage Act of 2015, § 305(a)–(b).
best interests.\textsuperscript{231} For example, Section 602.5(a) of the IMDMA provides in pertinent part, “The court shall allocate decision-making responsibilities \textit{according to the child’s best interests}. Nothing in this Act requires that each parent be allocated decision-making responsibilities.”\textsuperscript{232} In this manner, custody rights in the United States are not automatic—courts assign custody rights in the child’s best interests.

Consequently, an unmarried parent who has voluntarily acknowledged paternity and whose child’s country of habitual residence follows the parental authority laws, like Mexico, will likely have a right of custody on which to prevail in a Hague Convention petition because the parental authority laws instill both parents with rights to determine the child’s place of residence.\textsuperscript{233} In contrast, the unmarried parent who has voluntarily acknowledged paternity and whose child’s state of habitual residence is a state like Illinois will not automatically have a right of custody under the Convention because states like Illinois do not automatically confer decision-making powers to such parents.\textsuperscript{234}

These outcomes bore out in both \textit{Garcia} and \textit{Martinez}. In \textit{Garcia}, the parties’ child was born in Mexico.\textsuperscript{235} The child’s state of habitual residence was Mexico.\textsuperscript{236} Under Mexican law, since Salazar voluntarily acknowledged D.S. as his son, Salazar’s \textit{patria potestas} rights attached.\textsuperscript{237} Thus when Galvan refused to return D.S. to Mexico,

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\textsuperscript{232} Illinois Marriage and Dissolution of Marriage Act, § 602.5(a) (emphasis added).

\textsuperscript{233} Código Civil Federal [CC], art. 413; see Sedillo López, \textit{supra} note 81, at 297.

\textsuperscript{234} \textit{See, e.g.,} Illinois Parentage Act of 2015, § 305(a)–(b).

\textsuperscript{235} Garcia v. Pinelo, 808 F.3d 1158, 1160 (7th Cir. 2015).

\textsuperscript{236} \textit{Id.} at 1159.

\textsuperscript{237} \textit{Id.} at 1166.
she violated Salazar’s right of custody under The Convention and parental authority laws to determine where D.S. should live.\textsuperscript{238}

In contrast, in \textit{Martinez}, the Seventh Circuit found that Cahue did not have any rights of custody under the Convention.\textsuperscript{239} In \textit{Martinez}, although the parties’ child, A.M., was born in Illinois,\textsuperscript{240} Martinez took A.M. to live in Mexico when he was seven years old.\textsuperscript{241} After sending A.M. back to Illinois to visit his father for the summer, Cahue refused to return A.M. to Mexico.\textsuperscript{242}

Although Martinez filed a petition under the Convention to return A.M. to Mexico, the Seventh Circuit first considered whether Martinez wrongfully removed A.M. from Illinois in the first place.\textsuperscript{243} The Seventh Circuit likely made the right call to do so because the purpose of the Convention is to prevent parents from “obtain[ing] custody of children by virtue of their wrongful removal or retention.”\textsuperscript{244} Martinez should not prevail in her Convention petition if she removed A.M. wrongly first.

However, the Seventh Circuit found that Cahue took no action to assert his custody rights before he engaged in “self-help” to keep A.M. in Illinois.\textsuperscript{245} As mentioned above, Cahue’s voluntary acknowledgement of paternity only made him a parent; Illinois did not automatically confer custody rights to Cahue by virtue of his paternity acknowledgment.\textsuperscript{246} Because Cahue did not assert his parental rights in court before he retained A.M. in Illinois, he triggered the default

\textsuperscript{238} \textit{Id.} at 1159. \\
\textsuperscript{239} \textit{Martinez v. Cahue}, 826 F.3d 983, 991 (7th Cir. 2016). \\
\textsuperscript{240} \textit{Id.} at 987. \\
\textsuperscript{241} \textit{Id.} \\
\textsuperscript{242} \textit{Id.} at 988. \\
\textsuperscript{243} \textit{Id.} at 990. \\
\textsuperscript{245} \textit{Martinez}, 826 F.3d at 990. \\
custody laws in Illinois, which provide that “[i]n the absence of a court order, Illinois law presumes that the mother of a child [of unmarried parents] has sole custody.” Consequently, in the absence of a court order, Martinez had sole custody of A.M. and sole discretion as to where A.M. would live. Thus, under the Convention, Martinez did not violate any of Cahue’s rights of custody by removing A.M. to Mexico because Cahue did not have any under Illinois law to begin with.

But what about the private custody agreement Martinez and Cahue signed in 2010 promising Cahue liberal parenting time? Article III of the Convention provides in part that rights of custody may arise “by reason of an agreement having legal effect under the law of that State.” The commentaries to the Convention state that for private agreements to have legal effect they must not be prohibited by law.

As discussed above in Part I.B.1., private contracts or agreements related to child custody are generally unenforceable as against public policy in the United States. Only custody agreements supervised and approved by the court are permissible so that courts protect children’s best interests through the supervisory process. Cahue never attempted to memorialize his agreement with Martinez in a court order. As such, the private agreement was void as against public policy.

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247 Martinez, 826 F.3d at 990–91; Illinois Parentage Act of 2015, § 802(c).
248 Martinez, 826 F.3d at 991.
249 Id.
250 Id. at 987.
252 Perez-Vera Report, supra note 44, ¶ 70.
255 Martinez v. Cahue, 826 F.3d 983, 987 (7th Cir. 2016).
policy and did not serve as an example of Cahue asserting his parental rights.

What about the court order resulting from Cahue’s petition for custody in Illinois? This court order was filed after Cahue retained A.M. in Illinois without Martinez’s permission. Article 17 of the Convention provides in pertinent part:

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

The purpose of Article 17 is to “ensure, inter alia, that the Convention takes precedence over decrees made in favor of abductors before the court had notice of the wrongful removal or retention.” Cahue’s court order in Illinois is exactly the type of order the Convention contemplates. Cahue knew he could get a favorable hearing in Illinois and so he engaged in self-help by retaining A.M. in Illinois and sought refuge in its court system. The Convention is designed to halt court orders that would give effect to Cahue’s attempts to circumvent Martinez’s parental rights. As such, the court orders issued in response to custody petitions after Cahue’s retention of A.M. in Illinois cannot evince efforts to assert parental rights before A.M.’s retention in Illinois.

256 Id. at 988.
257 Id.
B. How Outcomes Would Have Been Different

1. Garcia v. Pinelo

In Garcia, the Seventh Circuit found that Salazar had a right of custody under the Convention because he had a parental authority right under Nuevo León state laws by voluntarily acknowledging paternity of D.S.260 But what if Nuevo León, Mexico did not have parental authority laws and instead followed the laws of Illinois?

In that case, Salazar would not have a right of custody under the Convention. Even though the parties did have a custody order from the court,261 Salazar still would not have a right of custody because Galvan was allocated physical custody of D.S. while Salazar was allocated weekly visitation.262 Under the Convention, Salazar’s court approved weekly visitation is not a right of custody—a right to determine the child’s place of residence.263 Instead, Salazar has a “right of access.”264

Although Salazar would not have a right of custody to prevent Galvan from automatically retaining D.S. in the United States, Salazar would have rights arising out of the original court order allocating custody and visitation.265 The parties’ court order would enable Salazar to ask a court in either Illinois or Mexico to conduct a hearing to determine whether it is in D.S.’s best interests to remain in Illinois.266 In this manner, because Galvan and Salazar had a

260 Garcia v. Pinelo, 808 F.3d 1158, 1166 (7th Cir. 2015).
261 Id. at 1160.
262 Id.
264 Id.
265 Id. arts. 3 & 21.
266 Id. art. 21; Illinois Marriage and Dissolution of Marriage Act, 750 ILL. COMP. STAT. ANN. 5/413(b)(2) (West, Westlaw through Pub. Act 99-937, 2016 Reg. Sess.); 750 ILL. COMP. STAT. ANN. 5/609.2(g) (West, Westlaw through Pub. Act 99-
preexisting, court-approved custody agreement, Galvan’s ability to relocate is encumbered by Salazar’s right to petition the court to make a best interest determination.

2. Martinez v. Cahue

The outcome would also be different in Martinez if Cahue could rely on parental authority laws. Unlike Salazar, Cahue did not have a court order allocating him any rights of custody or visitation. Thus Cahue could not overcome the default custody presumption under Illinois law and the Seventh Circuit found that only Martinez’s parental intent was relevant.

However, in a scenario where Cahue has parental authority rights, the Seventh Circuit likely would find that it would have to consider both Martinez’s and Cahue’s intent. Because Cahue, like Salazar, voluntarily acknowledged paternity of his child, the right of parental authority would attach immediately. With the right of parental authority, Cahue would have a right of custody on which to rely in a Convention petition.

In this manner, when Martinez left Illinois to move to Mexico, he could have filed a Hague petition to return A.M. to Illinois because the parties lacked mutual intent for A.M. to relocate. Martinez would have an encumbered right of custody where she would be unable to relocate without a court determining whether relocation was in the child’s best interests.

C. What’s the Better Rule?

Mexico’s parental authority rights and Illinois’s presumption that an unmarried mother has sole legal custody of her children in the

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267 Martinez v. Cahue, 826 F.3d 983, 987 (7th Cir. 2016).

268 Id. at 991.
absence of a court order reflect different policy considerations. Ultimately, Illinois’s presumption is the better rule because children’s best interests are better protected.

Parental authority rights, as originally conceived and as they have evolved in jurisdictions like Mexico, stand for the proposition that parenthood is rooted in the natural order of the world. As a natural consequence of the parent-child relationship, certain parental rights and powers automatically arise at a child’s birth or a parent’s voluntary acknowledgment of paternity. In other words, both parents—regardless of marital status—have natural rights to make decisions about their children by virtue of the parent-child relationship.

However, in jurisdictions like Illinois, no such natural rights exist for unmarried fathers or partners of unmarried mothers. The parens patriae doctrine subordinates the natural rights of parents so that the State—through the courts—can guarantee that parents pursue their children’s best interests despite the parents’ separated or divorced status.

As discussed above, in the absence of a court order allocating parental responsibilities, Illinois law presumes unmarried mothers have sole legal custody of their children. The historical and practical reason for this presumption is that maternity usually is not questioned since a biological mother is present at birth.

Illinois’s presumption that an unmarried mother retains sole legal custody of her children in the absence of a court order is predicated on the assumption that unmarried fathers are not involved in raising their

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269 Bégné, supra note 22, at 528.
270 Id.
271 Id. at 527.
272 46 AM. JUR. 2D Juvenile Courts, Etc. § 19 (2016).
274 See, e.g., CENT. MINN. LEGAL SERVS. UNMARRIED FATHERS’ GUIDE TO PATERNITY, CUSTODY, PARENTING TIME AND CHILD SUPPORT IN MINNESOTA 5 (3d rev. ed. 2011).
children when the parents have not entered into a custody agreement. Presuming for a moment that this assumption is correct, enabling a parent to assert rights of custody for the first time in a Convention proceeding would undermine the stability of the children’s status quo where their mother made significant parenting decisions alone.

However, the assumption that the absence of a court order signifies a lack of parental involvement may, in fact, not be true. As previously mentioned, many unmarried couples with children prefer to follow informal parenting arrangements without court orders. Additionally, going to court is expensive and requiring unmarried parents to formalize their parenting arrangements in court may place a high burden on the most vulnerable unmarried parents.

Despite these shortcomings, Illinois’s presumption that an unmarried mother has sole legal custody of her children in the absence of a court order remains the better public policy. Allowing parents to assert rights of custody for the first time through parental authority rights enables such parents to circumvent children’s best interests through gamesmanship.

For example, in Martinez v. Cahue, Peter Cahue consulted an attorney regarding his legal options. Yet he never followed through with filing a petition to allocate parental responsibilities and parenting time. He also researched his rights under The Hague Convention. But knowing, in his own words, “[he] wouldn’t have won,” Cahue engaged in self-help by retaining A.M. in Illinois against Jaded Martinez’s wishes and deploying the Illinois courts to secure favorable custody orders. If Cahue had parental authority rights, he would be able to disturb the status quo without any court having previously

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276 Bowman, supra note 5, at 222.
277 Martinez v. Cahue, 826 F.3d 983, 987 (7th Cir. 2016).
278 Id.
279 Id.
280 Id. at 993.
considered A.M.’s best interests. Such a result rewards custodial gamesmanship rather than protecting A.M.’s best interests.

A primary aim of the Convention is to deter parents from not only child abductions and wrongful retentions but also adversarial gamesmanship involving children. Such gamesmanship can take many forms, but courts are particularly concerned about deterring custodial parents from bargaining to retain legal and physical custody of their children by accepting reduced support payments. In Garska v. McCoy, the Supreme Court of Appeals of West Virginia noted:

[W]e are concerned to prevent the issue of custody from being used in an abusive way as a coercive weapon to affect the level of support payments and the outcome of other issues in the underlying divorce proceeding. Where a custody fight emanates from this reprehensible motive the children inevitably become pawns to be sacrificed in what ultimately becomes a very cynical game.

Because adversarial gamesmanship, e.g., accepting lower support payments to retain custody, would not be in the children’s best interests, courts in jurisdictions like Illinois make best interest determinations in custody proceedings to make sure that the children—who often do not have a voice in the custody proceeding itself—are protected from the adversarial process.

Illinois’s presumption is a better rule because it is narrow. The presumption only applies in the absence of a court order.

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284 Id. at 361.
unmarried parents have voluntarily acknowledged paternity and sought the court’s relief to adjudicate each parent’s custody rights, the presumption will not apply.286 Under The Hague Convention, a parent with a court order predating the alleged wrongful abduction or retention will more easily be able to argue that rights of custody or access exist.287 Moreover, even if a parent only has rights of access, the parent can still request under the Convention that Contracting States enforce and protect the rights of access.288

More importantly, if the parties obtain a custody judgment contemporaneously with a voluntary acknowledgment of paternity, then the parties will have gone through a process where the court has considered the child’s best interests.289 In contrast, an unmarried parent without a custody order who relies on parental authority laws as a right of custody under the Convention may not have had a court ever previously consider the child’s best interests. This essentially means that such a parent could assert his rights for the first time in court by filing a petition under the Convention rather than when the parent voluntarily acknowledged paternity in the first place.

Whether a parent asserted parental rights before asserting rights of custody in a petition under the Convention matters because stability is important in children’s lives.290 Courts and practitioners agree that fostering stability in the midst of a family’s breakup is in children’s

286 720 ILL. COMP. STAT. ANN. 5/10-5(a)(3); 750 ILL. COMP. STAT. ANN. 46/802(c).
288 Hague Convention, supra note 14, at art. 21, 1343 U.N.T.S. at 102.
best interests. Consequently, courts applying the best interests standard will often favor maintaining the status quo of custody arrangements in order to prevent disruption in children’s lives.

V. CONCLUSION

As this article goes to print, the U.S. Supreme Court will decide whether to grant Cahue’s petition for writ of certiorari. Cahue’s actions are exactly the kind that the Hague Convention is meant to deter—self help and litigious gamesmanship at the expense of a child’s best interests. Illinois’s presumption that an unmarried mother has sole custody of her children in the absence of a court order prevents parents like Cahue from using the Hague Convention and laws like it to their tactical advantage. Although social trends in the United States point to less formal relationships—e.g., avoidance of the institution of marriage—and informal parenting arrangements, such informal parenting arrangements do not protect children’s best interests in the unhappy event the unmarried parents cannot agree as to how to raise their children. Requiring unmarried fathers or partners of unmarried mothers to obtain a court order to define their custodial rights adds formality to the family status that should help protect the children’s interests. In all likelihood, the Supreme Court will deny Cahue’s petition for writ of certiorari. But if it does grant certiorari, the Court should affirm the Seventh Circuit.

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291 E.g., Davis, 792 N.E.2d at 394; See ALI PRINCIPLES, supra note 290, § 2.05 cmt. i.
HORSING AROUND WITH DOBSON AND CHEVRON: TAX DEFERENCE IN ROBERTS V. COMMISSIONER

MEGAN HEINZ*


INTRODUCTION

In April of 2016, the United States Court of Appeals for the Seventh Circuit reversed an opinion by the United States Tax Court in Roberts v. Commissioner.1 The reversal has been called “an embarrassment not only for the Internal Revenue Service (“IRS”), but for the Tax Court judge in the case.”2 The Seventh Circuit’s opinion is rife with patronizing language, arguing “[w]e mustn’t be too hard on the Tax Court,” and referring to certain IRS regulations as “goofy.”3

In Dobson v. Commissioner, the United States Supreme Court severely restricted appellate review of Tax Court decisions by circuit courts, essentially forbidding reversal without a “clear-cut mistake of

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1 820 F.3d 247, 254 (7th Cir. 2016).


3 Roberts, 820 F.3d at 250.
law.” The “Dobson rule” has since fallen out of favor, but has had a lasting impact on deference issues in the Tax Court context.

The United States Supreme Court again changed the landscape of deference in *Chevron U.S.A., Inc. v. National Resource Defense Council, Inc.* The *Chevron* decision stands for the principle that agency expertise should be granted a certain amount of deference in the interpretation of statutes. In *Mayo Foundation for Medical Education and Research v. United States*, the Supreme Court definitively determined that *Chevron* deference should apply to regulations promulgated by the United States Treasury Department.

This article will discuss the impact and enduring effect of both the *Dobson* and *Chevron* decisions on federal tax litigation. It will also discuss the impact these decisions have, or should have had, on the Seventh Circuit’s decision in *Roberts v. Commissioner*. Finally, it will address how the courts and the Department of the Treasury and IRS might act in an attempt to clarify what deference should look like in the tax world going forward.

I. DEFERENCE ISSUES IN TAX

The United States Tax Court is a federal trial court established by the United States Congress under Article I of the United States Constitution. Its first incarnation was as the Board of Tax Appeals, which was established by Congress through the Revenue Act of 1924. The Board of Tax Appeals was an independent agency within the executive branch. In 1929, the Supreme Court’s decision in *Old Colony Trust Co. v. Commissioner* definitively established that the

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6 Id. at 844.
8 26 U.S.C. § 7441 (establishing the Tax Court as an Article I court).
9 See HAROLD DUBROFF, THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS, 1 (2nd ed. 1979).
10 Id.
Board was “not a court,” but rather “an executive or administrative board.”

Congress changed the Board’s name to the “The Tax Court of the United States” in 1942 and again to “The United States Tax Court” in 1969. At this point, the status of the Tax Court changed from an administrative board within the executive branch to a purely judicial court.

In Freytag v. Commissioner, the Supreme Court asserted “[t]he Tax Court exercises judicial power to the exclusion of any other functions.”

For several reasons, the Tax Court is the forum of choice for up to 97 percent of federal tax litigation. The most common reason taxpayers choose to litigate in the Tax Court, rather than in federal district court, is the ability to avoid paying the tax in question before contesting.

When taxpayers receive an unfavorable ruling from the Tax Court, those decisions are appealable to the federal courts of appeal. The Tax Court is in a unique position as a court outside of the judicial branch whose appeals are heard by judicial branch courts. The question of appropriate standard of review for Tax Court decisions, therefore, has been heavily contested since the Tax Court’s inception.

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11 279 U.S. 716, 725.
14 See Freytag v. Comm’r, 501 U.S. 868, 891 (1991) (“[The Tax Court’s] function and role in the federal judicial scheme closely resemble those of the federal district courts, which indisputably are ‘Courts of Law.’”).
15 Id.
17 See Kaffenberger v. United States, 314 F.3d 944, 958 (8th Cir. 2003) (“Full payment of a tax assessment is a prerequisite to suit in federal district court; taxpayers may bring prepayment suits only in United States Tax Court.”).
20 See DUBROFF, supra note 9, at 472-474.
A. Dobson v. Commissioner and Deference to the Tax Court

Dobson v. Commissioner was brought before the Supreme Court in 1943. The case raised the issue of a doctrine known as the “tax benefit rule.” It consisted of a consolidation of four petitions by the Commissioner wherein the Court of Appeals had reversed Tax Court decisions. The facts of one case defined the common issue.

The taxpayer in question, James N. Collins, had sold certain shares at a loss in tax years 1930 and 1931 and claimed those losses as deductions on his tax returns. In 1936, Collins learned that the stocks had not been appropriately registered in compliance with certain state laws. He sued the seller of the stocks for fraud and failure to register, asking for rescission of his entire purchase. The suit was settled in 1939 and Collins netted a recovery of $45,150.63. Collins, however, did not report any part of his recovery, including that which was allocable to his previously claimed losses, as income on his 1939 tax return. Adjustment of his 1930 and 1931 tax liability was barred by the statute of limitations during the 1939 tax year.

The Commissioner adjusted Collins’ gross income for the 1930 tax year by adding the recovery attributable to the sold shares as ordinary gain. Collins sought redetermination by the Board of Tax Appeals (now the Tax Court). He argued that he recognized no gain or income as he had received no tax benefit from his 1930 and 1931 loss

21 Dobson v. Comm’r of Internal Revenue, 320 U.S. 489 (1943).
22 See id. at 492.
23 Id. at 490.
24 Id.
25 Id. at 491.
26 Id.
27 Id.
28 Id.
29 Id.
30 Id.
31 Id.
32 Id. at 492.
deductions.\textsuperscript{33} The Tax Court agreed with Collins and concluded that he had no taxable gain.\textsuperscript{34}

The Court of Appeals for the Eighth Circuit held that the Tax Court had overstepped its bounds in applying the “tax benefit theory.”\textsuperscript{35} The Eighth Circuit argued that the “tax benefit theory” was an equitable one, without root in statute or regulation.\textsuperscript{36} Therefore, the Tax Court used it inappropriately to determine whether Collins had recognized taxable gain.\textsuperscript{37} The Supreme Court granted certiorari, determining that “questions important to tax administration were involved” in the underlying case.\textsuperscript{38}

Justice Robert H. Jackson wrote for a unanimous Court.\textsuperscript{39} Justice Jackson had a particularly unique perspective on the substance of the Dobson case. Early in his career, he served as Chief Counsel for the U.S. Treasury Department’s Bureau of Internal Revenue,\textsuperscript{40} known today as the Internal Revenue Service.\textsuperscript{41} Some have speculated that Justice Jackson considered much of the appellate review of Tax Court decisions unnecessarily complex.\textsuperscript{42} Accordingly, he intentionally wrote the Dobson opinion to limit such review.\textsuperscript{43}

The Court reversed the decision below, rejecting the Commissioner’s argument and reinstating the decision of the Tax
Court. The opinion emphasized that appellate courts should defer to Tax Court findings absent “a clear-cut mistake of law.” Several reasons are given for this proposition, including the unique expertise of the Tax Court and the advantage of uniformity in tax law application. The guiding principle that Tax Court decisions should be given a heightened amount of deference became known as the “Dobson rule.”

B. After Dobson

Legal scholars and commentators swiftly criticized the Dobson decision. Critics took particular issue with the opinion’s confusing and unclear distinction between the reviewability of legal and factual findings. The courts were equally frustrated with Dobson. The Court of Appeals for the First Circuit wrote that the decision raised “a question which will no doubt perplex the circuit courts of appeals until

44 See Dobson, 320 U.S. at 507.
45 Id. at 502.
46 Id.
47 See e.g., Leandra Lederman, (Un)appealing Deference to the Tax Court, 63 DUKE L.J. 1835, 1867 (2014).
48 See e.g., Randolph E. Paul, Dobson v. Commissioner: The Strange Ways of Law and Fact, 57 HARV. L. REV. 753 (1944) (“The Supreme Court in the Dobson Decision leaves an impression that difficulty in answering a question may excuse a failure to answer it.”); Louis Eisenstein, Some Iconoclastic Reflections on Tax Administration, 58 HARV. L. REV. 477 (1945) (“[T]he Dobson decision is a poorly disguised effort to rescue the Supreme Court from the growing demands of tax litigation and, at the same time, augment the scope of administrative finality.”); Erwin N. Griswold, The Need for a Court of Tax Appeals, 57 HARV. L. REV. 1153, 1170-73 (1944) (“[T]here is almost certain to be more litigation as to the applicability of the Dobson rule than there was as to the basic tax questions themselves.”).
49 See e.g., Dubroff, supra note 9, at 807; Ralph S. Rice, Law, Fact, and Taxes: Review of Tax Court Decisions Under Section 1141 of the Internal Revenue Code, COLUM. L. REV. 439 (1951) (“In the entire course of the doctrine’s reign, the court never revealed the criteria by which a clear-cut question of law might be distinguished from other questions.”); Eisenstein, supra note 48, at 540.
further light is shed.” Judge Learned Hand, writing for the Second Circuit Court of Appeals, criticized Dobson on multiple occasions. The Supreme Court itself applied the Dobson rule unevenly, to the further frustration of the courts of appeals. Even those who agreed with Dobson’s reasoning—that the Tax Court had specialized expertise in tax law—acknowledged that the jurisdictional framework under Dobson was untenable.

In 1948, Congress attempted to quell the controversy surrounding Dobson by amending the Internal Revenue Code. As enacted, the statute now dictates the courts of Appeals have “jurisdiction to review the decisions of the Tax Court . . . in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury.” According to the Federal Rules of Civil Procedure, this means that the Tax Court’s findings of fact “must not be set aside unless clearly erroneous.” The Tax Court’s legal

50 Denholm & McKay Realty Co. v. Comm’r, 139 F.2d 545, 550 (1944).
51 See Comm’r v. Nat’l Carbide Corp, 167 F.2d 304, 307 (1948) (“There remains only the vexed question whether we should yield our own judgment to that of the Tax Court.”); Brooklyn Nat’l Corp. v. Comm’r, 157 F.2d 450, 452-53 (1946) (“Why . . . we – or indeed, even the Supreme Court itself – should be competent to fix the measure of the Tax Court’s competence, and why we should ever declare that it is wrong is indeed an interesting inquiry, which happily it is not necessary for us to pursue).
52 See e.g., John Kelley Co. v. Comm’r, 326 U.S. 521, 530 (1946) (concluding that the Tax Court’s findings must be dispositive as the terms in question were well understood); Bingham’s Trust v. Comm’r, 325 U.S. 365, 384 (1945) (refusing to apply the Dobson rule to the facts at hand).
53 See e.g., Bingham’s Trust, 325 U.S. at 384 (Frankfurter, J., concurring) (“The fact that the district courts continue to have vestigial jurisdiction may call for a scientific revamping of jurisdiction in tax cases. It does not counsel against giving the fullest efficacy to Tax Court decisions consonant with its special responsibility.”).
55 Id.
findings should be reviewed *de novo*. Some courts and scholars have interpreted this congressional action as an overruling of *Dobson*—the effective end of the *Dobson* rule. However, the “end” of *Dobson* was not so cut-and-dry, and its shadow continues to linger around the topic of Tax Court appellate review.

In the first place, Congress did not replace the original language of the statute, which outlined the appropriate standard of review. To this day, subsection (c)(1) of Section 7482 states that the courts of appeals “shall have the power to affirm or, if the decision of the Tax Court is not in accordance with law, to modify or to reverse the decision . . . as justice may require.” This is the same language that Justice Jackson used to formulate the *Dobson* rule in the first place. Some scholars have called into question whether Congress intended to overrule *Dobson* in its entirety, or simply to ensure that it did not apply to questions of fact. Regardless of Congress’s intent, it seems well established among courts, including the Supreme Court, that the *Dobson* rule, however interpreted, is no longer binding precedent.

Even though the *Dobson* rule has been effectively overruled, its enduring effect is undeniable; several federal courts have

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57 See *e.g.*, *Griffin v. Camp* 40 F.3d 170, 172 (7th Cir. 1994) (“We subject the district court’s findings of law and mixed findings of law and fact to *de novo* review” (citing *Brewer v. Aiken*, 935 F.2d 850, 855 (7th Cir. 1991))).
58 See *DUBROFF*, *supra* note 9, at 811-12 (“The overruling of the *Dobson* rule was, at that point, so uncontroversial that it was accomplished in a bill, the movement of which through Congress depended on its acceptability to all.”).
59 See *Lederman*, *supra* note 47, at 1867-74.
62 See *Lederman*, *supra* note 47, at 1855-56; David F. Shores, *Deferential Review of Tax Court Decisions: Dobson Revisited*, 49 TAX LAW 629, 673 (1996) (That Congress intended to modify rather than overrule *Dobson* when it amended subsection (a) in 1948 is made plain by the retention of subsection (c)).
63 See, e.g., *Freytag v. Comm’r*, 501 U.S. 868, 912 (1991); *Comm’r v. Idaho Power Co.*, 418 U.S. 1, 19 (1974) (Douglas, J., dissenting) (“Dobson was short-lived, as Congress made clear its purpose that we were to continue on our leaden-footed pursuit of law and justice.”); *Vukasovich v. Comm’r*, 790 F.2d 1409, 1412-13 (9th Cir. 1986).
maintained the idea that the Tax Court’s decisions deserve a special level of deference. The Ninth Circuit in particular has a long history of acknowledging the Tax Court’s specialized expertise. In 2012, the Ninth Circuit heard an appeal from the Tax Court regarding pass-through loss from foreign currency transactions. The taxpayers, a married couple, argued that the Tax Court lacked jurisdiction, which was denied by the Tax Court judge. The taxpayers appealed. In the same breadth that the Ninth Circuit insisted it would “not give the Tax Court special deference in a de novo review,” it acknowledged, “the Tax Court has special expertise in the field” and “its opinions bearing on the Internal Revenue Code are entitled to respect.” The decision of the Tax Court was affirmed.

Several other Ninth Circuit opinions have expressed the same sentiment. For example, in United States v. Hinkson, the court found that in order to reverse the Tax Court, it would have to find the Tax Court’s conclusions “illogical,” “implausible,” or “without support in inferences that may be drawn from facts in the record.” In Sibla v. Commissioner, the Ninth Circuit acquiesced to the Tax Court, stating that the Tax Court had “exercised that degree of special expertise which Congress has intended . . . and that this court should not overrule that body, unless some unmistakable question of law mandates such a decision.”

The Court of Appeals for the District of Columbia, in an appeal from a Tax Court decision, wrote, “we are aware that the Tax Court deserves some deference for its significant expertise on what bare

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64 Meruelo v. Comm’r, 691 F.3d 1108, 1111 (2012).
65 Id. at 1113 (citing Meruelo v. Comm’r, 132 T.C. 355 (2009)).
66 Meruelo, 691 F.3d at 1119.
67 Id. at 1114 (quoting Merkel v. Comm’r, 192 F.3d 844, 847-48 (9th Cir. 1999)).
68 Meruelo, 691 F.3d at 1119.
69 585 F.3d 1247, 1262 (2009) (citing to Anderson v. City of Bessemer City, N.C., 470 S.C. 564, 577 (1985)).
70 611 F.2d 1260, 1262 (1980).
bones allegations are essential . . . in tax deficiency cases.” In 2011, a United States District Court seated in Massachusetts cited to Dobson in asserting that “[w]hile decisions by the Tax Court are not binding, ‘uniform administration would be promoted by conforming to them where possible.’” The Second Circuit did not acknowledge the idea that Tax Court decisions should be treated with the same level of deference as district court decisions until 2013.

C. Chevron Deference and Tax

The Supreme Court case *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.* stands for the principle that courts should defer to agency interpretations of statutes where those interpretations are reasonable. The 1984 decision upheld an Environmental Protection Agency (EPA) regulation. The regulation allowed existing plants to purchase new equipment that did not meet standards set forth by the Clean Air Act of 1977, so long as the total emissions from those plants did not increase.

The decision to uphold the regulation and defer to the EPA’s authority rested largely on the concept that Congress charged the agency with the administration of the Act and that its expertise on its subject matter should be afforded a level of heightened deference.

73 See Diebold Foundation, Inc. v. Commissioner, 736 F.3d 172, 174 (2d Cir. 2013) (“[W]e conclude that the standard of review for mixed questions of law and fact in a case on review from the Tax Court is the same as that for a case on review after a bench trial from the district court: de novo to the extent that the alleged error is in the misunderstanding of a legal standard and clear error to the extent the alleged error is in a factual determination.”). For further discussion of the *Dobson* rule and its continued implications, see Lederman, *supra* note 47, at 1841-74.
74 497 U.S. at 844.
75 Id. at 866.
76 Id. at 840.
77 See id. at 865.
Chevron created a two-step test in determining whether courts should defer to an agency’s statutory interpretation. If Congress’s intent is clear, the matter is closed. If the intent is unclear, the court must then ask whether the agency’s interpretation is reasonable—that is, “based on a permissible construction of the statute.”

Later Supreme Court jurisprudence clarified that Chevron deference does not necessarily apply to any and all actions taken by an agency in the administration of a statute. In United States v. Mead Corp., the Mead Corporation challenged a ruling by the United States Customs Service. Mead imported day planners. The Customs Service imposed a tariff on “diaries, notebooks, and address books,” but until 1993 had not classified Mead’s day planners as such. In January of 1993, Customs changed its position and determined that the day planners should, in fact, be subject to tariff. Mead objected and the case eventually made its way to the Supreme Court. The issue at hand was whether the Customs Service ruling should be granted Chevron deference. The Court determined that an agency’s statutory interpretation should only be afforded Chevron deference “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.”

78 Id. at 842.
79 Id. at 842.
80 Id. at 842-43.
81 Id. at 843.
83 Id. at 225-26.
84 Id. at 224.
85 Id.
86 Id.
87 Id. at 226-27.
88 Id. at 226.
89 Id. at 226-27.
In *Mayo Foundation for Medical Education & Research v. United States*, the Supreme Court affirmed that *Chevron* deference applies to interpretations of the Internal Revenue Code by the United States Treasury Department (of which the IRS is a part). The *Mayo* dispute arose over a disagreement between the IRS and the medical community as to whether residents are “students” who are exempt from FICA taxes.

Internal Revenue Code Section 3121(b) states that “employment,” for the purposes of FICA tax, does not include employment by a university “if such service is performed by a student who is enrolled and regularly attending classes.” In 2004, the Treasury Department issued a regulation setting forth a rule that full time employees cannot qualify for the student FICA exemption, thereby subjecting wages earned by most, if not all, medical residents to FICA taxes. The Mayo Foundation brought suit arguing that the regulation was invalid and that its residents should be exempt. A District Court in Minnesota agreed with Mayo and proclaimed the regulation invalid. When the Government appealed, the Court of Appeals for the Eighth Circuit reversed, finding that *Chevron* applied, that the statute was “silent or ambiguous on the question whether a medical resident working for the school full-time is a ‘student’” and that the regulation in question was “a permissible interpretation” of § 3121(b).

The Supreme Court granted certiorari and affirmed the Eighth Circuit’s decision. The Court began its analysis under the two-part

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90 562 U.S. 44, 55-56 (2011) (“We see no reason why our review of tax regulations should not be guided by agency expertise pursuant to *Chevron* to the same extent as our review of other regulations.”).
91 See id. at 49.
93 Mayo, 562 U.S. at 51.
96 Mayo, 562 U.S. at 51, 60.
The Chevron test.\footnote{Id. at 52.} It determined that “the plain text of the statute . . . [does not] speak with the precision necessary to say definitively whether [it] applies to’ medical residents.”\footnote{Id. at 53.} The first step of Chevron was, therefore, satisfied.\footnote{See id.} The Court went on to say that “[t]he full time employee rule easily satisfies the second step of Chevron, which asks whether the Department’s rule is a ‘reasonable interpretation’ of the enacted text.”\footnote{Id. (quoting Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984)).} Therefore, the decision of the Eighth Circuit below was affirmed and the regulation was upheld.\footnote{Id. at 57.}

In its analysis, the Court also concluded that the regulation satisfied the requirements set forth by Mead.\footnote{Id. at 57.} It wrote that the Department of the Treasury had “explicit authorization to ’prescribe all needful rules and regulations for the enforcement’ of the Internal Revenue Code.”\footnote{Id. (citing 26 U.S.C. § 7805(a)).} This particular pronouncement is significant because it indicates the Mead and Chevron standards apply to both general authority and specific authority regulations.\footnote{See Steve R. Johnson, The Rise And Fall of Chevron in tax: From the Early Days to King and Beyond, 2015 PEPP. L. REV. 19, 25 (2015).} However, where a pronouncement by an agency is less than a formal regulation, it appears settled that Chevron deference does not apply.\footnote{See Christensen v. Harris County, 529 U.S. 576, 587 (2000) (“Interpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant Chevron-style deference.”); see, e.g., Voss v. Comm’r, 796 F.3d 1051, 1066 (9th Cir. 2015) (“[T]he IRS’s Chief Counsel Advice is only entitled to the ‘measure of deference proportional to the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.’” (quoting Christopher v. SmithKline Beecham Corp., 132 S.Ct. 2156, 2168-69 (2012))).}
Some scholars have asserted that *Chevron* deference should also apply to the Tax Court. 106 This argument rests on the fact that the Tax Court originated as the Board of Tax Appeals, which was an independent agency within the executive branch. 107 If it had remained as such, Professor David Shores argues, its interpretive rulings would have been afforded *Chevron* deference. 108 By Professor Shores’s logic, it makes little sense that the Tax Court’s legal interpretations should be reviewed de novo simply because its status has since been converted to that of a judicial court. 109

However, the Tax Court is not an agency. The Tax Court is a “court of record” and only has judicial functions and power. 110 It is generally agreed upon that the notion of *Chevron* deference as it applies to the Tax Court was settled by the Supreme Court’s decision in *Freytag*. 111 The *Freytag* decision held that “the Tax Court is not a ‘Department’ like the Treasury, but rather is a ‘Court of Law.’” 112 It is clear that *Chevron* deference will apply to regulations promulgated by the Department of Treasury and the IRS, 113 but the decisions of the Tax Court hold no such weight. 114

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106 *See, e.g.*, Shores, *supra* note 62, at 669.
107 *See* *Dubroff*, *supra* note 9, at 1.
108 *See* Shores, *supra* note 82, at 669.
109 *Id.* (Shores does acknowledge that “[i]t would be a stretch to claim that review of Tax Court decisions falls within the four corners of *Chevron* [as] *Chevron* involved a classic administrative agency . . . with rulemaking as well as adjudicative powers.”)
110 *See* I.R.C. § 7441 (establishing the Tax Court under Article I as a “court of record”).
The application of Chevron to tax cases has been rocky in the wake of Mayo. Professor Steve Johnson discussed this rocky history in depth and argued that “[p]art of the confusion is the persistent use of ‘deference’ to refer to both force-of-law regulations and mere non-binding guidance documents.” Professor Johnson went on to discuss several cases in which Chevron is either completely ignored where logic dictates it would apply or “converting [Chevron] from a shield to protect agency actions into a sword with which to assail them.” Many recent cases, according to Johnson, point to the fall of Chevron, both in the tax context and generally.

One of the strongest cases indicating the fall of Chevron in tax is the 2015 Supreme Court decision in King v. Burwell. King concerned the interpretation of certain provisions of the Patient Protection and Affordable Care Act (“ACA”). The ACA allowed for subsidies on healthcare exchanges established by the states. A regulation implemented by the IRS as a part of the ACA allowed for subsidies on both state and federally-run exchanges. The petitioners in King argued that the regulation exceeded the authority granted to it by Congress. The Court ultimately determined that the regulation did not warrant Chevron deference, carving out two additional exceptions to Chevron in the process. First, the IRS lacked expertise

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115 See Johnson, supra note 104, at 26-31.
116 Id. at 26.
118 See Johnson, supra note 104, at 31.
119 Id. at 26–31.
120 135 S. Ct. 2480.
121 Id. at 2485.
122 Id. at 2486.
123 Id. at 2488.
124 Id.
125 Id. at 2489.
in the particular area of law, and second, the statute itself did not clearly delegate the authority to the IRS to make decisions of “deep ‘economic and political significance.’”¹²⁶

II. ROBERTS v. COMMISSIONER

A. The Facts of Roberts

Taxpayer Merrill C. Roberts, a successful Indiana businessman and restaurateur, bought his first two racehorses in 1999.¹²⁷ The same year, he built a horse track on his Indianapolis land.¹²⁸ Within three years, he owned ten racehorses and a breeding stallion and obtained an Indiana horse-training license.¹²⁹

By 2005, Roberts was comfortable enough with his horse racing, breeding, and training that he decided to build his own horse training facility.¹³⁰ He purchased a 180-acre parcel of land in Mooresville, Indiana, in 2006, where he began construction.¹³¹ The facility, which included a track, horse stalls, rehabilitation equipment, specialized training areas, and living space for employees, was completed in 2007.¹³²

From 2005 to 2008, Roberts participated in various aspects of the horse racing industry including the boarding, breeding, and training of racehorses.¹³³ He hired a full-time assistant trainer and spent substantial time keeping up the condition of his training facility and studying horse racing strategy.¹³⁴ During that time period, he also

¹²⁶ Id.
¹²⁷ Roberts v. C.I.R., 820 F.3d 247, 248 (7th Cir. 2016).
¹²⁸ Id.
¹²⁹ Id.
¹³⁰ Id.
¹³¹ Id. at 248–49.
¹³³ Id.
¹³⁴ Id. at 4-5.
joined several professional horse racing organizations and served on the board of two of them.\textsuperscript{135}

During those same years, Roberts suffered numerous misfortunes and setbacks.\textsuperscript{136} Several of his horses were injured or killed in lightning strikes and in-race accidents.\textsuperscript{137} These mishaps contributed to losses he deducted for tax years 2005 through 2008.\textsuperscript{138} He also deducted other “ordinary and necessary expenses” related to his racehorse activities.\textsuperscript{139} The Internal Revenue Code allows such deductions for “expenses paid or incurred . . . in carrying on any trade or business.”\textsuperscript{140}

On March 1, 2011, the Commissioner of the Internal Revenue Service (Commissioner) issued a notice of deficiency to Roberts.\textsuperscript{141} Commissioner contended that Roberts was liable for taxes and penalties for tax years 2005 through 2008.\textsuperscript{142} Commissioner’s argument rested on the proposition that Roberts was engaged in his racehorse activities as a hobby and not as a business.\textsuperscript{143} Therefore, his deductions for losses related to those activities were erroneous and disallowed.\textsuperscript{144}

\textbf{B. Roberts in the Tax Court}

The Tax Court heard Roberts’s case on April 29, 2014.\textsuperscript{145} The Tax Court began its analysis by noting that a notice of deficiency by the Commissioner is “presumed correct, and the taxpayer generally

\textsuperscript{135} \textit{Id.} at 5.
\textsuperscript{136} \textit{Id.}
\textsuperscript{137} \textit{Id.}
\textsuperscript{138} \textit{Id.} at 6.
\textsuperscript{139} \textit{Id.}
\textsuperscript{140} \textit{See} 26 U.S.C. § 162(a).
\textsuperscript{141} \textit{Roberts,} 2014 WL 1688127 at *1.
\textsuperscript{142} \textit{Id.}
\textsuperscript{143} \textit{Id.}
\textsuperscript{144} \textit{Id.}
\textsuperscript{145} \textit{Id.}
bears the burden of proving that the determinations are in error.”146 A taxpayer also bears the burden of proof when he claims entitlement to any deduction.147

Under section 183(a) of the Internal Revenue Code (“Code”), a deduction attributable to an activity not engaged in for profit will not be allowed.148 Section 183(c) defines “activity not engaged in for profit” as any activity other than an activity for which deductions are allowable under section 162 or section 212 of the Code.149 Deductions are allowed under these sections where “the taxpayer is engaged in the activity with the actual and honest objective of making a profit.”150 The taxpayer has the burden of proving that actual and honest objective, but need not establish that any expectation of profit was reasonable.151

In its analysis of whether Roberts demonstrated the requisite intent and profit objective, the Tax Court gave more weight to the objective facts than to Roberts’s actual statement of his intent to make profit.152 Reviewing the facts, the Tax Court relied on a series of factors set forth in Treasury Regulation Sec. 1.183-2.153 The factors are:

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146 Id. at *7 (citing Welch v. Helvering, 290 U.S. 111, 115 (1933)).
148 Id. (“[E]xcept to the extent provided by section 183(b) . . . [which] allows for those deductions that would have been allowable had the activity been engaged in for profit only to the extent of gross income derived from the activity, reduced by deductions attributable to the activity that are allowable without regard to whether the activity was engaged in for profit.”).
149 Id. at *8.
150 Id. (citing Dreicer v. Comm’r, 78 T.C. 642, 645 (1982)).
151 Id. (citing Golanty v. Comm’r 72 T.C. 411, 425-26 (1979), aff’d without published opinion, 647 F.2d 170 (9th Cir. 1981)).
152 See id. (citing Elliott v. Comm’r, 84 T.C. 227, 236-37 (1985)).
153 Id.
The manner in which the taxpayer carries on the activity; the expertise of the taxpayer or his advisers; the time and effort expended by the taxpayer in carrying on the activity; the expectation that the assets used in the activity may appreciate in value; the success of the taxpayer in carrying on other similar or dissimilar activities; the taxpayer’s history of income or losses with respect to the activity; the amount of occasional profits, if any, which are earned; the financial status of the taxpayer; and elements of personal pleasure or recreation associated with the activity.\textsuperscript{154}

The factors are non-exhaustive and “no one factor is determinative.”\textsuperscript{155} The Tax Court weighed each of the nine factors individually.\textsuperscript{156}

Regarding the manner in which Roberts carried on his horseracing activities, it determined that Roberts “significantly changed his business model” in 2007 when he moved to the larger property and hired an assistant trainer.\textsuperscript{157} The Tax Court found the “significant changes in operating methods suggest[ed] [Roberts] engaged in horse racing activity for profit once his new facility was placed in service starting in the 2007 tax year.”\textsuperscript{158} It also rejected the Commissioner’s argument that Roberts’s “rudimentary” accounting method was an indicator that his activities were not businesslike.\textsuperscript{159} Rather, it determined that Roberts’s recordkeeping system “allowed him to make informed business decisions,” which appears to be the threshold.\textsuperscript{160}

\textsuperscript{154} Id.; Treas. Reg. § 1.183-2(b).
\textsuperscript{155} Treas. Reg. § 1.183-2(b).
\textsuperscript{156} See Roberts, 2014 WL 1688127 at *8–18.
\textsuperscript{157} Id. at *9 (citing Phillips v. Comm’r, T.C. Memo. 1997-128 (explaining a business plan could be evidenced by actions rather than a written document)).
\textsuperscript{158} Id.
\textsuperscript{159} Id.
\textsuperscript{160} See id.
As to the expertise of Roberts or his advisors, the Tax Court found that Roberts “immersed himself in all aspects of the horse racing business, becoming an expert in his own right.” Roberts also participated in trade associations, in which he eventually took on leadership roles. The Tax Court accepted Roberts’s testimony as credible and believed that he had spent significant time and effort to developing expertise in boarding, breeding, and training, as well as in the financial aspects of the horseracing business, concluding that this factor weighed in his favor for all the years at issue. The Tax Court came to a similar conclusion regarding the “time and effort” factor.

The Tax Court went on to analyze whether Roberts appeared to expect that the assets used in his horseracing venture would appreciate in value. It separated the assets associated with the activities into two types: the horses themselves, and the real property and capital improvements on it. The Tax Court determined that Roberts did not buy the land where he built his first horse track specifically for that purpose and, by his own admission, did not expect the land to appreciate for any reason other than regular real estate appreciation. On the other hand, when Roberts bought the larger property, his specific intent was to use it as a “premier horse training facility.” Therefore, the Tax Court again concluded that Roberts did not manifest intent to profit from his horse racing activities until tax year 2007 when he bought the larger property.

The Tax Court next considered Roberts’s success in carrying on other activities and quickly found his previous entrepreneurial

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161 Id. at *10.
162 Id.
163 Id. at *10–11.
164 Id. at *11–12 ([B]y tax year 2005 petitioner devoted time and effort appropriate to demonstrate a profit objective for all the tax years in issue.”)
165 Id. *12.
166 Id.
167 Id. at *13.
168 Id.
169 Id.
successes weighed the factor in his favor.\textsuperscript{170} When considering Roberts’s history of income and losses associated with his horseracing activities, the Tax Court noted that a portion of his losses were attributable to “a series of unfortunate events beyond his control.”\textsuperscript{171} These unfortunate events, coupled with the fact that Roberts’s horseracing venture was in its “startup stage” during the years at issue balanced against the substantial losses he asserted.\textsuperscript{172} This factor was “neutral.”\textsuperscript{173}

When analyzing the “amount of occasional profits” factor, the Tax Court acknowledged that “[h]orse racing can be very speculative, and the expectation of profit may be very small.”\textsuperscript{174} It determined that Roberts’s expectation of future profits was reasonable and “consistent with the existence of a profit objective for all the tax years in issue” because he had initial success with the first two horses he purchased and his later successes indicated that “his horses [had] the potential to race at a very high level and possibly earn significant profit.”\textsuperscript{175}

As to Roberts’s financial status, the Tax Court noted that “[s]ubstantial income from sources other than the activity, particularly if the losses from the activity generate substantial tax benefits, may indicate that the activity is not engaged in for profit, especially if personal or recreational elements are involved.”\textsuperscript{176} Whereas, Roberts did have income from other sources and the losses he claimed reduced

\textsuperscript{170} \textit{Id.} at *13–14 (Listing Roberts’s various business successes and concluding “[h]e worked hard and showed initiative, foresight, and other qualities that led to success in his other business activities, and he had reason to expect eventual success in his horse-related activities.”).

\textsuperscript{171} \textit{Id.} at *14 (“These events include the untimely death of several racing and breeding prospects, an unfortunate quarantine during racing season, a contractor’s building a shoddy fence that factored into the accidental death of two stallions, and the need to hire and fire several different trainers.”).

\textsuperscript{172} \textit{Id.}

\textsuperscript{173} \textit{Id.}

\textsuperscript{174} \textit{Id.} at *15.

\textsuperscript{175} \textit{Id.}

\textsuperscript{176} \textit{Id.}
his overall taxable income. The Tax Court weighed this factor in favor of the Commissioner.

Finally, the Tax Court considered the “elements of personal pleasure or recreation” involved in Roberts’s horse-racing activities. It found Roberts initially began his activities as a result of social meetings and gatherings. During tax years 2005 and 2006, Roberts took equal part in the business and social aspects of the horse track. However, in 2007 he hired an assistant trainer who attended to more of the social obligations, freeing Roberts up to attend to the business side of things. Therefore, the Tax Court again drew a distinction between Roberts’s activities during 2005 and 2006 and his activities beginning in 2007 and moving forward.

Conclusively, after examining the factors individually, the Tax Court weighed them together. It ruled that Roberts did demonstrate a profit objective for the 2007 and 2008 tax years. However, the Tax Court also found that for 2005 and 2006, the activities were engaged in primarily for “personal pleasure or recreation,” and therefore the losses related therewith could not be deducted.

C. Roberts in the Seventh Circuit

Roberts appealed to the Seventh Circuit and Judge Posner wrote for a unanimous court. The Seventh Circuit held that Roberts’ activities were a business and not a hobby for all years in question,

177 Id. at *16.
178 Id.
179 Id.
180 Id.
181 Id. at *16–17.
182 Id. at *17.
183 Id.
184 Id.
185 Id.
186 Id. at *16–17.
187 See Roberts v. C.I.R., 820 F.3d 247, 248 (7th Cir. 2016).
including 2005 and 2006, overturning the Tax Court’s decision.\textsuperscript{188} The Seventh Circuit, after discussing the Tax Court’s findings, began its analysis saying, “We mustn’t be too hard on the Tax Court . . . It felt itself imprisoned by a goofy regulation”—referring to Reg. Sec. 1.183-2.\textsuperscript{189} The rest of the analysis hinges on that “goofy regulation.”\textsuperscript{190} The Seventh Circuit found that the regulation’s factors “overwhelmingly favor[ed] Roberts’ claim that even in 2005 and 2006, his horse-racing enterprise was a business.”\textsuperscript{191}

The opinion goes on to acknowledge that, indeed, the horseracing industry attracts hobbyists,\textsuperscript{192} but that just because the activities in question were “fun,” did not mean they were not a business.\textsuperscript{193} The Seventh Circuit concluded by suggesting that the Tax Court, rather than considering the factors set forth by the IRS regulations, would be better off listening to the taxpayer’s protestations.\textsuperscript{194}

\textsuperscript{188} Id. at 254.
\textsuperscript{189} Id. at 250.
\textsuperscript{190} See id. at 252.
\textsuperscript{191} Id. (“He conducted it in a businesslike way (factor 1). He prepared by extensive study (to obtain a training license) (factor 2). He largely withdrew from his previous businesses in order to devote ‘most of his energies’ to his horse-racing enterprise (factor 3). He expected to derive an eventual profit from the enterprise, including profit in the form of appreciation of the value of the land and buildings used in the enterprise (factor 4)—it’s not as if he were a billionaire indifferent to the modest profit that probably was all he could expect from horse racing. Entering the restaurant business on a small scale in his twenties, Roberts had suffered setbacks that prevented his business from being an immediate success—indeed his first restaurant burned down and the insurance settlement was too small to enable him to rebuild it as a full-service establishment. Yet he ‘grew’ the business to large dimensions over time, a pattern consistent with his attempting to repeat the process in his horse-racing venture in 2005 and 2006 (factor 5). ‘A series of losses during the initial or start-up stage of the activity may not necessarily be an indication that the activity is not engaged in for profit’ (factor 6)—that’s this case, all right. A ‘substantial profit, though only occasional, would generally be indicative that an activity is engaged in for profit’ (factor 7).”).
\textsuperscript{192} See id. at 254.
\textsuperscript{193} See id. at 253–54.
\textsuperscript{194} Id. at 254.
D. Deference Issues in Roberts

The Seventh Circuit’s opinion is particularly dismissive of the Tax Court, its opinion on Reg. Sec. 1.183-2, and the regulation itself. To begin, the Seventh Circuit makes no mention of the applicable standard of review it should give to the Tax Court’s decision.\footnote{See generally, id.} At this point, as this article has discussed, it is well established that courts of appeals owe little to no deference to the Tax Court’s findings of law and should review them de novo.\footnote{See, e.g., Freytag v. Comm’r, 501 U.S. 868, 891 (1991) (“[The Tax Court’s] function and role in the federal judicial scheme closely resemble those of the federal district courts, which indisputably are ‘Courts of Law.’”); Diebold, 736 F.3d 174 (“[T]he standard of review for mixed questions of law and fact in a case on review from the Tax Court is the same as that for a case on review after a bench trial from the district court: de novo to the extent that the alleged error is in the misunderstanding of a legal standard and clear error to the extent the alleged error is in a factual determination.”).} Here, that seems to simply be taken for granted.

The Tax Court clearly went to great pains in this case to examine each of the factors set forth in the Treasury Regulation in depth and to apply the facts at hand, taking the better part of ten pages to do so.\footnote{See Roberts v. Comm’r, 2014 WL 1688127 at *7–18 .} The Seventh Circuit managed the same analysis in little more than a paragraph.\footnote{See Roberts, 820 F.3d at 252–53 .}

One of the most unusual things about the Tax Court’s opinion is that, as painstakingly as it applies Reg. Sec. 1.183-2(b) it makes no mention of Reg. Sec. 1.183-2(c).\footnote{See generally, Roberts, 2014 WL 1688127.} Part (c) of the regulation comprises examples to illustrate its provisions\footnote{Treas. Reg. §1.183-2(c).} and the third example provided by the Department of the Treasury matches the facts of the Roberts dispute, particularly during 2005 and 2006, almost to a T.\footnote{See id.}
Example 3 of Treas. Reg. 1.183-2(c) describes a hypothetical taxpayer who is a successful businessman and who has taken up the hobby of raising and racing thoroughbred horses.\textsuperscript{202} The taxpayer has suffered increasing losses over the years as a result of his horse racing and breeding activities and has never seen a profit as a result.\textsuperscript{203} His horse racing activities are combined with social and recreational ones.\textsuperscript{204} He conducts the activities on a large residential property where he resides with his family.\textsuperscript{205} “Since (i) the activity of raising . . . and racing the horses is of a sporting and recreational nature, (ii) the taxpayer has substantial income from his [other] business activities . . ., (iii) the horse . . . operations are not conducted in a businesslike manner, and (iv) such operations have a continuous record of losses, it could be determined that the horse . . . activities of the taxpayer are not engaged in for profit.”\textsuperscript{206}

Clearly this regulation is not a particularly rigid one, as the Seventh Circuit points out.\textsuperscript{207} It should be noted that neither the Tax Court nor the Seventh Circuit mention \textit{Chevron} in their opinions.\textsuperscript{208} However, it seems apparent that the Tax Court must have taken into consideration the example in part (c), as the facts of the case were so glaringly similar. It is not a great leap in logic to think that the authors of the regulation, given the example put forth, would have found Roberts’ horse racing activities during the 2005 and 2006 tax years to have been “not engaged in for profit.” And the Tax Court appeared to

\textsuperscript{202} \textit{Id.}
\textsuperscript{203} \textit{Id.}
\textsuperscript{204} \textit{Id.}
\textsuperscript{205} \textit{Id.}
\textsuperscript{206} \textit{Id.}
\textsuperscript{207} \textit{See} Roberts v. C.I.R., 820 F.3d 247, 252 (7th Cir. 2016) (“[T]he test is open-ended – which means that the Tax Court was not actually required to apply all of those factors to Roberts’ horse-racing enterprise. It could have devised its own test, with its own factors, as long as it explained why the factors that should ‘normally be taken into account’ were insufficient.”).
\textsuperscript{208} \textit{See generally, Roberts,} 820 F.3d at 247; \textit{Roberts,} 2014 WL 1688127.
have afforded the deference required by *Chevron* to the Treasury Departments guidance as set forth in the regulation.\(^{209}\)

Technically, the Seventh Circuit also deferred to the regulation and found that the factors set forth therein supported the position that Roberts was conducting a business in 2005 and 2006.\(^{210}\) However, the opinion appears to stand for the proposition that neither the Seventh Circuit nor the Tax Court is bound to give any sort of deference to the regulation.\(^{211}\) It is true that the regulation itself concedes “no one factor is determinative,” and not “only the factors described . . . are to be taken into account.”\(^{212}\) However, the principles of *Chevron* lie largely on the concept of agency expertise in a given area of law.\(^{213}\) With this in mind, does it truly stand to reason that any time a regulation uses a “may” rather than a “shall,” it should be tossed out the window? Surely this cannot be the case, even where a court finds a regulation “goofy.”

It is clear that deferential treatment to the Tax Court is dead. However, the Seventh Circuit’s apparent defiance of the Treasury Regulation’s authority as well as it and the Tax Court’s failure to mention *Chevron* deference at all may be one of many signals that *Chevron* in tax is dying. As it stands, the level of deference a court of appeals will give to either the Tax Court’s logic or to a Treasury Regulation appears largely unpredictable. Perhaps the decision is an indication that the Treasury Department and the IRS should reevaluate the manner in which they draft regulatory language. Would a “shall” inserted somewhere into Reg. Sec. 1.183-2 have forced the Seventh Circuit to defer to it? If regulations like this one are so easily brushed off by courts, it seems a waste of agency resources to even bother issuing them. If the Treasury Department were to use more assertive and authoritative language in its regulations and courts continued to


\(^{210}\) See *Roberts*, 820 F.3d at 252.

\(^{211}\) See *id*.

\(^{212}\) Treas. Reg. §1.183-2(c).

dismiss them (the way the Seventh Circuit did in Roberts) the Supreme Court or Congress would have an opportunity to again evaluate the proper role (if there is one) of deference, Chevron or otherwise, in tax.

CONCLUSION

The jurisprudential landscape of deference in tax continues to be ever-changing. Dobson, though incredibly unpopular, would have put to bed many of the inconsistencies we are presented with today by simply deferring to the expertise of the Tax Court, which handles an overwhelming majority of federal tax litigation. But, as it happens, Dobson was short-lived, and deference in the tax world has been a messy affair since its death.

Although technically Chevron deference applies to Treasury Regulations, Chevron itself is applied so haphazardly that it hardly provides clarity in the already complex field of tax litigation. Accordingly, the Department of the Treasury and the IRS should take a harder line when issuing regulatory guidance. If these agencies are more insistent that their interpretations of the Internal Revenue Code should be adhered to, they will provide more certainty to tax litigators.