University of Wyoming
College of Law

WYOMING LAW REVIEW

VOLUME 7 *2007* NUMBER 1

UNIVERSITY
OF WYOMING

Published semiannually under the
auspices of the University of Wyoming
College of Law and the Wyoming State Bar.

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The WYOMING LAW REVIEW is published twice during the academic year, once in February and again in June.

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Optimism

By C.P. Arnold
Laramie, Wyoming, 1925
First President of the Wyoming Bar Assoc.

Not all sunshine, not all shade,
Not all ease for wife or maid,
Cake,
    And bugs,
        And lemonade,
Life's a picnic, Who's afraid?

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VOLUME 7 ***2007*** **NUMBER 1**

CONTENTS

WYOMING LAW DIVISION

Articles

The Crime That Wasn't There: Wyoming's Elusive Second-Degree Murder Statute
Eric A. Johnson 1

Wyoming Pre-Statehood Legal Materials: An Annotated Bibliography
Debora A. Person 49

Comment

Fixing *O'Boyle v. State*—Traffic Detentions Under Wyoming's Emerging Search-and-Seizure Standard
Mervin Mecklenburg 69

GENERAL LAW DIVISION

Articles

The 115 Year-Old Ninth Circuit—Why a Split Is Necessary and Inevitable
Honorable John M. Roll,
Chief Judge, United States District Court, District of Arizona 109

Is *Lara* the Answer to Implicit Divestiture? A Critical Analysis of the Congressional Delegation Exception
Anna Sappington 149

Comment

Who Decides: Institutional Choice in Determining a Performance Enhancing Drug Policy for the NFL
Scott B. Shapiro 183

Case Note

CONSTITUTIONAL LAW—The Supreme Court Can't Have it Both Ways Under RFRA: The Tale of Two Compelling Interest Tests. *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal,* 126 S. Ct. 1211 (2006).
Aaron D. Bieber 225

Transcript

Address to the Wyoming State Bar Annual Meeting 2006
Morris Dees 259

University of Wyoming
College of Law

Wyoming Law Review

Volume 7 2007 Number 1

WYOMING LAW DIVISION

WYOMING LAW REVIEW

VOLUME 7 *2007* NUMBER 1

THE CRIME THAT WASN'T THERE: WYOMING'S ELUSIVE SECOND-DEGREE MURDER STATUTE

*Eric A. Johnson**

I. INTRODUCTION

Under current Wyoming case law, second-degree murder has two mental components. First, the defendant must intend to perform the act that causes the other person's death, though he need not intend to cause the death itself.[1] Second, the defendant must perform this act either with "hatred, ill will, or hostility" or "without legal justification or excuse."[2] This definition of second-degree murder is largely a product of the Wyoming Supreme Court's 1986 decision in *Crozier v. State*.[3] The *Crozier* decision has been criticized for having "enlarged the

*Assistant Professor of Law, University of Wyoming College of Law. I am grateful to Amy Smith for her invaluable research assistance and to the Kline Law Faculty Research Fund for its generous support of this research. All errors are my own.

[1] Butcher v. State, 2005 WY 146, ¶ 20, 123 P.3d 543, 550 (Wyo. 2005); *see also* WYOMING CRIMINAL PATTERN JURY INSTRUCTIONS (CRIMINAL) § 21.04 (2004).

[2] *Id.* at ¶ 24, 123 P.3d at 550-51 (concluding that the definition of malice from Keats v. State, 2003 WY 19, ¶¶ 16-33, 64 P.3d 104, 109-14 (Wyo. 2003), applies to second-degree murder). Wyoming's current pattern jury instructions on second-degree murder provide that a person commits the offense if he or she "purposely" and "maliciously" kills a human being. WYOMING PATTERN JURY INSTRUCTIONS (CRIMINAL) § 21.04 (2004). The pattern instructions also define the two critical terms:

> "Purposely" means that the act which caused the death was intentionally done.
>
> "Maliciously" means the state of mind in which an intentional act is done without legal justification or excuse. The term "maliciously" conveys the meaning of hatred, ill will, or hostility toward another.

Id. § 21.04B.

[3] Crozier v. State, 723 P.2d 42 (Wyo. 1986).

reach of second-degree murder, transferring some killings from the category of manslaughter to that of second-degree murder."[4] The real trouble with *Crozier*, though, is not that it remade the law of second-degree murder, but that it remade it so badly.

Neither of the two mental components of the current definition of second-degree murder has any real content. An "intentional act" is an element of *every* criminal offense, including, for example, reckless manslaughter and negligent homicide.[5] So the requirement of an "intentional act" cannot serve to distinguish second-degree murder from either of these lesser forms of homicide, nor can it serve even to distinguish it from innocent conduct. Further, the current definition of malice—which requires the state merely to prove *either* that the defendant acted "without legal justification or excuse" *or* that the defendant acted with "hatred, ill will, or hostility"[6]—is a throwback to the unhappy days when judges used the word "malice" in "the old vague sense of 'wickedness in general.'"[7]

These defects in the existing definition of second-degree murder are more than theoretical. They made themselves felt, for example, in *Lopez v. State*,[8] where a jury convicted the defendant of second-degree murder on evidence that he had caused the victim's death by "slapp[ing him] on the head with an open hand and push[ing] him back down onto a couch."[9] The slap caused the victim's death only because the victim "had numerous health problems that made him susceptible to death by the slap," including "veins so fragile they could easily rupture from sudden movement."[10] But it could hardly be disputed either that the slap was an "intentional act" or that the slap was delivered with "hatred, ill will, or hostility," and so the jury convicted Lopez. The Wyoming Supreme Court reversed the conviction on the ground that "the evidence is insufficient as a matter of law that Lopez acted maliciously."[11] The court's holding, though, was limited to its facts; the court did not reformulate its general definition of "malice" to make the definition inapplicable to cases like Lopez's. After *Lopez*, as before, the state is

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[4] Theodore Lauer, *The Wyoming Criminal Code Revisited: Reflections After Fifteen Years*, 33 LAND & WATER L. REV. 523, 553 (1998).
[5] *See* Michael Corrado, *Is There An Act Requirement In The Criminal Law?*, 142 U. PA. L. REV. 1529, 1560 (1994).
[6] *Butcher*, 2005 WY 146, ¶ 24, 123 P.3d at 550-51 (explaining that trial court erred in requiring state to prove *both* of these alternatives at Butcher's trial).
[7] Regina v. Cunningham, 41 Crim. App. 155, 2 Q.B. 396, 399, 2 All Eng. Rep. 412 (1957).
[8] Lopez v. State, 2004 WY 28, 86 P.3d 851 (Wyo. 2004).
[9] *Id.* at 855.
[10] *Id.* at 856.
[11] *Id.* at 859.

required merely to prove that the defendant acted either with "hatred, ill will, or hostility" toward another person or "without legal justification or excuse."[12]

The intuitions underlying the court's decision in *Lopez* are right. The existing definition of second-degree murder is wrong. The purpose of this Article is to identify the confusions that lie behind the Wyoming Supreme Court's current definition of second-degree murder and to formulate an alternative definition that captures the intuitions underlying the court's decision in *Lopez*. I will begin with a brief summary of the historical background of Wyoming's second-degree murder statute and a brief summary of the *Crozier* decision. Then I will argue, first, that an intentional act is an element of every criminal offense; second, that the word "maliciously," as used in the second-degree murder statute, should be reinterpreted to require something akin to a "depraved heart" or extreme recklessness; third, that in formulating its current definition of second-degree murder, the Wyoming Supreme Court understandably fell victim, as many other courts have also, to confusion engendered by the terms "general intent" and "specific intent."

II. HISTORICAL BACKGROUND

A. A brief history of the statute's language

Wyoming's 1983 revised criminal code defines second-degree murder as a killing committed "purposely and maliciously, but without premeditation."[13] The wording of this definition has deep historical roots. Wyoming's territorial criminal code, which was enacted by the Council and House of Representatives of the Wyoming Territory in 1869, provided that "[a]ny person who shall *purposely and maliciously*, but without premeditation, kill another . . . shall be deemed guilty of second-degree murder."[14] This early Wyoming provision was based, in turn, on an Ohio statute originally enacted in 1815.[15] The Ohio statute defined second-degree murder as a killing committed "*purposely and maliciously*, but without deliberate and premeditated malice."[16]

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[12] *Butcher*, 2005 WY 146, ¶ 24, 123 P.3d at 550-51.
[13] WYO. STAT. ANN. § 6-2-104 (LexisNexis 2005).
[14] 1876 COMPILED LAWS OF WYOMING, ch. 35, § 16 (emphasis added).
[15] Act of Jan. 27, 1815, ch. 28, § 2, 1814-1815 Ohio Acts. This influential Ohio formulation eventually was adopted not only in Wyoming but also in Indiana, Nebraska, and Washington. *See* Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 154-55 (2004).
[16] *Id.* (emphasis added).

In cases predating the enactment of Wyoming's territorial criminal code, the Ohio courts interpreted this language to require proof that the defendant intended to cause the death of another person; to require, as the Model Penal Code now puts it, that the death of the other person was the defendant's "conscious object."[17] In its 1857 decision in *Fouts v. State*, for example, the Ohio Supreme Court reversed a defendant's conviction for second-degree murder on the ground that the indictment was "insufficient for want of a positive and direct averment of a purpose or intention to kill, in the description of the offense."[18] In concluding that "purpose or intent to kill" was an essential element of second-degree murder, the court relied on decisions dating back to 1831.[19] "This interpretation of the statute," said the court, "has been consistently followed as the settled law of Ohio for the last twenty-five years."[20]

Early Wyoming decisions interpreting Wyoming's second-degree murder statute likewise required proof of intent to kill.[21] For example, in its 1899 decision in *Ross v. State*,[22] the Wyoming Supreme Court said that murder committed with "a distinctly formed intention to kill, not in self-defense, and without adequate provocation,"[23] is "only murder in the second degree, which must be done purposely and maliciously; that is, it must be done with the intent to kill, and with malice, or else it is not even murder in the second degree."[24] In 1916, the court reiterated that a homicide in which "the intention to kill was present in the mind of defendant at the time the act was committed . . . under our statute would constitute murder in the second degree."[25]

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[17] MODEL PENAL CODE § 2.02(2)(a) (1985) (defining "purposely" to require that it be the actor's "conscious object . . . to cause [the proscribed] result").

[18] Fouts v. State, 8 Ohio St. 98, 112, 122-23 (Ohio. 1857); *see also* Robbins v. State, 8 Ohio St. 131 (Ohio 1857).

[19] *Fouts*, 8 Ohio St. at 111-12 (citing, e.g., Wright's Rep. 27 (1831) (holding that "[m]alice and a design to kill, are essential ingredients of the crime of murder, in either degree")).

[20] *Id.* at 112.

[21] It would have been natural for the Wyoming courts to conclude that Wyoming's territorial legislature had been aware of the settled interpretation of Ohio's second-degree murder statute when it adopted that statute verbatim as part of the territory's new criminal code. And thus it would have been only logical for the court to assume that the territorial legislature meant to adopt not only the Ohio statute but also "the construction placed thereon by the courts of the state." Jordan v. Natrona Lumber Co., 75 P.2d 378, 413 (Wyo. 1928) (holding that a statute borrowed by Wyoming from another state will be presumed to have been adopted with the construction placed upon it by the courts of that state).

[22] Ross v. State, 8 Wyo. 351, 57 P. 924 (Wyo. 1899).

[23] *Id.* at 384-85, 57 P. at 932.

[24] *Id.* at 385, 57 P. at 932.

[25] Parker v. State, 24 Wyo. 491, 161 P. 552 (Wyo. 1916).

This interpretation of the statute appears to have persisted well into the latter half of the twentieth century. In the Wyoming Supreme Court's 1942 decision in *Eagan v. State*,[26] for example, Justice Blume said of a jury instruction challenged by the defendant that "it was correct in telling the jury that they should not convict of murder in the first or second degree, unless it was committed 'intentionally, and with the purpose of killing.'"[27] Likewise in *Cullen v. State*,[28] the court approved a jury instruction that required the state to prove, "beyond a reasonable doubt, that [the defendant] intended to kill the deceased."[29] In 1979's *Goodman v. State*,[30] the court explicitly approved jury instructions that required the state to prove "the essential element of intention to kill" as an element of second-degree murder, saying: "These instructions are correct and complete in their statement of the pertinent law."[31]

This was how things stood when the Wyoming Legislature, in the early 1980's, undertook the task of revising and modernizing Wyoming's criminal code. In 1981, the criminal code revision subcommittee of the Joint Judiciary Interim Committee proposed a first draft of the revised code, which would have combined first- and second-degree murder into one offense.[32] As the Wyoming Supreme Court later would explain, this first draft came in for heavy criticism on the ground that "the draft, if enacted, would destroy 90 years of Wyoming case law in the area of homicide."[33] In response to this criticism, the criminal code revision subcommittee, and the legislature as a whole, chose ultimately "to retain the existing second-degree murder statute without change."[34]

This re-enactment of the existing second-degree murder statute might have been perceived as placing a kind of legislative *imprimatur* on the Wyoming Supreme Court's existing interpretation of the statute. After all, in the ordinary case where a statute has been construed by a court of last resort and has subsequently been re-enacted in the same or substantially the same terms, the legislature is presumed to have been familiar with its construction and to have adopted that construc-

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[26] Eagan v. State, 58 Wyo. 167, 128 P.2d 215 (Wyo. 1942).
[27] *Id.* at 222.
[28] Cullen v. State, 565 P.2d 445 (Wyo. 1977).
[29] *Id.* at 452 (holding that "all the instructions taken together do not relieve the State of proving intent beyond a reasonable doubt as an essential element of second degree murder, as contended by defendant"). The court also said in *Cullen*: "There is no question but what intent is a necessary element of the crime of second-degree murder, a showing that the killing was done purposely and maliciously without premeditation." *Id.* at 451.
[30] Goodman v. State, 601 P.2d 178 (Wyo. 1979).
[31] *Id.* at 186, 187.
[32] *See* Crozier v. State, 723 P.2d 42, 51 (Wyo. 1986) (recounting criminal code revision process).
[33] *Id.*
[34] *Id.*

tion as part of the law, unless a contrary intent clearly appears.[35] With respect to Wyoming's second-degree murder statute, of course, it is not really necessary to "presume" the legislature's familiarity with and approval of the existing law; as the Wyoming Supreme Court itself has acknowledged, the decision to re-enact the existing language was driven at least in part by the legislature's expressed desire to retain "90 years of Wyoming case law in the area of homicide."[36] One might have expected, then, that the Wyoming Supreme Court's prior decisions interpreting the second-degree murder statute would assume the status of "super-precedents" in the wake of the 1983 criminal code revision.

That is not how things turned out, however. In 1986, just three years after the Wyoming Legislature's adoption of the revised criminal code, the Wyoming Supreme Court jettisoned its longstanding interpretation of the second-degree murder statute. The occasion for re-evaluation of the court's precedents came in *Crozier v. State*.[37]

B. Crozier v. State

The principal issue in *Crozier* was whether the trial court had erred in instructing the jury that voluntary intoxication was not a defense to second-degree murder.[38] Defendant Dennis Crozier had been charged with first-degree murder after he strangled a six-year-old boy. At his trial, he introduced evidence that he had drank an entire bottle of brandy on the night of the murder. Over Crozier's objection, the trial judge instructed the jury that voluntary intoxication was a defense to first-degree murder but not to the lesser included charges of second-degree murder and manslaughter.[39] After the jury returned a verdict of guilty of second-degree murder, Crozier appealed his conviction, arguing in part that voluntary intoxication was a defense to second-degree murder. The Wyoming Supreme Court rejected this claim.

The court started with the principle "that in Wyoming intoxication may negate the existence of a specific-intent element of a specific-intent crime but is not a factor affecting a general-intent crime."[40] The court defined a "general-intent crime" as a crime whose statutory definition does not require proof of

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[35] Carpenter & Carpenter v. Kingham, 56 Wyo. 350, 109 P.2d 463 (Wyo. 1941).
[36] *Id.*
[37] *Crozier*, 723 P.2d 42.
[38] *Id.* at 51.
[39] *Id.*; *see also* WYO. STAT. ANN. § 6-1-202(a) (LexisNexis 2005) ("Self-induced intoxication of the defendant is not a defense to a criminal charge except to the extent that in any prosecution evidence of self-induced intoxication of the defendant may be offered when it is relevant to negate the existence of a specific intent which is an element of the crime.").
[40] *Id.*

"intent" beyond the intent "to do the proscribed act;"[41] in other words, a crime is a "general-intent crime" if the statute requires only "that the prohibited conduct . . . be undertaken voluntarily."[42] And the court defined a "specific-intent crime" as a crime whose statutory definition requires proof of the "intent to do a further act or achieve a future consequence."[43] After articulating these two definitions, the court set out to determine whether second-degree murder was a "specific-intent crime" or a "general-intent crime." It examined in turn the statute's two ostensibly-mental elements: "maliciously" and "purposely."

The court concluded that the element of "malice" was a general-intent element describing "the act to be committed and not an intention to produce a desired specific result."[44] The court made little effort to give the element of "malice" any definite content. It did, however, quote a North Carolina decision where malice had been defined very broadly as "any act evidencing wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty and deliberately bent on mischief."[45] According to the quoted portion of the North Carolina decision, malice is present where a defendant voluntarily performs an act that satisfies this broad definition, regardless of whether his actions are accompanied by any other intent.[46] "Malice" therefore is a form of "general intent," not "specific intent."[47]

The court reached the same conclusion with respect to the requirement that the defendant kill "purposely." This conclusion obviously was at odds with the court's longstanding interpretation of the second-degree murder statute; after all, an "intent to kill" plainly is an "intent to . . . achieve a future consequence."[48] In order to reach the conclusion that "purposely" did not refer to a specific-intent element, then, the court was required to abandon its existing interpretation of "purposely." In place of its earlier view that the word "purposely" denotes intent to kill, the court adopted the view that the word "purposely" merely denotes an intent to perform the physical act that causes the victim's death.[49] "The word 'purposely' as used in the second-degree murder statute describes the act to be committed and not an intention to produce a desired, specific result."[50] In adopting this view, the court relied on cases interpreting the word "willfully" and on out-of-state cases.[51] It said nothing about those prior cases where it had held that

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[41] *Id.* at 52 (quoting Dean v. State, 668 P.2d 639, 642 (Wyo. 1983)).
[42] *Id.*
[43] *Id.* at 53 (quoting Dorador v. State, 573 P.2d 839, 843 (Wyo. 1978)).
[44] *Crozier*, 723 P.2d at 53 (quoting *Dean*, 668 P.2d at 642).
[45] *Id.* (quoting State v. Wilkerson, 295 N.C. 559, 247 S.E. 2d 905, 917 (1978)).
[46] *Id.*
[47] *Id.*
[48] *Id.* at 52 (defining "specific intent") (internal citation omitted).
[49] *Id.* at 54.
[50] *Crozier*, 723 P.2d at 54.
[51] *Id.* at 54-56.

second-degree murder "must be done with the intent to kill, and with malice."[52] Having determined that neither the word "maliciously" nor the word "purposely" denotes a "specific intent," the court concluded that the trial court had been correct in instructing the jury not to consider Crozier's intoxication in deciding whether he was guilty of second-degree murder.

Little has changed in the intervening years. The court has continued to emphasize that the word "purposely," as used in the second-degree murder statute, requires the state to prove only that the defendant "*acted* purposely, not that he *killed* purposely."[53] Though the court's definition of the word "maliciously" has changed somewhat, the definition remains undemanding. The requirement of "malice," according to the Wyoming court's latest decisions, is satisfied where the state proves *either* that the defendant acted "without legal justification or excuse" *or* that the defendant acted with "hatred, ill will, or hostility."[54]

C. Why not require intent to kill?

Before I begin the real project at hand—constructing a workable definition of second-degree murder that is consistent with the basic outlines of *Crozier*—I need to address an obvious objection. Namely, why try to salvage *Crozier* at all? After all, *Crozier*'s interpretation of the statute is at odds both with the plain language of the second-degree murder statute, which requires the state to prove that the defendant "purposely . . . kill[ed]" any human being,[55] and with roughly 150 years of history, during which this language was consistently interpreted to require an intent to kill. Why not simply wipe the slate clean and return to the pre-*Crozier* requirement of intent to kill?

The first, and most obvious, reason is stare decisis. As the Wyoming Supreme Court has recognized, stare decisis is "an important principle which furthers the 'evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'"[56] Considerations of stare decisis "are particularly forceful in the area of statutory construction,"[57] since the legislature always "remains free

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[52] *See* Ross v. State, 8 Wyo. 351, 385, 57 P. 924 (1899).
[53] Butcher v. State, 2005 WY 146, ¶ 20, 123 P.3d 543, 550-51 (Wyo. 2005).
[54] *Id.* at ¶ 24, 123 P.3d at 550-51 (explaining that trial court erred in requiring state to prove *both* of these alternatives at Butcher's trial); *see also* Strickland v. State, 2004 WY 91, ¶ 15, 94 P.3d 1034, 1043 (Wyo. 2004); Keats v. State, 2003 WY 19, ¶¶ 16-33, 64 P.3d 104, 109-14 (Wyo. 2003).
[55] WYO. STAT. ANN. § 6-2-104 (LexisNexis 2005).
[56] In re ANO, 2006 WY 74, ¶ 6, 136 P.3d 797, 799 (Wyo. 2006) (quoting Goodrick v. Stobbe, 908 P.2d 416, 420 (Wyo. 1995)).
[57] IBP, Inc. v. Alvarez, 126 S. Ct. 514, 523 (2005).

to alter what [the courts] have done."[58] The two decades that have passed since *Crozier* was announced have substantially enhanced its precedential force; the statute, as interpreted in *Crozier*, has been applied frequently and consistently during that time, so the Wyoming Legislature has had both the occasion and the opportunity to change it.[59] In my view, stare decisis dictates that the court adhere to *Crozier* to the degree that the holding of *Crozier* actually is workable.

The second, and far less obvious, reason for adhering to *Crozier* is that interpreting the second-degree murder statute to require proof of intent to kill would create a conflict with Wyoming's manslaughter statute. The trouble arises from the first clause of the manslaughter statute, which limits the statute's scope to homicides committed "without malice, expressed [sic] or implied."[60] This provision, which has been part of Wyoming's criminal code since 1890, obviously means that homicides traditionally classified as "implied malice" murder—"extreme indifference" homicides, for example—cannot be punished as manslaughter in Wyoming. Thus, unless we are to assume that the legislature meant for the perpetrators of extreme-indifference homicide to go unpunished, we must conclude that the legislature meant this form of homicide to fall within the scope of the murder statutes. If this form of homicide falls within the scope of the murder statutes, the murder statutes cannot be said to require intent to kill.

At common law, murders were broken down into two categories: those involving "express malice" and those involving "implied malice." "Express malice" was said to be present when the defendant intended to cause the death of the victim; when, in other words, the death of the victim was the defendant's conscious objective.[61] "Implied malice" is harder to define. It would undoubtedly be correct, though somewhat unhelpful, to say that "implied malice" encompasses "any state of mind sufficient for murder while lacking that specific intent [to kill]."[62] This

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[58] Patterson v. McLean Credit Union, 491 U.S. 164, 172-73 (1989).

[59] Shepard v. United States, 544 U.S. 13, 23 (2005) (observing, in support of application of stare decisis, that "time has enhanced even the usual precedential force, nearly 15 years having passed since [the relevant precedent] came down, without any action by Congress").

[60] WYO. STAT. ANN. § 6-2-105 (LexisNexis 2005).

[61] *See* ROLLIN PERKINS & RONALD BOYCE, CRIMINAL LAW 76 (3d ed. 1982) (observing that "'*express malice*' is generally employed to indicate that type of malice aforethought represented by an intent to kill"); Downing v. State, 11 Wyo. 86, 70 P. 833, 835 (1902) (quoting from jury instruction that defined "express malice" as "that deliberate intention unlawfully of taking away the life of a fellow creature which is manifested by external circumstances capable of proof"); *see also* Walker v. People, 489 P.2d 584 (Colo. 1971) ("express malice is that deliberate intention, unlawfully to take away the life of a fellow creature which is manifested by external circumstances capable of proof"); Kelsey v. State, 532 P.2d 1001, 1004 (Utah 1975) (malice "is express when there is manifested a deliberate intention unlawfully to take the life of a fellow creature").

[62] PERKINS & BOYCE, *supra* note 61, at 76.

definition tells us at least that "implied malice" actually is a "state of mind," rather than a set of external circumstances; it tells us that implied malice is, in the words of Professors Perkins and Boyce, "a psychical fact just as homicide is a physical fact."[63] Thus, when courts say (as they very often do) that implied malice can be *inferred* from, e.g., the use of a deadly weapon, they mean simply that the use of a deadly weapon may provide a factual basis for inferring the existence of a particular state of mind.[64] They do not mean that using a deadly weapon is a form of "implied malice."[65]

So exactly what "state of mind" does the term "implied malice" signify? The term "implied malice" has its origins in a time when "authorities assumed the necessity of an intent to kill"[66]—when they assumed, that is, the necessity of proving as an element of murder that the defendant actually wanted to bring about the victim's death. The courts resorted to the term "implied malice" to accommodate those cases where the defendant's "foresight of the consequences" made him as culpable as a person who actually meant to kill.[67] These historical origins are reflected in modern definitions like the one found in *State v. Wardle*,[68] a Utah case that (as we will see) played a pivotal role in the Wyoming Supreme Court's decision in *Lopez v. State*.[69] In *Wardle*, the court equated "implied malice" with

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[63] *Id.* at 74.

[64] *See*, *e.g.*, Moya v. People, 484 P.2d 788 (Colo. 1971) (holding that "malice may be inferred where homicide is committed by use of deadly weapon or instrument in such a manner as would naturally and probably cause death; inference of malice is one of fact for jury determination from the evidence"). The danger of misinterpretation is evident, for example, in *Wardle v. State*, where the Utah Supreme Court said that "ordinarily a blow with the fist does not imply malice or intent to kill." 564 P.2d 764, 766 (Utah 1977). Where, as here, courts refer to malice being "implied" from the circumstances of the conduct, it is possible to conclude that the courts mean that "implied malice" may inhere in the existence of certain circumstances. *Id.* This is wrong, however, for malice is a mental state like any other. It may, of course, be *inferred* from external circumstances, as indeed any mental state may be. What the court in *Wardle* really meant was that, as it said elsewhere, "when the assault from which death resulted was intended with such circumstances of violence, excessive force, or brutality, an intent to kill or malice may be inferred." *Id.* at 765-66.

[65] As early as 1854, it was apparent that the term "implied malice" was "calculated to mislead and to engender false ideas." Darry v. People, 10 N.Y. 120, 140 (1854). Specifically, it was apparent that "[i]t tended to introduce confusion, through the indiscriminate use of the word *implied* in two conflicting senses, one importing an inference of actual malice from facts proved, the other an imputation of fictitious malice, without proof." *Id.* It is in the second sense that the phrase "implied malice" has survived.

[66] PERKINS & BOYCE, *supra* note 61, at 59.

[67] *See* OLIVER WENDELL HOLMES JR., THE COMMON LAW 53 (Little Brown ed. 1951); PERKINS & BOYCE, *supra* note 61, at 74.

[68] State v. Wardle, 564 P.2d 764 (Utah 1977).

[69] Lopez v. State, 2004 WY 28, ¶ 22, 86 P.3d 851, 858 (Wyo. 2004).

a killing committed "under circumstances evidencing a depraved indifference to human life."[70]

It bears mention that the meaning of "implied malice" will vary depending on whether the jurisdiction defines murder simply to require that the defendant act "maliciously" (as Wyoming does) or instead defines murder to require that the defendant act "with malice aforethought." "Malice aforethought" is a technical term[71] that encompasses four different forms of *mens rea*: (1) the intent to kill; (2) the intent to inflict grievous bodily harm; (3) extreme indifference to the value of human life; (4) the intent to commit a felony (which leads to culpability under the felony-murder rule).[72] In jurisdictions where murder is defined as a killing with "malice aforethought," the term "implied malice" may be used to refer to any of the latter three of these forms of *mens rea*.[73] But in jurisdictions where the legislature—like Wyoming's—has eschewed the technical term "malice aforethought" in favor of the broader legal term "maliciously,"[74] the better view is that the law requires proof of either (1) the intent to bring about the proscribed result or (2) foresight of the consequences that imports an equivalent degree of culpability.[75]

With this background, it is possible to explain in somewhat greater detail why interpreting the second-degree murder statute to require "intent to kill" would prove problematic. Before 1890, Wyoming's criminal code contained three

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[70] *Wardle*, 564 P.2d at 765 n.1.

[71] GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART § 30 at 75 (2d ed. 1961) (cautioning "that the phrase 'malice aforethought,' in murder is a technical one, and that the word 'malice' does not here bear its usual legal meaning"); *see also* People v. Jefferson, 748 P.2d 1223, 1226 (Colo. 1988) (explaining that "[o]ver time, the phrase malice aforethought became an arbitrary symbol used by common law judges to signify any of a number of mental states deemed sufficient to support liability for murder").

[72] BLACK'S LAW DICTIONARY 969 (7th ed. 1999).

[73] PERKINS & BOYCE, *supra* note 61, at 59.

[74] By "broader" I mean that the word "maliciously," unlike the term "malice aforethought," is used in a wide array of contexts *other than* criminal homicide. *See*, *e.g.*, WYO. STAT. ANN. § 6-3-101 (LexisNexis 2005) (defining first-degree arson to require, among other elements, that the defendant act "maliciously"); *see also* WYO. STAT. ANN. § 37-12-120 (LexisNexis 2005) (defining offense of "interference with or injury to electric utility poles or wire" to require that the defendant act "maliciously or mischievously").

[75] PERKINS & BOYCE, *supra* note 61, at 860; *see also* KENNY'S OUTLINES OF THE LAW OF ENGLAND § 108 at 147 (J.W.C. Turner ed. 1962) (urging courts to jettison technical meaning of implied "malice aforethought" in favor of a definition "based on foresight of the consequences"); HOLMES, *supra* note 67, at 53 (arguing that "intent will again be found to resolve itself into two things; foresight that certain consequences will follow from an act, and the wish for those consequences working as a motive which induces the act").

statutes defining the offense of manslaughter.[76] Two of these statutes specified that the offense must be committed "without malice."[77] It would have been possible to construe these bare references to "malice" as references to "express malice," which was after all the original form of common-law malice. This construction would, then, have facilitated a narrow construction of the second-degree murder statute. If "implied malice" or "depraved heart" homicides could be prosecuted under the manslaughter statutes, then there would be no need to interpret the second-degree murder statutes to reach them.

This changed in 1890, when the territorial legislature adopted a unified and revised manslaughter statute that specifically limited the statute's reach to homicides committed "without malice, express or implied."[78] With this revision, it became apparent that the legislature meant to exclude from the definition of manslaughter not just homicides committed with "express malice," but those committed with "implied malice" as well. Thus, unless the legislature meant for "implied malice" homicides simply to go unpunished, it must have assumed that those homicides would be prosecuted under the second-degree murder statute. So it was not, ultimately, the Wyoming Supreme Court's decision in *Crozier* that "enlarged the reach of second-degree murder, transferring some killings from the category of manslaughter to that of second degree murder."[79] It was the legislature's decision explicitly to exclude "implied malice" homicides from the scope of the manslaughter statute.

There is, finally, an additional reason for adhering to the basic outlines of the *Crozier* decision—in addition, that is, to the dictates of stare decisis, and in addition to the problems created by the manslaughter statute. The notion that foresight of consequences sometimes carries a degree of culpability equal to intent has profound intuitive appeal. It was this intuitive appeal that led historically to the erosion of the requirement of "express malice" and to the creation of the legal fiction of "implied malice." And, in more recent times, it was this intuitive appeal that led the drafters of the Model Penal Code to assign the same degree of fault to homicides "committed recklessly under circumstances manifesting extreme indifference to the value of human life" as it did to homicides committed "purposely

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[76] The first category encompassed any killing committed "without malice, either upon a sudden quarrel or unintentionally, while the slayer is in the commission of some unlawful act." 1876 WYOMING COMPILED LAWS ch. 35, § 18. The second category encompassed any killing committed "in the heat of passion, by means of a dangerous weapon, or in a cruel and inhuman manner." *Id.* § 19. The third category encompassed any killing committed "without malice, either upon sudden quarrel, or unintentionally or by any culpable neglect or criminal carelessness." *Id.* § 20.

[77] 1876 WYOMING COMPILED LAWS ch. 35, §§ 18, 20.

[78] 1890 Wyo. Sess. Laws Ch. 73, § 17.

[79] Lauer, *supra* note 4, at 553.

or knowingly."[80] This provision, as the Wyoming Supreme Court explained in *O'Brien v. State*,[81] "reflect[s] the judgment that there is a kind of reckless homicide that cannot fairly be distinguished in grading terms from homicides committed knowingly or purposely."[82] *Crozier*, whatever its analytical flaws, is intuitively sound in recognizing the moral equivalence of express and implied malice.

III. THE REQUIREMENT OF A VOLUNTARY ACT

In the decisions interpreting the second-degree murder statute, the Wyoming Supreme Court has given pride of place to the requirement that the act that causes the victim's death be performed "purposely." Indeed, when the court has summarized the second-degree murder statute, it sometimes has left out the requirement of malice entirely, saying simply that the statute "require[es] proof only of acting purposely or voluntarily."[83] The court likewise has emphasized that the mens rea "purposely" applies only to the act performed by the defendant, not to the death that results from his actions: "second-degree murder is a general intent crime in which the 'purposely' element requires only that the State prove the [defendant] *acted* purposely, not that he *killed* purposely."[84]

The requirement that the act resulting in death be performed "purposely" or "intentionally" sounds as if it would serve to distinguish second-degree murder from a wide array of other, less culpable forms of criminal homicide. As the Wyoming Supreme Court itself has said repeatedly in defining second-degree murder, the requirement that the act be performed purposely or intentionally "distinguishes the act from one committed 'carelessly, inadvertently, accidentally, negligently, heedlessly, or thoughtlessly.'"[85] This point seems intuitively inescapable. After all, in common parlance an act performed "purposely" is plainly more culpable than one performed, say, negligently.

But this intuition is wrong. As I will explain, the perverse truth is that even "negligent" acts are performed "purposely," as too are "careless" acts, "heedless" acts, and "thoughtless" acts. The implied ascription of blame associated with each of these terms presupposes that the negligent or careless or heedless *act* was itself

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[80] MODEL PENAL CODE § 210.2 (1985).
[81] O'Brien v. State, 2002 WY 63, 45 P.3d 225 (Wyo. 2002).
[82] *Id.* at ¶ 16, 45 P.3d at 231.
[83] Young v. State, 849 P.2d 754, 759 (Wyo. 1993); *see also* Wilks v. State, 2002 WY 100, ¶ 37, 49 P.3d 975, 990 (Wyo. 2002) (remarking that "second-degree murder is a crime of general intent requiring only proof of acting purposely or voluntarily"); Bowkamp v. State, 833 P.2d 486, 493 (Wyo. 1992) (remarking that "second degree murder is a general intent crime, requiring only proof of the element of voluntariness").
[84] Butcher v. State, 2005 WY 146, ¶ 20, 123 P.3d 543, 550 (Wyo. 2005).
[85] *Id.* (quoting Lopez v. State, 2004 WY 22, ¶ 18, 86 P.3d 851, 857 (2004) (quoting State v. Keffer, 860 P.2d 1118, 1138 (Wyo. 1993))).

performed "purposely." The words "negligent," "careless," and "heedless" do not serve to identify the defendant's mental state with respect to the act itself, but serve rather to identify his mental state with respect to the real or possible consequences of the act.[86] In short, to say that someone has performed a "negligent act" is to say that he has purposely or intentionally performed an act with negligence of the consequences of that act. And to say that someone has performed a "careless act" is to say that he has purposely or intentionally performed an act with carelessness of the consequences.

This is a difficult (if uncontroversial) point. Perhaps the best place to begin is with an example. Let us imagine, first, a standard-issue case of criminally negligent homicide, where a driver attempts to pass another car on a curve that is marked as a no-passing zone and then, despite swerving and applying his brakes, collides with an oncoming car, killing the other car's driver.[87] In a case like this one, the usual charge will be negligent or perhaps reckless homicide, despite the fact that the act resulting in the death was performed "purposely"—the defendant *meant* to drive across the center line to pass. It is with respect to the *consequences* that the driver was "negligent." In the words of Wyoming's statutory definition of "criminal negligence," the driver culpably "fail[ed] to perceive a substantial and unjustifiable risk that the harm he is accused of causing [would] occur."[88] It is with respect to the risk of harm, not with respect to his "act," that the driver was negligent.

There are harder cases, of course, where the voluntary or intentional act underlying the imposition of liability for negligence or carelessness is harder to identify. Consider, for example, the relatively common case where a defendant's car simply drifts across the center line and into oncoming traffic. Juries sometimes impose criminal or civil liability for negligence in cases like this, despite being unable to say exactly what caused the defendant's car to cross the center line.[89] But the juries' decisions in these cases critically presuppose the performance of *some* voluntary act, whether it was, say, the driver's decision to change the radio station, or was instead just the driver's decision to continue driving without attending adequately to the task of driving.[90] If the crossing of the center line truly was

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[86] *See*, *e.g.*, WYO. STAT. ANN. § 6-1-104(a)(iii) (LexisNexis 2005) (providing in part that "[a] person acts with criminal negligence when, through a gross deviation from the standard of care that a reasonable person would exercise, he fails to perceive a substantial and unjustifiable risk *that the harm he is accused of causing will occur*, and the harm results" (emphasis added)).

[87] *See*, *e.g.*, State v. Wilcoxon, 639 So.2d 385 (La. Ct. App.1994)

[88] WYO. STAT. ANN. § 6-1-104(a)(iii) (LexisNexis 2005).

[89] *See*, *e.g*, Utley v. State, No. CR 05-1400, 2006 WL 1516454 (Ark. June. 1, 2006); Panther v. State, 780 P.2d 386 (Alaska Ct. App. 1989).

[90] *See* RESTATEMENT (SECOND) OF TORTS § 282, comment a (1965) (explaining that civil liability for negligence presupposes a volitional act or omission); § 2, comment a (explain-

attributable to something other than a voluntary act—was attributable, say, to the defendant's falling asleep, or to a seizure or convulsion—then this nonvoluntary event obviously could not provide the basis for imposition of negligence liability.[91]

There are, of course, plenty of cases where the courts have imposed liability for criminal negligence on drivers who fall asleep at the wheel of a car, or who suffer seizures or convulsions at the wheel. But not only do these cases not *dis*prove the claim that negligence liability presupposes a voluntary act, they go a long way toward proving it.

Consider, for example, *People v. Decina*,[92] where the defendant suffered an epileptic seizure while driving and, as a result, drove onto a sidewalk, killing four schoolchildren. On this basis, he was charged with "criminal negligence in the operation of a vehicle resulting in death,"[93] and this charge was sustained by the New York Court of Appeals. In *Decina*, of course, the defendant obviously did not *purposely* or *volitionally* steer the car onto the sidewalk, so the court's decision to sustain the charge might seem to suggest, at first glance anyway, that even non-volitional events can provide a basis for negligence liability.[94] But it does not. The court sustained the indictment not on the basis of the defendant's "act" of driving onto the sidewalk, but rather on the basis of his earlier voluntary decision to drive despite his susceptibility to fits:

> [T]his defendant knew that he was subject to epileptic attacks and seizures that might strike *at any time.* He also knew that a

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ing that "[t]here cannot be an act without volition"); *see also* RESTATEMENT (THIRD) OF TORTS, Proposed Final Draft, § 3, comment c (2006) (explaining that in a case where the driver fails to brake as he approaches the other car, "it can be stated that the driver is negligent for the dangerous action of driving the car without taking the precaution of braking appropriately"); *Utley*, 2006 WL 1516454 (Hannah, J., dissenting) (asking, in attempt to identify voluntary act that formed basis for imposition of liability for negligent homicide: "What happened to Utley? Did he doze off? Was he changing a CD or the radio? Did his mind wander?").

[91] RESTATEMENT (SECOND) OF TORTS § 2, comment a (1965) (explaining that "a contraction of a person's muscles which is purely in reaction to some outside force, such as a knee jerk or the blinking of the eyelids in defense against an approaching missile, or the convulsive movements of an epileptic, are not acts of that person. So too, movements of the body during sleep when the will is in abeyance are not acts.").

[92] People v. Decina, 138 N.E.2d 799 (N.Y. 1956).

[93] *Id.* at 808 (Desmond, J., dissenting).

[94] This was how the dissenters characterized the majority opinion, in fact. *See id.* at 808 (Desmond, J., dissenting) (arguing that "[o]ne cannot be 'reckless' while unconscious. One cannot while unconscious 'operate' a car in a culpably negligent manner or in any other 'manner.'").

> moving motor vehicle uncontrolled on a public highway is a highly dangerous instrument capable of unrestrained destruction. With this *knowledge*, and without anyone accompanying him, he deliberately took a chance by making a conscious choice of a course of action, in disregard of the consequences which he knew might follow from his conscious act, and which in this case did ensue.[95]

In other words, the court looked backward in time to identify a voluntary act that was a cause of the victims' death and that was performed with negligence of the consequences.

The same thing is true of cases where courts have imposed liability on parents who roll onto their infant children while sleeping. In *Bohannon v. State*,[96] for example, the Georgia Court of Appeals sustained the defendant's conviction for involuntary manslaughter on evidence that she had placed her infant daughter in the bed shared by defendant and her partner, and that her partner had, "in a drunken sleep, roll[ed] on top of the child thereby inflicting injuries to the child's head and asphyxiating her."[97] The court appeared to agree with the defendant (and with the dissent) that "the averred act of the [partner] of rolling onto the baby, while being in a drunken sleep," could not provide the basis for imposition of criminal liability on *either* the defendant or her husband.[98] The court recognized that the conviction instead would have to be grounded on "the act of appellant [in] plac[ing] her less than three-month-old baby in the bed to sleep between herself and the male co-defendant who she also then knew was 'intoxicated.'"[99] The court explained: "as the 'conscious disregard' arose at the moment the child was positioned in the bed, it is of no relevance regarding appellant's culpability that she and her co-defendant were asleep when the resulting act of fatal overlay occurred."[100] So the court in *Bohannan*, too, looked backward in time to identify a voluntary act that was the cause of death.

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[95] *Id.* at 804.
[96] Bohannon v. State, 498 S.E.2d 316 (Ga. Ct. App. 1998).
[97] *Id.* at 320.
[98] *Id.* at 322.
[99] *Id.*
[100] *Id.* at 323; *see also* Hemby v. State, 589 S.W.2d 922 (Tenn. Ct. App. 1978) (upholding defendant's conviction for involuntary manslaughter on evidence that the defendant, after falling asleep on a bed in which his infant son was sleeping, "apparently rolled over on the baby, with the weight of the defendant's body suffocating the sleeping infant"); United States v. Red Eagle, 60 Fed. Appx. 155 (9th Cir. 2003) (striking down conviction on ground that defendant lacked any "subjective awareness of the risk posed by putting his child in the bed and going to sleep with him while intoxicated").

The requirement of a voluntary or intentional act as a prerequisite to the imposition of criminal liability is neither novel nor controversial.[101] The basic point was explained by Aristotle, who illustrated it by saying that an indispensable element of moral culpability would be missing "if [the actor] were to be carried somewhere by the wind, or by men who had him in their power."[102] Aristotle's examples would have to be conceded even today. Thus, a person charged with fishing commercially in a closed area might validly defend by asserting "that he had made the set in legal waters but that his boat had been caused to drift into closed waters by the wind and the tide."[103] And a person charged with the offense of "appear[ing] in any public place" while "intoxicated or drunk" might validly defend by asserting that he had been "involuntarily and forcibly carried to that place by the arresting officer."[104]

There is, admittedly, some controversy at the boundaries about exactly what will qualify as a voluntary act. In *Fulcher v. State*,[105] for example, the justices of the Wyoming Supreme Court split on the question whether a person who performs complex actions[106] while "in an automatistic state" really acts "without intent, exercise of free will, or knowledge of the act."[107] Academics too have disagreed about the boundaries of the concept. H.L.A. Hart questioned the viability of existing definitions of "voluntariness" in a 1968 lecture,[108] as did Michael Corrado in a 1994 law review article.[109] But the existence and necessity of the require-

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[101] WAYNE LAFAVE & AUSTIN SCOTT, SUBSTANTIVE CRIMINAL LAW, vol. 1, § 3.2(c) at 278 (1986) ("a voluntary act is an absolute requirement for criminal liability"); Maura Caffrey, *A New Approach to Insanity Acquittee Recidivism: Redefining the Class of Truly Responsible Recidivists*, 154 U. PA. L. REV. 399, 427 (2005) ("Both negligence and recklessness presuppose voluntary action.").

[102] THE NICOMACHEAN ETHICS OF ARISTOTLE, BOOK III, § 1 (W.D. Ross transl. 1958).

[103] Love v. State, 457 P.2d 622, 635 (Alaska 1969) (Nesbett, J., dissenting).

[104] Martin v. State, 17 So.2d 427 (Ala. Ct. App. 1944); *see also* Kuhlmann v. Rowald, 549 S.W.2d 583, 584 (Mo. Ct. App. 1977) (holding that trial court had erred in instructing jury on contributory negligence where plaintiff had been pushed into the path of the defendant's oncoming car by one of her companions; "plaintiff's 'movement' into the path of defendant's oncoming car was not an act of her own volition," and so could not form the basis for a finding of contributory negligence).

[105] Fulcher v. State, 633 P.2d 142 (Wyo. 1981).

[106] The defendant in *Fulcher* was charged with aggravated assault after he kicked and stomped on his cellmate's head. *Id.* at 143.

[107] *Id.* at 145. The three justices in the majority took the position that "[b]ecause these actions are performed in a state of unconsciousness, they are involuntary." *Id.* at 145. The two concurring justices appeared to agree that some forms of unconsciousness would defeat the imposition of liability. *Id.* at 156-57 (discussing the commentary to MODEL PENAL CODE § 2.01). But they argued that automatism should be treated as a form of insanity rather than as a form of unconsciousness. *Id.*

[108] H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 90-112 (1968).

[109] Corrado, *supra* note 5.

ment are utterly uncontroversial. Everybody agrees that the criminal law includes a "requirement that something be done intentionally."[110] For everybody agrees that only an intentional act can signal either the sort of "moral deficiency" that justifies retributive punishment[111] or the sort of dangerousness that calls for rehabilitation.[112]

At first glance, this argument might seem to be at odds with the fact that juries rarely are instructed on the requirement of an intentional act in cases involving, say, recklessness or criminal negligence. But there are good reasons for this seeming anomaly. One reason why "[o]rdinarily, no special instruction is needed concerning the requirement of a voluntary act [is that] this issue is not disputed."[113] Another reason why no special instruction is needed is that standard instructions requiring the jury to determine, say, whether the defendant "acted recklessly" will be interpreted by jurors, in keeping with common usage, to require them to determine whether the defendant performed an intentional act with recklessness toward the consequences of his act.[114]

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[110] *Id.* at 1560.

[111] *Fulcher*, 633 P.2d at 146 (adopting the view that "a person who is completely unconscious when he commits an act otherwise punishable as a crime cannot know the nature and quality thereof or whether it is right or wrong); *see also* NICHOMACHEAN ETHICS, BOOK III, § 1 (arguing that "to distinguish the voluntary and the involuntary is presumably necessary for those who are studying the nature of virtue, and useful also for legislators with a view to the assigning both of honours and of punishments").

[112] *Id.* (asserting that "[t]he rehabilitative value of imprisonment for the automatistic offender who has committed the offense unconsciously is nonexistent").

[113] Mooney v. State, 105 P.3d 149, 155 (Alaska Ct. App. 2005).

[114] *See* Nelson v. State, 927 P.2d 331, 334 (Alaska Ct. App. 1996) (rejecting defendant's claim that special instruction on requirement of voluntary act was necessary, and agreeing with the prosecution that "jurors who are asked to decide whether a defendant has . . . 'recklessly' caused some result will approach their task correctly if they are told the statutory meaning of . . . 'recklessly'"). In its brief in the *Nelson v. State* appeal, the State had argued:

> [R]eplacement of the word "recklessly" with a complex formula [requiring the jury to decide whether the defendant intentionally or knowingly performed an act with recklessness of the consequences] will not alter jurors' verdicts. Just as a baseball player *knows* how to swing a bat, an ordinary person *knows* how to use the word "recklessly," regardless of whether he can formulate the rules that govern his participation in this activity. Here, as elsewhere in our experience, the ability to participate in a particular activity is not dependent, or perhaps even related to, the ability to identify and describe its constituent parts.

Brief of Appellee, Nelson v. State, No. A-5688, at 14 (citing Ludwig Wittgenstein, Philosophical Investigations, Part I, § 60 (G.E.M. Anscombe trans. 1958)).

Nor is "the requirement of a voluntary act" any less a requirement by virtue of the fact that the Wyoming courts impose on the defendant the burden of raising the "defense" of involuntariness and the burden of proving by a preponderance of the evidence that his acts were performed involuntarily.[115] Imposition of the burden of persuasion on the defendant does not signify that criminal liability sometimes is appropriate even in the absence of a voluntary act; rather, it signifies only that the law ordinarily *presumes* the voluntariness of the defendant's actions[116] and that the defendant is better situated than the state to acquire information about the voluntariness of his actions. Whether proven or presumed, a voluntary act remains an essential prerequisite to the imposition of moral blame, and so, to the imposition of criminal liability.

The existence of this fundamental "requirement that something be done intentionally"[117] as a prerequisite to the imposition of *any* form of criminal liability—even strict liability[118]—suffices to show why the first prong of the definition of second-degree murder is without substance. As defined by the Wyoming Supreme Court, this first prong "require[s] proof only of acting purposely or voluntarily."[119] But if the law requires proof of "acting purposely or voluntarily" as an element of every crime, then the first prong of the statute cannot serve to distinguish second-degree murder from reckless manslaughter, or negligent homicide.

Nor even can the requirement of an intentional act serve to distinguish criminal homicide from wholly innocent conduct. This point was explained by Justice Holmes more than a hundred years ago in *The Common Law.* "The act is not enough by itself," he wrote, to justify the assignment of blame or the imposition of criminal liability, even though "[a]n act, it is true, imports intention in a certain sense."[120] Glanville Williams made much the same point, in language that seems weirdly responsive to *Crozier*: "The requirement of an act with its element of will is not so important a restriction upon criminal responsibility as it may first appear."[121] A voluntary act, though necessary to justify criminal liability, is

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[115] *Fulcher*, 633 P.2d at 147.
[116] *Cf.* Clark v. Arizona, 126 S. Ct. 2709 (2006) (referring to "universal" presumption "that a defendant has the capacity to form the *mens rea* necessary for a verdict of guilt").
[117] Corrado, *supra* note 5, at 1543.
[118] *Id.* at 1536 (acknowledging "the fact that even for strict liability, the agent must be doing something intentionally").
[119] Young v. State, 849 P.2d 754, 759 (Wyo. 1993).
[120] HOLMES, *supra* note 67, at 54. Holmes explained that "to crook the forefinger with a certain force is the same act whether the trigger of the pistol is next it or not." Thus, a person who intentionally crooks his forefinger can be said to have "purposely acted" whether he knew of the trigger's presence. And thus, "[a]n act cannot be wrong, even when done under circumstances in which it will be hurtful, unless those circumstances are or ought to be known." *Id.*
[121] WILLIAMS, *supra* note 71, § 8 at 13.

not close to being sufficient. A requirement that the defendant "act purposely" cannot, finally, be the gravamen of second-degree murder or any other serious crime.

IV. THE REQUIREMENT OF MALICE

What remains of second-degree murder is the requirement that the defendant's voluntary act be performed "maliciously." Under current Wyoming case law, this requirement of malice is satisfied where the state proves *either* that the defendant acted "without legal justification or excuse" *or* that the defendant acted with "hatred, ill will, or hostility."[122] This definition of malice originated in Justice Blume's 1924 opinion in *State v. Sorrentino*,[123] a second-degree murder case. The definition was recovered in a 2003 arson case, *Keats v. State*,[124] where the court concluded that Wyoming's definition of malice had "always contained the alternative theories of actual hostility or ill will and the doing of an act without legal justification or excuse."[125] Two years later, in *Butcher v. State*, the court said that this definition would be applied not only in arson cases but in second-degree murder cases, too.

The trouble with this definition of "malice," as I will explain below, is that it adds little of substance to the requirement of a voluntary act. The *Keats* definition of malice works in the arson setting because the arson statute, in addition to requiring proof of malice, also requires proof of another culpable mental element—"intent to destroy or damage an occupied structure."[126] In the second-degree murder setting, by contrast, the job of differentiating culpable from non-culpable conduct falls entirely on the shoulders of the malice element; the requirement of a voluntary act, as we have seen, does little or nothing to separate culpable from non-culpable conduct. Neither the vague requirement of "hostility or ill will" nor the alternative requirement of absence of "legal justification or excuse" can handle the heavy lifting required of malice here.

What Wyoming's second-degree murder statute needs is something akin to the definition of malice currently applied by most other states. This modern definition of malice requires proof of "either (a) an actual intent to cause the particular harm which is produced or harm of the same general nature, or (b) the wanton and willful doing of an act with awareness of a plain and strong

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[122] Butcher v. State, 2005 WY 146, ¶ 24, 123 P.3d 543, 550-51 (Wyo. 2003) (explaining that trial court erred in requiring State to prove *both* of these alternatives at Butcher's trial).

[123] State v. Sorrentino, 31 Wyo. 129, 224 P. 420 (1924).

[124] Keats v. State, 2003 WY 19, ¶ 32, 64 P.3d 104, 114 (Wyo. 2003).

[125] *Id.*

[126] WYO. STAT. ANN. § 6-3-101(a) (LexisNexis 2005).

likelihood that such harm may result."[127] The Wyoming Supreme Court moved subtly toward this definition in *Lopez v. State*, where the court, in holding that defendant Lopez's open-handed slap did not suffice to show malice, relied on cases from other states that use "malice" in roughly this sense. In this part of the Article, I will urge the court to follow *Lopez* to its logical conclusion; to make the modern form of malice an element of second-degree murder.

A. Why the existing definition of malice is unworkable

In *Keats v. State*,[128] the first-degree arson charge was based on Keats's actions in setting several small fires in his residence during a standoff with police.[129] At his trial, Keats asked the judge to instruct the jury that "malice" requires "hatred, ill will, or hostility *toward another*," apparently in the hope that the jury would conclude that he meant only to harm himself.[130] It was in reviewing the trial judge's refusal to give this instruction that the Wyoming Supreme Court undertook a comprehensive review of the meaning of "malice." This review led the court to conclude that the requirement of malice is satisfied where the state proves *either* that the defendant acted "without legal justification or excuse" *or* that the defendant acted with "hatred, ill will, or hostility."[131]

The *Keats* decision is defensible as an interpretation of the first-degree arson statute. Under this statute, a "person is guilty of first-degree arson if he maliciously starts a fire or causes an explosion with intent to destroy or damage an occupied structure."[132] Because this statute requires proof of "intent to destroy or damage an occupied structure," the element of malice serves a very limited—and purely negative—purpose. Specifically, it serves to remove from the arson statute's reach those rare cases where a person intentionally destroys or damages an occupied structure with a lawful justification and without hostility or ill will. The element of malice would, for example, be absent where "fire departments . . . perform training exercises by burning old structures with the owners' permission."[133] In this setting, as the Wyoming Supreme Court said in *Keats*, "[t]he fire is set with

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[127] PERKINS & BOYCE, *supra* note 61, at 857-60 (referring to the current "clear recognition of the non-necessity of any element of hatred, spite, grudge or ill-will"; and summarizing the modern sense of malice as requiring "either (a) an actual intent to cause the particular harm which is produced or harm of the same general nature, or (b) the wanton and willful doing of an act with awareness of a plain and strong likelihood that such harm may result").

[128] Keats v. State, 2003 WY 19, 64 P.3d 104 (Wyo. 2003).

[129] *Id.* at ¶¶ 3-5, 64 P.3d at 106.

[130] *Id.* at ¶ 17, 64 P.3d at 109.

[131] *Id.* at ¶ 32, 64 P.3d at 114.

[132] WYO. STAT. ANN. § 6-3-101(a) (LexisNexis 2005).

[133] *Keats*, 2003 WY 19, ¶ 28 n.5, 64 P.3d at 113 n.5.

the specific intent to damage or destroy the structure, but there is no unlawful intent."[134]

Keats's definition of "malice" cannot, however, plausibly be extended to second-degree murder. It can be said of nearly every homicide that the act that caused death was performed *either* with "hostility or ill will" *or* without "legal justification or excuse." For starters, the words "hostility" and "ill will" are broad enough to encompass a wide array of innocuous conduct. A bicyclist who hollers "asshole" at a rude motorist, for example, certainly acts with "hostility," but few of us would be willing to convict the bicyclist of second-degree murder if the motorist, in turning to glare at the bicyclist, were to lose control of his vehicle and suffer a fatal rollover accident. Worse, the alternative criterion of "without legal justification or excuse" is even broader. The phrase "legal justification or excuse" appears to encompass just those situations where, as in cases of self-defense[135] or defense of property, the defendant has some affirmative statutory or common law justification for his actions. But *every* form of criminal homicide—including negligent homicide—requires that the defendant's act be performed without this sort of justification. This very difficulty was remarked by the Wyoming Supreme Court itself in *Helton v. State*,[136] another second-degree murder case:

> While many definitions may be found of "Legal Malice", "Implied Malice" and "Constructive Malice", which say in substance that such malice denotes merely the absence of legal excuse, legal privilege or legal justification, these definitions fail to satisfy when they are placed under the scrutiny of close analysis or of subjective reasoning. In homicide, if the killing be legally excusable, legally privileged or legally justifiable, there can, of course, be no legal conviction of any crime. Conversely, if legal conviction is had, there must be an absence of legal excuse, privilege or justification. Hence, if such definitions are accurate, then in every legal conviction of homicide there would be legal malice, implied malice or constructive malice. This, of course, is not so.[137]

At first glance, my conclusion—that the *Keats* definition of malice cannot workably be extended to second-degree murder—seems to be at odds with precedent; after all, the *Keats* definition of malice *originated* in a second-degree murder

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[134] *Id.*

[135] *See Butcher*, 2005 WY 146, ¶ 25, 123 P.3d at 551 (in addressing question whether defendant acted "without legal justification or excuse," court addressed defendant's claim that he had stabbed the victim in self-defense).

[136] Helton v. State, 73 Wyo. 92, 276 P.2d 434 (1954).

[137] *Id.* at 114-15, 276 P. at 442.

case, *State v. Sorrentino*.[138] But this first glance is deceiving. In 1924, when Justice Blume announced the court's decision in *Sorrentino*, second-degree murder was thought to require proof of another mental element in addition to malice—namely, the intent to kill. Just a few years after *Sorrentino*, in *Eagan v. State*, Justice Blume would say of a jury instruction challenged by defendant Eagan: "it can hardly be denied that [the instruction] was correct in telling the jury that they should not convict of murder in the first *or second degree*, unless it was committed 'intentionally, and *with the purpose of killing*.'"[139] Nor was *Eagan* anomalous in this respect. In the century or so that intervened between the adoption of the second-degree murder statute and the court's decision in *Crozier*, the Wyoming Supreme Court repeatedly had said that second-degree murder required proof of intent to kill. [140]

This explains why a minimalist definition of malice would have seemed suitable to Justice Blume in *Sorrentino.* Just as the arson statute's requirement of "intent to destroy or damage an occupied structure" relieves the arson statute's "malice" element of any substantial role in differentiating innocent conduct from criminal conduct, so too did second-degree murder's former requirement of "intent to kill" leave that statute's malice element with little work to do. In 1924, the only purpose served by the malice element in second-degree murder was to remove from the statute's reach those very rare cases where the defendant was legally justified in intentionally killing another person. It was only after the court in *Crozier* eliminated the requirement of "intent to kill" that the task of differentiating second-degree murder from less culpable forms of homicide fell onto the shoulders of the malice requirement. In short, the workability of Justice Blume's definition of malice in 1924 says nothing about its workability post-*Crozier.*

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[138] State v. Sorrentino, 31 Wyo. 129, 224 P. 420 (1924).

[139] Eagan v. State, 128 P.2d 215, 222 (Wyo. 1942) (emphasis added).

[140] Indeed, in *Sorrentino* itself, Justice Blume said that a "verdict of murder in the second degree necessarily implies the finding of all the facts essential to the offense of voluntary manslaughter." *Sorrentino*, 31 Wyo. at 149, 224 P. at 426. "[I]n voluntary manslaughter," as the Wyoming Supreme Court long had recognized, "there is an intentional killing, but without any element of malice or premeditation." Brantley v. State, 9 Wyo. 102, 107, 61 P. 139, 140 (1900); *see also* Ivey v. State, 24 Wyo. 1, 8-9, 154 P. 589, 590-91 (1916) (holding that "one who upon a sudden heat of passion aroused by great and sufficient provocation, but without malice, but as the result of the passion so aroused solely, voluntarily assaults another *with intent to kill* him, and inflicts upon him a wound causing death, is guilty of voluntary manslaughter under our statute") (emphasis added); Goodman v. State, 601 P.2d 178, 186-87, (Wyo. 1979) (characterizing as "correct and complete in their statement of the pertinent law" jury instructions that included statement that "If the essential element of intention to kill is excluded, the defendant cannot be found guilty of murder in the first degree, or of murder in the second degree, or of voluntary manslaughter"); Jahnke v. State, 692 P.2d 911, 917 (Wyo. 1984) ("in the case of voluntary manslaughter there is an intentional killing but without any element of malice or premeditation", quoting Brantley);

Further, these difficulties with the definition of malice would remain even if the state were required to prove *both* constituent parts of the *Keats* test—both "with hatred, ill will or hostility toward another" and "without legal justification or excuse"—as the state apparently was required to do before *Keats.*[141] The bicyclist who causes a fatal rollover accident by shouting "asshole" at a rude motorist obviously would satisfy both of these requirements, as would, say, a person who causes another's death by slapping him once. This latter case is *Lopez v. State*,[142] of course, where the victim of the slap unfortunately "had numerous health problems that made him susceptible to death by the slap."[143] Though the Wyoming Supreme Court in *Lopez* concluded that the slap was insufficient to prove malice, it reached this conclusion only by momentarily ignoring its own definition of malice in favor of precedent from Utah and Colorado. The state in *Lopez* unquestionably had offered sufficient proof both that Lopez had acted with "hatred, ill will, or hostility toward another" and that he had acted without "legal justification or excuse."

B. What Lopez teaches indirectly about malice

As I have said, the *Lopez*[144] decision will provide my starting point for formulating a new definition of malice. But it is important to emphasize, as a preliminary matter, that the *Lopez* decision did not itself formulate a new definition of malice. The focus of the *Lopez* decision was on identifying certain states of affairs from which malice can and cannot be *inferred.* It said, for example, that malice *can* sometimes be inferred from "repeated use of fists or feet or boots."[145] And it said that malice *cannot* be inferred from an open-handed slap or from "a harmless shove."[146] But identifying the circumstances from which malice can be inferred is not the same as saying what malice is. Malice is, after all, a "psychical fact," not a physical one.[147] Even if the appellate courts were to catalogue exhaustively all of the circumstances from which malice could be inferred, each trial jury would still have to decide whether to *draw* the inference.[148] And before it could decide

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[141] The current pattern jury instruction defines "maliciously" as follows:

> "Maliciously" means the state of mind in which an intentional act is done without legal justification or excuse. The term "maliciously" conveys the meaning of hatred, ill will or hostility toward another.

WYOMING PATTERN JURY INSTRUCTIONS (Criminal) § 21.04(b) (1996), *quoted in* Butcher v. State, 2005 WY 146, ¶ 19, 123 P.3d 543, 549-50 (2005).

[142] Lopez v. State, 2004 WY 28, 86 P.3d 851 (Wyo. 2004).

[143] *Id.* at ¶ 8, 86 P.3d at 856.

[144] Lopez v. State, 2004 WY 28, 86 P.3d 851 (Wyo. 2004).

[145] *Id.* at ¶ 21, 86 P.3d at 858.

[146] *Id.* at ¶¶ 22-23, 86 P.3d at 859.

[147] PERKINS & BOYCE, *supra* note 61, at 74.

[148] *See* Moya v. People, 484 P.2d 788, 789 (Colo. 1971) (holding that "inference of malice is one of fact for jury determination from the evidence").

whether to draw the inference, the jury would have to be told exactly what mental state it was being asked to infer. On this point, the *Lopez* decision offers no direct guidance.[149]

Thankfully, *Lopez* offers an abundance of *indirect* guidance. First of all, *Lopez* tells us indirectly that malice cannot really be defined as "ill will, hatred or hostility toward another." As a matter of common sense, there is a strong basis for inferring "ill will, hatred or hostility" when one person physically strikes another in the face, regardless of whether the attacker's hand is open or closed. By holding that an open-handed blow *never* can provide a factual basis for inferring malice, then, the *Lopez* court signaled unambiguously that malice must be something other than "ill will, hatred or hostility toward another." Nor should this come as any surprise. Though in ordinary speech the word "malice" is roughly synonymous with the "hatred," "ill-will," and "hostility,"[150] other courts long have recognized that "malice" in its "legal sense" does not describe a feeling of "ill-will against a person."[151]

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[149] There is one statement in *Lopez* that might, at first glance anyway, appear to point toward a formula for defining "implied malice." *Lopez*, 2004 WY 28, ¶ 22, 86 P.3d at 858. The court made this statement in the course of explaining why an open-handed slap could not supply the factual basis for inferring malice:

> Death or great bodily harm must be the reasonable or probable consequence of the act to constitute murder. The striking of a blow with the fist on the side of the face or head is not likely to be attended with dangerous or fatal consequences, and so no inference of malice is warranted by such proof.

Id. This statement is drawn almost verbatim from an Illinois case, People v. Crenshaw, 131 N.E. 576 (Ill. 1921). Where the original differs from the *Lopez* version is in the last line, where the Illinois court said not that "no inference of malice is warranted" but that "no inference of *an intent to kill* is warranted." *Id.* at 577 (emphasis added). This comparison with the original only confirms what might have been apparent from the *Lopez* statement itself: that neither court's concern is with defining the mental state that constitutes "malice"; both courts are concerned rather with identifying circumstances from which that mental state—whatever it might be—can plausibly be inferred. The "reasonable or probable consequence" formulation appears no place else in the Wyoming cases.

[150] OXFORD AMERICAN THESAURUS 456 (Lindberg ed., 1999) (identifying "hatred," "hostility," and "ill will" as synonyms of "malice").

[151] Bromage v. Prosser, 4 Barn. & Cres. 255 (K.B. 1825) (explaining that "[m]alice, in common acceptation, means ill-will against a person, but in its legal sense, it means a wrongful act, done intentionally, without just cause or excuse"); *see also* PERKINS & BOYCE, *supra* note 61, at 857-60 (referring to the current "clear recognition of the non-necessity of any element of hatred, spite, grudge or ill-will"); Commonwealth v. Buckley, 18 N.E. 577 (Mass. 1888) (holding that "[t]he malice required by the [arson] statute is not a feeling of ill-will towards the person threatened, but the willful doing of the act with the illegal intent"); York's Case, 9 Met. 93 (Mass. 1845) (Lemual Shaw, J.) (explaining that

The *Lopez* decision also tells us indirectly that "malice" cannot really mean "wickedness in general."[152] The Wyoming Supreme Court frequently has said, as indeed it did again in *Lopez* itself, that "malice" denotes a "wicked, evil, or unlawful purpose"[153] But this definition of the word "malice" is inconsistent with the result in *Lopez* itself, since it certainly would have been possible for Lopez's trial jury to conclude—in the words of the state's brief on appeal—that "Lopez acted with a 'wicked' mind when he struck [Robert Herman]."[154]

Nor should it come as any surprise that the Wyoming Supreme Court proved reluctant to apply this definition of malice. This use of the word malice is a holdover from the time when courts first began requiring proof of *mens rea*.[155] In this early stage of the criminal law's development, "mens rea . . . meant little more than a general immorality of motive"[156] or general "moral blameworthiness."[157] Accordingly, *mens rea* was essentially fungible; a defendant's belief that he was committing, say, fornication, might suffice to establish the requisite culpability for a different and more serious offense like statutory rape.[158] This blunt-knife approach to criminal liability is illustrated by Wyoming "misdemeanor-manslaughter" statute, which was part of Wyoming's territorial criminal code and which survived until 1983.[159]

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the word "malice" "is not to be understood in that narrow, restrained sense to which the modern use of the word 'malice' is apt to lead one"); People v. Sedeno, 518 P.2d 913, 926 (Cal. 1974) (holding that "[i]ll will toward or hatred of the victim are not requisites of malice as that term is used in defining murder").

[152] Regina v. Cunningham, 41 Crim. App. 155, 2 Q.B. 396, 2 All Eng. Rep. 412 (1957).

[153] *Lopez*, 2004 WY 28, ¶ 19, 86 P.3d at 858 (reciting the rule that "[t]he required state of mind for a murder conviction is that degree of mental disturbance or aberration of the mind that is wicked, evil and of unlawful purpose, or of that willful disregard of the rights of others which is implied in the term malice").

[154] *Id.* at ¶ 20, 86 P.3d at 858.

[155] *See* Frank Remington & Orrin Helstad, *The Mental Element In Crime—A Legislative Problem*, 1952 WIS. L. REV. 644, 648-49 (1952) (describing the historical "transition from strict liability to the requirement of a mental element" and identifying "[t]he early concept of *mens rea* [as] little more than a general notion of moral blameworthiness"); KENNY'S OUTLINES OF CRIMINAL LAW, *supra* note 75, § 158a at 202 (noting that first edition of Kenny's treatise in 1902 had characterized this use of the term "malice" as "the old vague sense of 'wickedness in general'").

[156] Francis Sayre, *The Present Signification of Mens Rea in the Criminal Law*, HARVARD LEGAL ESSAYS 399, 411-12 (1934).

[157] Remington & Helstad, *supra* note 155, at 649; *see also* Sanford Kadish, *The Decline of Innocence*, 26 CAMBRIDGE L. J. 273, 274 (1968).

[158] *See* W.M. CLARK, HANDBOOK OF CRIMINAL LAW § 36 at 86-87 (2d ed. 1902) (compiling cases).

[159] In 1976, seven years before the misdemeanor-manslaughter provision finally was superseded, the Wyoming Supreme Court held that the vehicular homicide statute had impliedly repealed the misdemeanor-manslaughter provision, at least to the extent that an act "malum prohibitum" was involved. *See* Bartlett v. State, 569 P.2d 1235 (Wyo. 1977).

Under this statute, a person was guilty of manslaughter if he killed any human being "in the commission of some unlawful act."[160] What this—and similar statutes—meant in practice was that the defendant's mere intent to commit a misdemeanor supplied all of the culpability required for imposition of homicide liability,[161] regardless of whether the misdemeanor carried any perceptible risk of death.[162] Thus, the statute did not require offense-specific culpability—did not require, as Wyoming's current manslaughter statute does, that the defendant either wanted to bring about or at least foresaw the *possibility* of bringing about the proscribed social harm.

This late change in Wyoming's manslaughter statute is, then, illustrative of the broader historical trend, in which the vague requirement of "wickedness" gradually has been replaced by finely calibrated requirements of offense-specific culpability.[163] First-year law students usually learn about this change by reading *Regina v. Cunningham.*[164] Cunningham removed the gas meter from the basement of his residence for the purpose of stealing coins that had been deposited in the meter.[165] His removal of the gas meter caused the release of coal gas, which poisoned the occupant of the adjacent residence, who happened to be Cunningham's mother-in-law. At trial, the judge instructed the jury that the "malice" element of the poisoning statute would be satisfied if the defendant's actions were "wicked."[166] This instruction would, of course, have permitted the jury to find "malice" on

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[160] 1876 WYOMING COMPILED LAWS ch. 35, § 18; *see also* State v. Cantrell, 64 Wyo. 132, 146 186 P.2d 539, 543 (1947) (observing that a charge of manslaughter will lie where the killing occurs *either* "in the commission of an unlawful act *or* by any culpable neglect or criminal carelessness").

[161] Comber v. United States, 584 A.2d 26, 37 (D.C. App. 1990).

[162] State v. Pray, 378 A.2d 1322, 1323 (Me. 1977) (criticizing misdemeanor-manslaughter rule on the ground that it imposes liability "even though [a] person's conduct does not create a perceptible risk of death"). In this respect, liability under the misdemeanor-manslaughter statute differs from felony-murder liability, which generally attaches only with respect to felonies that create a perceptible risk of death. *See*, *e.g.*, WYO. STAT. ANN. § 6-2-101(a) (LexisNexis 2005) (limiting application of felony-murder rule to "sexual assault, arson, robbery, burglary, resisting arrest, kidnapping or the abuse of a child under the age of sixteen").

[163] *See* Paul Robinson & Jane Grall, *Element Analysis in Defining Criminal Liabilty: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 687-88 (1983).

[164] Regina v. Cunningham, 41 Crim.App. 155, 2 Q.B. 396, 2 All Eng. Rep. 412 (1957). Among the first-year Criminal Law casebooks that include the *Cunningham* decision are, *e.g.*, RICHARD BONNIE, ANNE COUGHLIN, JOHN JEFFRIES JR. & PETER LOW, CRIMINAL LAW 180 (2d ed. 2004); JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 144 (3d ed. 2003); WAYNE LAFAVE, MODERN CRIMINAL LAW: CASES, COMMENTS AND QUESTIONS 114 (3d ed. 2001); SANFORD KADISH & STEPHEN SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 204 (7th ed. 2001).

[165] *Cunningham*, 41 Crim.App. 155, 2 Q.B. 396, 2 All Eng. Rep. 412.

[166] *Id.* at 397.

the basis of Cunningham's intent to steal, for Cunningham "had clearly acted wickedly in stealing the gas meter and its contents."[167] In reversing, the appellate court concluded that Cunningham's intent to steal could not supply "malice" of the right sort. In its modern sense, the court said, "malice" requires "either (1) [a]n actual intention to do the particular kind of harm that [the statute proscribes], or (2) recklessness as to whether such harm should occur or not."[168]

C. Toward an alternative definition of malice

An updated definition of "malice" would presumably take much the same form as the definition of malice in *Cunningham*: it would require proof that the defendant either wished to bring about or consciously disregarded a risk of bringing about the very social harm—death—that is an element of second-degree murder. At the same time, however, it would have to require more than ordinary recklessness, since reckless homicide is a form of manslaughter in Wyoming.[169] *Lopez* points the way toward such a definition by its heavy reliance on precedent from Utah and Colorado.[170] In Utah and Colorado, and indeed in much of the rest of the country, "express malice" is defined to require the intent to bring about the proscribed result,[171] while "implied malice" is defined to require something

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[167] *Id.* at 401.

[168] *Id.* at 399. In Wyoming's criminal code, this modern approach to culpability finds expression not only in statutes defining specific offenses—like the statute defining manslaughter—but in Wyoming's statutory definitions of recklessness and criminal negligence. These definitions require the government to prove that the defendant either consciously disregarded or culpably overlooked *the very social harm that is proscribed by the statute under which the defendant is being prosecuted*. Under these definitions, "[a] person acts recklessly when he consciously disregards a substantial and unjustifiable risk that *the harm he is accused of causing* will occur"; he acts with criminal negligence when "he fails to perceive a substantial and unjustifiable risk that *the harm he is accused of causing* will occur." WYO. STAT. ANN. § 6-1-104(a) (LexisNexis 2005) (emphasis added). The same calibration of mental state to social harm occurs as a matter of course where the law requires proof that the defendant *intended* to bring about the very social harm that is the statute's target. A defendant who is charged with first-degree arson must intend "to destroy or damage an occupied structure," WYO. STAT. ANN. § 6-3-101 (LexisNexis 2005), while a defendant who is charged with larceny must intend "to steal or deprive the owner of the property," WYO. STAT. ANN. § 6-3-402 (LexisNexis 2005). Though both intentions are wicked, they are not interchangeable.

[169] *See* WYO. STAT. ANN. § 6-2-105(a)(ii) (LexisNexis 2005).

[170] *Lopez*, 2004 WY 28, ¶ 22, 86 P.3d at 858-59.

[171] *See* Walker v. People, 489 P.2d 584, 176-77 (Colo. 1971) ("[E]xpress malice is that deliberate intention, unlawfully to take away the life of a fellow creature which is manifested by external circumstances capable of proof."); Kelsey v. State, 532 P.2d 1001, 1004 (Utah 1975) (malice "is express when there is manifested a deliberate intention unlawfully to take the life of a fellow creature").

akin to "extreme recklessness."[172] It is, of course, the latter half of this definition—the "implied malice" component—that interests us here. There has never been any question whether "express malice"—the intent to kill—would satisfy the malice element of second-degree murder.[173] The difficult question for the Wyoming courts has always been what *else*—in addition to intent to kill—would suffice. And on this point, the Colorado and Utah decisions that were cited in *Lopez* point unambiguously to a single clear answer.

The Utah decision that was cited in *Lopez* was *Wardle v. State*.[174] *Wardle* was a second-degree murder case, where the evidence showed that the defendant had caused the victim's death by jumping up and down on him. The question on appeal was whether this conduct could support an inference that the defendant had acted with any of the three culpable mental states specified by Utah's second-degree murder statute: intent to kill; intent to cause serious bodily injury; or "depraved indifference to human life."[175] The court concluded that it could. What matters for our purposes, though, is that in so doing the court equated the last of these three culpable mental states—"depraved indifference to human life"—with "implied malice."[176] And, at the same time, the court made reference to another traditional definition of implied malice: "when the circumstances attending the killing show an abandoned and malignant heart."[177] In Utah, then, the "implied malice" that can be inferred from stomping but not slapping is equivalent to the mental state that has variously been described as "depraved indifference," "depraved heart," and "an abandoned and malignant heart."

The same is true in Colorado law. The Colorado Supreme Court's 1969 decision in *Pine v. People*,[178] which was cited in *Lopez*,[179] does not define "implied

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[172] PERKINS & BOYCE, *supra* note 61, at 860 (defining implied malice to require "the wanton and willful doing of an act with awareness of a plain and strong likelihood that [death] may result").

[173] Downing v. State, 11 Wyo. 86, 70 P. 833, 835 (1902) (quoting from jury instruction that defined "express malice" as "that deliberate intention unlawfully of taking away the life of a fellow creature which is manifested by external circumstances capable of proof").

[174] Wardle v. State, 564 P.2d 764 (Utah 1977).

[175] UTAH CODE ANN. § 76-5-203(2).

[176] *Wardle*, 564 P.2d at 765 n.1 (saying of the "depraved indifference" provision: "The terminology of this section indicates an implied malice, viz., when the circumstances attending the killing show an abandoned and malignant heart."); *Id.* at 766 (concluding that "there was a question of fact for the jury as to defendant's intention to kill or to cause serious bodily injury, or his implied malice").

[177] *Id.* at 765 n.1. In more recent cases, the Utah Supreme Court has clarified that the requisite culpable mental state for this form of second-degree murder is "knowledge [by the defendant] that his conduct created a grave risk of death to another." Fontana v. State, 680 P.2d 1042, 1047 (Utah 1984).

[178] Pine v. People, 455 P.2d 868 (Colo. 1969).

[179] *Lopez*, 2004 WY 28, ¶ 22, 86 P.3d at 858.

malice." But other contemporaneous Colorado decisions say that "implied malice" exists "[1] where there is no considerable provocation for killing or [2] where circumstances show an abandoned or malignant heart."[180] The second part of this definition—"where circumstances show an abandoned or malignant heart"—is the same as Utah's definition. The Colorado court has equated this formula to "depraved heart"[181] and "extreme indifference"[182] and has said that all three concepts define an extreme form of recklessness:

> The essential concept was one of extreme recklessness regarding homicidal risk. Thus, a person might be liable for murder absent any actual intent to kill or injure if he caused the death of another in a manner exhibiting "a wanton and willful disregard of an unreasonable human risk," or, in the confusing elaboration of one court "a wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty." Since "depraved heart" murderers exhibit the same disregard for the value of human life as deliberate or premeditated murderers, they are viewed as deserving of the same serious sanctions.
>
> Examples of the kinds of conduct which would demonstrate "depraved heart" murder at common law include: the firing of a loaded gun, without provocation, into a moving train and the resultant death of an innocent bystander, the discharge of a firearm into a crowd of people, operating a vehicle at high speed, placing obstructions on a railroad track, throwing a heavy piece of timber from a roof onto a crowded street, pointing a revolver loaded with a single cartridge and firing it on the third pull of the trigger during a game of Russian Roulette, firing several shots into a home known to be occupied, intending to shoot over a victim's head in order to scare him, but hitting him by "mistake," and throwing a heavy beer glass at a woman carrying a lighted oil lamp.[183]

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[180] People v. Spinuzzi, 369 P.2d 427, 430 (Colo. 1962).
[181] People v. Jefferson, 748 P.2d 1223 (Colo. 1988).
[182] *Id.* at 1230. Colorado adopted a revised criminal code in 1972. In this revised criminal code, the extreme-indifference formulation replaced the old "abandoned and malignant heart" formulation. Under COLO. REV. STAT. § 18-3-102(1)(C), a person commits first-degree murder if "[u]nder circumstances manifesting extreme indifference to the value of human life, he intentionally engages in conduct which creates a grave risk of death to a person other than himself, and thereby causes the death of another."
[183] *Jefferson*, 748 P.2d at 1227 (citations omitted).

What, then, can be made of the first clause of Colorado's definition of "implied malice," which says that "'implied malice' exists where there is no considerable provocation for killing"? It cannot mean that every homicide that occurs without provocation will qualify as murder; after all, most negligent and accidental homicides occur without provocation.[184] The answer to this seeming conundrum is that the first part of Colorado's definition of implied malice—"where there is no considerable provocation"—does not define an *alternative* way of proving implied malice, but rather defines a separate and essential component of malice, implied *or* express. Where the state proves that the defendant killed the victim intentionally or with a depraved heart, no finding of "malice" will be warranted if "considerable provocation appears in the case"[185] or if the killing was justified or excused. That is: in addition to the *positive* requirement of intent to kill or depraved indifference, malice includes a separate, *negative* component requiring that the homicide occur without "justification, excuse, or recognized mitigation."[186]

Unfortunately, courts often mistakenly refer to this purely negative requirement as "implied malice" in recognition of the fact that it will be "implied" or "presumed" unless the defendant produces affirmative evidence of justification, excuse, or mitigation—in recognition, that is, of the rule "that the prosecution is not required to prove in the first instance as part of its case in chief . . . that [the killing] did not result from the privileged use of deadly force or that it did not result from the sudden heat of passion engendered by adequate provocation, or other matters of this kind."[187] This confusion explains why the Colorado Supreme Court would say that "implied malice" exists "[1] where there is no considerable provocation for killing *or* [2] where circumstances show an abandoned or malignant heart."[188] And perhaps it also explains why, in cases like *Butcher v. State*,[189] the Wyoming court has treated the absence of "legal justification or excuse" as sufficient proof of malice. In any event, the positive core of Colorado's definition of implied malice, and of Utah's and many other states',[190] remains the requirement of "depraved indifference" or "extreme indifference."

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[184] *See* Helton v. State, 73 Wyo. 92, 115, 276 P.2d 434, 442 (1954).

[185] Lucas v. State, 91 S.E. 72 (Ga. 1916) (holding that "it was not erroneous to charge [the jury]: 'Wherever it is shown that one person kills another intentionally, whenever that appears and no considerable provocation appears in the case, then that case would be a case of murder and the law would imply malice'").

[186] PERKINS & BOYCE, *supra* note 61, at 860.

[187] *Lucas*, 91 S.E. at 76.

[188] People v. Spinuzzi, 369 P.2d 427, 430 (Colo. 1962) (emphasis added).

[189] Butcher v. State, 2005 WY 146, ¶ 24, 123 P.3d 543, 550-51 (Wyo. 2005).

[190] *See, e.g.*, People v. Sedeno, 518 P.2d 913, 926 (Cal. 1974) (quoting a jury instruction which said that a homicide is committed with malice if "the killing was proximately caused by 'an act, the natural consequences of which are dangerous to life, which was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard of life'").

This relationship between "extreme indifference" and "implied malice" has not escaped the attention of the Wyoming courts. Wyoming trial courts occasionally have used the alternative "abandoned and malignant heart" formulation in instructing juries on the meaning of "implied malice."[191] And the Wyoming Supreme Court itself has had occasion to explore the meaning of "extreme indifference" in cases interpreting Wyoming's aggravated assault and battery statute, which provides in part that a person is guilty of the offense if he "causes serious bodily injury to another intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life."[192] The court has recognized that the terms "implied malice" and "depraved heart" were the predecessors of the term "extreme indifference."[193] Even more usefully, the court in *O'Brien v. State* seems tacitly to have adopted the view that the "extreme indifference" provision in the assault and battery statute is "designed to more severely punish battery where the defendant's state of mind would have justified a murder conviction had his victim not fortuitously lived."[194]

From this observation, it is but a small step to the conclusion that second-degree murder requires proof either of intent to kill or of "extreme indifference to the value of human life." Given the general unworkability of the current two-part *Keats* definition of malice in the second-degree murder context; given the inconsistency of that definition with the result reached, correctly, in *Lopez v. State*; and given, finally, the rough moral equivalence of intent-to-kill homicide and "extreme indifference" homicide; the Wyoming Supreme should adopt a modernized version of "implied malice" like the one applied in Utah and Colorado and in Wyoming's own aggravated assault and battery statute.[195]

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[191] *See* Vigil v. State, 563 P.2d 1344, 1355 n.12 (Wyo. 1977); Wiggin v. State, 206 P. 373, 374 (Wyo. 1922); Downing v. State, 70 P. 833, 834-35 (Wyo. 1902); Ross v. State, 57 P. 924, 930 (Wyo. 1899).

[192] WYO. STAT. ANN. § 6-2-502(a)(i) (LexisNexis 2005).

[193] *See* O'Brien v. State, 2002 WY 63, ¶ 13, 45 P.3d 225, 230 (Wyo. 2002), where the court said:

> In many other states, the "extreme indifference" language was preceded by the "depraved heart" and "implied malice" terms to distinguish between homicides such as second degree murder and involuntary manslaughter, and each term was recognized to mean that it contemplated circumstances which make a defendant more blameworthy than recklessness alone.

[194] *Id.* at ¶ 17, 45 P.3d at 231; *see also id.* at ¶ 23, 45 P.3d at 233 (appearing tacitly to adopt defendant's assertion on appeal that aggravated assault is "the functional equivalent of a murder in which, for some reason, death fails to occur").

[195] I want to emphasize that my suggestion that the court should move toward a new definition of implied malice in connection with second-degree murder is not meant to suggest that *Keats v. State* was wrongly decided. *Keats* was an arson case, and, as the Wyoming Supreme Court acknowledged in *Keats* itself, the word "malice" can mean dif-

V. THE ORIGINS OF THE *CROZIER* DECISION IN CONFUSION OVER GENERAL AND SPECIFIC INTENT

Why did the court in *Crozier* define "malice" in keeping with "old vague sense of wickedness," instead of adopting the modern view of malice? The answer, as Professor Lauer has hinted,[196] appears to lie in the court's concern that adoption of a more specific, more substantial definition of implied malice would have made the defense of voluntary intoxication available to Crozier and to other defendants charged with second-degree murder. The court began its analysis, after all, by reciting the common law rule that voluntary intoxication is a defense to "specific intent crimes" but not to "general intent crimes."[197] From there, it appears to have worked backward, constructing definitions of "purposely" and "maliciously" whose only apparent virtue was their lack of anything that might remotely be characterized as "specific intent."

Though I share the court's guiding intuition—that the voluntary intoxication defense should not be available to defendants charged with second-degree murder—I disagree with the court's apparent conclusion that this intuition requires the adoption of vague, insubstantial definition of "malice." As I will argue in this section, second-degree murder is a general-intent crime, regardless of how malice is defined.

A. *Why the Crozier court might have supposed that intoxication evidence would be admissible to negate "extreme indifference"*

In *Crozier v. State*, the principal question on appeal was whether "intoxication should have been considered by the jury as bearing upon the question of intention regarding the second-degree murder charge."[198] In Wyoming, the question whether voluntary intoxication "has bearing upon the question of intention" in a particular case must be resolved—as it has been since territorial days[199]—by

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ferent things in different settings. Keats v. State, 2003 WY 19, ¶¶ 19, 25, 64 P.3d 104, 109, 112 (Wyo. 2003). The court accordingly framed the question posed by the *Keats* case in the narrowest way possible: "the important question is not what 'maliciously' may have meant as part of common law arson, or even as part of the earlier statute, but what it means in the current statute." *Id.* at ¶ 25, 64 P.3d at 112. The fact that the *Keats* definition of malice does not suffice in the second-degree murder setting does not, then, necessitate reconsideration of *Keats*.

[196] Lauer, *supra* note 4, at 553.

[197] Crozier v. State, 723 P.2d 42, 51 (Wyo. 1986).

[198] *Id.*

[199] *See* 1876 COMPILED LAWS OF WYOMING, ch. 35, tit. I, § 9 (providing in part that "[w]here a crime rests in intention, the inebriated condition of the defendant at the time of committing the offense may be proven to the jury, as being upon the question of intention").

resort to statute.[200] The Wyoming criminal code provides that "[s]elf-induced intoxication of the defendant is not a defense to a criminal charge except that in any prosecution evidence of self-induced intoxication of the defendant may be offered when it is relevant to negate the existence of a specific intent which is an element of the crime."[201] Thus, as the Wyoming Supreme Court said in *Crozier*, the question whether intoxication was relevant to second-degree murder required application of the distinction between crimes of "specific intent" and crimes of "general intent": "in Wyoming intoxication may negate the existence of a specific-intent element of a specific-intent crime but is not a factor affecting a general-intent crime."[202]

The distinction between specific-intent crimes and general-intent crimes has been a perennial source of confusion.[203] (In *Keats*, the court understated the problem considerably when it said that "the differences between the concepts [are] not always readily discernable."[204]) Wyoming's formula for distinguishing general-intent crimes from specific-intent crimes does, at least, have the virtue of being clearly worded. Under Wyoming's formula, a crime qualifies as a "general intent crime" if "it is sufficient to demonstrate that the defendant undertook the prohibited conduct voluntarily, and his purpose in pursuing that conduct is not an element of the crime."[205] A crime will qualify as a "specific intent crime" if it "requires the state to prove that the defendant intended to commit some further act, or achieve some additional purpose, beyond the prohibited conduct itself."[206]

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[200] WYO. STAT. ANN. § 6-1-202(a) (LexisNexis 2005).
[201] *Id.*
[202] *Crozier*, 723 P.2d at 51.
[203] MODEL PENAL CODE § 2.02, cmt at 231 n.3 (1985) (referring to this distinction as "an abiding source of confusion and ambiguity in the penal law").
[204] Keats v. State, 2003 WY 19, ¶ 10, 64 P.3d 104, 107 (Wyo. 2003).
[205] Jennings v. State, 806 P.2d 1299, 1303 (Wyo. 1991).
[206] *Id.* A similar formula appeared in the California Supreme Court's widely cited opinion in *People v. Hood*, 462 P.2d 370 (Cal. 1969). There, Justice Traynor wrote for the court:

> When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to be a general criminal intent. When the definition refers to defendant's intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent.

Id. at 456-57. *See also* Crosby v. People, 27 N.E. 49, 52 (Ill. 1891) (crime is one of specific intent "where a particular intent is charged, and such intent forms the gist of the offense, as contradistinguished from the intent necessarily entering into every crime").

At first glance, this definition of "general intent crime" seems clear enough. It is easy to think of crimes that require the state merely to "demonstrate that the defendant undertook the prohibited conduct voluntarily." This definition obviously reaches crimes of strict liability, for which the bare "volition" accompanying the act is sufficient proof of culpability to justify the imposition of liability. This definition also is thought uncontroversially to reach crimes like rape and trespass, which, in addition to the requirement of a volitional bodily movement, require some minimal knowledge of the circumstances in which the bodily movement takes place—require, for example, knowledge by the defendant that he or she is engaging in sexual intercourse, or knowledge by the defendant that he is breaking into a building.[207]

Likewise, Wyoming's definition of "specific intent crime" seems clear enough at first glance. An example of a crime that "requires the state to prove that the defendant intended to commit some further act" would be burglary, which requires the state to prove that the accused entered or remained within a structure "with the intent to commit a larceny or a felony therein."[208] An example of a specific-intent crime that requires the state to prove that "the defendant intended to . . . achieve some additional purpose beyond the prohibited conduct itself"[209] would be first-degree murder, which requires not only that the defendant voluntarily or intentionally perform the *act* that causes another person's death but that he intend as well to cause another person's death.[210]

The principal trouble with these definitions is not that they are unclear, but that a great many offenses satisfy neither of them.[211] A great many offenses require

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[207] Susan Mandiberg, *The Dilemma of Mental State in Federal Regulatory Crimes: The Environmental Example*, 25 ENV'L L. 1165, 1231 n.370 (1995) (arguing that "[s]ometimes awareness of the circumstances is required as part of general intent"); *see also* People v. Colantuono, 12 Cal.Rptr.2d 134, 139 (Cal. App. 2 Dist. 1992) ("In general intent crimes, such as rape, *present* conduct (sexual intercourse) is coupled with a *present-looking* state of mind (knowledge of the act)."); SANFORD KADISH & STEPHEN SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 216 (7th ed. 2001) (observing that "the actor who broke into a building would be guilty of trespass, a general intent crime[,] so long as he knew the nature of the acts he performed").

[208] WYO. STAT. ANN. § 6-3-301(a) (LexisNexis 2005); *see also* Jennings v. State, 806 P.2d 1299, 1303 (Wyo. 1991) ("Both at common law and under the Wyoming statutory definition, burglary is a crime requiring specific intent.").

[209] Jennings v. State, 806 P.2d 1299, 1303 (Wyo. 1991).

[210] *See* Young v. State, 849 P.2d 754, 759 (Wyo. 1993) (holding that first-degree murder "is a specific intent crime, requiring proof that the defendant killed purposely and with premeditation").

[211] *See* PAUL ROBINSON, CRIMINAL LAW DEFENSES § 65(e) (1984) (suggesting that the distinction between general and specific intent fails to provide a workable rule to determining the availability of the intoxication defense because "[i]t fails to recognize the variety of culpability requirements contained in offense definitions").

the state to prove something *more* than a "voluntary act" but *less* than an "inten[t] to commit some further act[] or achieve some additional purpose." Take, for example, the crime of reckless manslaughter. Reckless manslaughter, as defined in Wyoming and nearly everywhere else, requires the state to prove, first, that the defendant voluntarily performed that act that caused the victim's death. But it also requires the state to prove that the defendant was reckless with respect to the harm caused[212]—i.e., that he consciously disregarded a substantial and unjustifiable risk that his voluntary act would cause another person's death.[213] This additional mental element of recklessness is not, however, the equivalent of a requirement that the defendant specifically "intend[] to commit some further act[] or achieve some additional purpose." Thus, reckless manslaughter—and indeed any crime whose definition requires knowledge or recklessness or negligence—fits comfortably neither within the standard definition of "general intent crime" nor within the standard definition of a "specific intent crime."

Courts have responded to this seeming dilemma in one of two ways. Some courts have treated crimes of recklessness as general-intent crimes, on the theory that these crimes do not require proof that the defendant "intended" to bring about the proscribed result.[214] These courts, in construing the phrase "specific intent," have read the word "intent" in its narrowest sense, to refer exclusively to those cases where the proscribed result is the defendant's conscious objective.[215] Under this approach, then, a crime is a "specific intent crime" only if it requires proof that the defendant specifically "intended" to bring about the social harm that is an element of the offense. A crime is a "general intent crime," by contrast, "if the actor can be convicted upon proof of any lesser state of mind," as where the required mental state with respect to the social harm is "knowingly, recklessly, or negligently."[216]

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[212] WYO. STAT. ANN. § 6-2-105(a)(ii) (LexisNexis 2005).

[213] WYO. STAT. ANN. § 6-1-104(a)(ix) (LexisNexis 2005) (defining "recklessly").

[214] *See*, *e.g.*, People v. Carr, 97 Cal. Rptr. 2d 143, 148 (Cal. Ct. App. 2000) (observing that "[t]ypically, when a crime requires mere recklessness, it will be characterized as a general intent offense"); Holbrook v. State, 772 A.2d 1240, 1250 (Md. 2001) (identifying "reckless and wanton disregard for the consequences" as a "general intent" element); State v. Zanger, 851 A.2d 134, 139 (N.J. Super. Ct. Law Div. 2004) (identifying "offenses involving recklessness or criminal negligence" as "general intent offenses"); Spicer v. State, 42 P.3d 742, 748 (Kan. Ct. App. 2002) (holding that "[s]pecific intent requires a demonstration of a greater culpable mental state than mere recklessness or neglignce").

[215] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 136 (3d ed. 2001) ("Sometimes, courts draw the following distinction: an offense is 'specific intent' if the crime requires proof that the actor's conscious object, or purpose, is to cause the social harm set out in the definition of the offense.").

[216] *Id.*; *see also* SANFORD KADISH & STEPHEN SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 216 (7th ed. 2001) ("General intent can mean a number of different things, but in this context it generally means that the defendant can be convicted if he did what in ordinary speech we would refer to as an intentional action.").

Other courts have, in contrast, treated crimes of recklessness as specific-intent crimes, on the theory that they require proof of something more than a voluntary act or voluntary conduct.[217] Under this approach, the word "intent" in the phrase "specific intent" effectively is read in its broader sense, to refer generally to any "mental element" *other than* the bare volition that accompanies a voluntary act.[218] Thus, if the statute defining the offense requires proof that the defendant acted "purposely," "knowingly," or "recklessly" with respect either to the proscribed harm or to an attendant-circumstance element, then the crime is a specific-intent crime.[219] Concomitantly, a crime is a general-intent crime only if the statute defining the offense "requires no further *mental state* beyond willing commission of the act proscribed by law."[220]

This second approach has considerable allure. If the Wyoming statute permitting the introduction of intoxication evidence on questions of "specific intent" is based on relevance concerns, as its wording arguably implies,[221] then there can be

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[217] *See* State v. Brown, 931 P.2d 69, 75-77 (N.M. 1996) (holding that extreme-recklessness element of murder statute, because it requires subjective awareness of risk, must be treated as equivalent to "specific intent"); *see also* Jennings v. State, 806 P.2d 1299, 1303 (Wyo. 1991) (defining crime of general intent as one where "it is sufficient to demonstrate that the defendant undertook the prohibited conduct voluntarily").

[218] *See* WAYNE LAFAVE, CRIMINAL LAW § 5.2(e) at 252 (4th ed. 2003) (acknowledging that "the phrase 'criminal intent' is sometimes used to refer to criminal negligence and recklessness"). This broader use of the word "intent" was remarked upon by the Wyoming Supreme Court in *Dean v. State*, 668 P.2d 639, 642 (Wyo. 1983), where the court acknowledged that the word "intent" sometimes is used to encompass mental states like "criminal negligence." The court criticized this use of the word intent, saying: "it is not a very apt term to describe the mental element requisite for each crime." *Id.*

[219] Thus, when courts say (as they often do) that rape is a "general intent offense," they mean not only that the state need not prove that the defendant specifically "intended to overcome his victim's resistance" but also that the state need not prove even that the defendant knowingly or "recklessly disregarded his victim's lack of consent." Steve v. State, 875 P.2d 110, 116, 116 n.3 (Alaska Ct. App. 1994); *see also* People v. Witte, 449 N.E.2d 966, 971-72 n.2 (Ill. App. 1983) (holding that "the only intent necessary to support rape is the *general* intent to perform the physical act"; "the crime of rape must be understood as *not* including an element of knowledge of the woman's lack of consent."); Commonwealth v. Lopez, 745 N.E.2d 961, 965 (Mass. 2001) (in prosecutions for rape, "the relevant inquiry has been limited to consent in fact, and no mens rea or knowledge as to the lack of consent has ever been required").

[220] People v. Sargent, 970 P.2d 409, 414 (Cal. 1999) (emphasis added); *see also*, *e.g.*, State v. Anderson, 773 A.2d 328, 340 (Conn. 2001) (holding that crime qualifies as "general intent crime" where "the elements of a crime consist of a description of a particular act and *a mental element not specific in nature*"); Commonwealth v. Sibinich, 598 N.E.2d 673, 676 n.3 (Mass. App. Ct. 1992) (observing that "[s]pecific intent' is intended to emphasize a particular *state of mind* at the time of the conduct in question." (emphasis added)).

[221] WYO. STAT. ANN. § 6-1-202(a) (LexisNexis 2005) (providing that evidence of voluntary intoxication "may be offered when it is relevant to negate the existence of a specific intent").

no basis for distinguishing purpose from, say, recklessness. After all, the capacity to be aware of risk—which is an essential component of recklessness—is surely no less affected by intoxication than is the capacity to entertain a "conscious objective."[222] Moreover, this second approach to defining specific and general intent is consistent with the way these terms are used in other settings. Courts often have said, for example, that a mistake of fact must be reasonable to provide a defense to a general-intent crime,[223] but need *not* be reasonable to provide a defense to a specific-intent crime. [224] Even an unreasonable mistake of fact sometimes will negate the mental state of recklessness.[225] So, at least for purposes of the rules governing the mistake-of-fact defense, recklessness is a form of "specific intent."

Treating recklessness as a form of "specific intent" is appealing for another reason, too. At common law, it was not a defense to a general-intent crime that the defendant, as a result of a mistake of fact, reasonably believed that he was engaged in committing an offense *different or less serious than* the charged offense.[226] The defendant, it was said, "cannot set up a defence by merely proving that he

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[222] *See* State v. Brown, 931 P.2d 69, 75 (N.M. 1996) (remarking that "[t]he capacity to possess 'subjective knowledge' may be just as affected by intoxication as the capacity to intend to do a further act").

[223] CAL. JURY INSTR.—CRIM. 4.35, comment (2006) (remarking that "[m]istakes of fact . . . must be reasonable to negate general criminal intent"); *see also*, *e.g.*, DRESSLER, *supra* note 215, § 12.03[D] at 155; United States v. Welstead, 36 C.M.R. 707, 710 (U.S. Army Bd. of Rev. 1966) (holding that where offense "requires a specific intent, the defense of mistake . . . need not include a showing that the mistake was both honest and reasonable but only that it was an honest mistake . . . . In general intent cases a mistake or ignorance of fact must be both honest and reasonable in order to constitute a defense"); Simms v. District of Columbia, 612 A.2d 215, 218 (D.C. Cir. 1992) (holding that "[i]n general intent crimes, such as tampering with another's vehicle, . . . defendant may interpose a mistake of fact defense if the defendant proves 'to the satisfaction of the fact finder that the mistake was both (1) honest and (2) reasonable'"); Commonwealth v. Simcock, 575 N.E.2d 1137, 1141 (Mass. App. Ct. 1991) (observing that " an honest and reasonable mistake of fact may be a defense even if the offense charged requires proof of only a general intent").

[224] WAYNE LAFAVE, *supra* note 219, at 283; *see also* PERKINS & BOYCE, *supra* note 61, at 1046 ("[E]ven an unreasonable mistake, if entertained in good faith, is inconsistent with guilt if it negates some special element required for guilt of the offense such as intent or knowledge.").

[225] For example, if a defendant is absolutely certain that a gun is unloaded and therefore lacks any conscious awareness of the risk that pulling the trigger will cause his friend's death, then the defendant's decision to pull the trigger in jest cannot be deemed reckless, regardless of how unreasonable the defendant's belief was. *See* WYO. STAT. ANN. § 6-1-104(a)(ix). (defining "recklessly" to require that defendant "consciously disregard[]" the risk in question).

[226] *See* Norman Finkel & Jennifer Groscup, *When Mistakes Happen: Commonsense Rules of Culpability*, 3 PSYCHOL. PUB. POL'Y & L. 65, 73-74 (1997) (identifying lesser-moral-wrong and lesser-legal-wrong doctrines as features of the common law's treatment of "general-

thought he was committing a different kind of wrong from that which in fact he was committing."[227] The culpability required for general-intent crimes was, then, literally "general," rather than "specific"; any sort of blameworthy mental state at all would supply the requisite "general intent." This reading of the term "general intent" also might be thought to explain why voluntary intoxication does not negate general intent: the blameworthiness associated with the decision to become intoxicated supplies the requisite degree of general blameworthiness.[228] As one court has said:

> Self-induced intoxication . . . by its very nature involves a degree of moral culpability. The moral blameworthiness lies in the voluntary impairment of one's mental faculties with knowledge that the resulting condition is a source of potential danger to others. . . . It is this blameworthiness that serves as the basis for [declaring voluntary intoxication incompetent to disprove general intent].[229]

On this view, then, the term "general-intent offense" refers exclusively to those offenses whose only mental element (beyond bare volition) is a kind of generalized blameworthiness.

It is possible to come away from this analysis with the sense that we have uncovered a deep, fundamental connection among the various uses of the terms "general intent" and "specific intent." The considerable allure of this approach to defining general and specific intent might well explain why the Wyoming Supreme Court in *Crozier* was reluctant to adopt a more demanding definition of implied malice. The court might have supposed, in keeping with this unitary definition of general and specific intent, that if the term "maliciously" were interpreted to require "extreme indifference," then second-degree murder would qualify as a specific-intent offense, to which voluntary intoxication was a valid defense. Extreme-indifference homicide, after all, plainly requires offense-specific culpability, rather than general blameworthiness. The allure of the unitary definition would explain, too, why the court ultimately defined malice to require something akin to general wickedness.

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intent offenses"); *see also* JOSHUA DRESSLER, TEACHER'S MANUAL TO ACCOMPANY CASES AND MATERIALS ON CRIMINAL LAW 52-53 (2003) (treating lesser-legal-wrong doctrine as relevant only to general-intent crimes).

[227] Regina v. Prince, 2 Crim. Cas. Res. 154 (1875).

[228] Remington & Helstad, *supra* note 155, at 649 (arguing that "voluntary intoxication was itself considered morally wrong and—therefore did not negative moral blameworthiness").

[229] Hendershott v. People, 653 P.2d 385, 393-94 (Colo. 1982) (citations omitted); *see also*, *e.g.*, State v. Burge, 487 A.2d 532 (Conn. 1985); Fields v. Commonwealth, 12 S.W.2d 275, 282 (Ky. 2000).

B. Why the unitary theory of general intent is false

The allure of this unitary definition of general and specific intent is false. And, indeed, any effort to develop coherent definitions of these terms is misguided. The terms "general intent" and "specific intent" have no meaning beyond their crude function as "devices for seeking a compromise verdict."[230] They are designed, in other words, purely to memorialize a pragmatic compromise "between the conflicting feelings of sympathy and reprobation for the intoxicated offender."[231] It is practice, and not theory, that has given content to this compromise. Where homicide is concerned, the prevailing practice is clear and well-established: voluntary intoxication is a defense to first-degree murder, but is not a defense to any less serious form of homicide. Second-degree murder is, then, a general-intent crime, to which voluntary intoxication is not a valid defense. The Wyoming Supreme Court therefore need not be concerned that the adoption of a more demanding definition of malice will make voluntary intoxication a valid defense to second-degree murder.

Before the nineteenth century, the common law apparently "made no concession whatever because of intoxication, however gross."[232] During the nineteenth century, however, judges in England and the United States began searching for a "more humane, yet workable, doctrine."[233] A potential avenue for ameliorating the harsh effects of the common law rule emerged in 1819, when Holroyd, J., held in a murder case that voluntary intoxication, though not a defense, could negate the mental element of premeditation.[234] The broader theory underlying this decision—that "intoxication could be considered to negate intent, whenever intent was an element of the crime charged"[235]—carried the potential, however, to undermine the traditional rule entirely, since some form of mens rea is an element of nearly every offense. The basis for a compromise emerged in 1849, when Coleridge, J., said that evidence of voluntary intoxication was relevant only if it deprived the defendant of "the power of forming any specific intention."[236] Other courts appear to have seized on this newly-forged distinction—between "specific intention" and other forms of mens rea—as a way of "limit[ing] the operation of the doctrine and achiev[ing] a compromise between the conflicting feelings of sympathy and reprobation for the intoxicated offender."[237]

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[230] *See* GEORGE FLETCHER, RETHINKING CRIMINAL LAW 850 (1978).
[231] People v. Hood, 462 P.2d 370, 377 (Cal. 1969).
[232] Jerome Hall, *Intoxication and Criminal Responsibility*, 57 HARV. L. REV. 1045, 1046 (1944); *see also* Montana v. Egelhoff, 518 U.S. 37, 45 (1996); *Hood*, 462 P.2d at 455.
[233] *Hood*, 462 P.2d at 455-56.
[234] Rex v. Grindley, quoted in Rex v. Carroll, 7 C. & P. 145, 173 Eng. Rep. 64 (1835).
[235] *Hood*, 462 P.2d at 456.
[236] Regina v. Moorhouse, 4 Cox C.C. 55 (1849).
[237] *Hood*, 462 P.2d at 456; *see also* Hall, *supra* note 232, at 1049-50.

What this distinction meant in practice was that voluntary intoxication was a defense to first-degree murder but not second-degree murder.[238] Remarkably, this practice seems not to have varied despite fundamental differences among the states' definitions of first- and second-degree murder. In states where the necessity of proving an intent to kill was what distinguished first- and second-degree murder, the element of intent to kill was said to be a specific-intent element.[239] In states where "depraved indifference to the value of human life" was what distinguished first- and second-degree murder, the element of depraved indifference was said to be a specific-intent element.[240] And in states where premeditation was what distinguished first- and second-degree murder, only the element of premeditation was said to qualify as a "specific intent" element.[241] This last category of states included Wyoming, where premeditation was long thought to be what

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[238] Hall, *supra* note 232, at 1051 (explaining that "[t]he application of the doctrine in homicide cases results mostly in conviction for second degree murder"); Brett Sweitzer, Comment, *Implicit Redefinitions, Evidentiary Proscriptions, and Guilty Minds: Intoxicated Wrongdoers After Montana v. Egelhoff*, 146 U. PA. L. REV. 269, 276 (1977) (explaining that courts' application of the distinction between general- and specific-intent offenses resulted in "a general amelioration of the harsh English common law (which provided for capital punishment for a wide variety of offenses), checked by courts' refusal to allow intoxication to mitigate second degree murder to manslaughter").

[239] *See*, *e.g.*, People v. Langworthy, 331 N.W.2d 171, 178 (Mich. 1982) (holding that intoxication does not negate the mental element of second-degree murder because second-degree murder does not require proof of intent to kill); Commonwealth v. Edward, 555 A.2d 818 (Pa. 1989) (approving jury instruction that permitted jury to consider evidence of intoxication only on the question whether defendant was guilty of first-degree, intent-to-kill murder).

[240] *See* State v. Brown, 931 P.2d 69, 75-77 (N.M. 1996) (holding that "extreme indifference" element in first-degree murder statute is a specific-intent element that may be negated by intoxication); *cf.* Langford v. State, 354 So.2d 313, 315 (Ala. Cr. App. 1978) (reversing conviction for first-degree "depraved mind" murder on the ground that intoxicated driver, as a result of his intoxication, probably had not "realized the likelihood of a collision").

[241] Hall, *supra* note 232, at 1051-52 (explaining that a majority of American courts chose to "implement the exculpatory doctrine only as regards premeditation"); *see also*, *e.g.*, Hopt v. People, 104 U.S. 631, 634 (1881) (holding that "when a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question whether the accused is in such a condition of mind, by reasons of drunkenness or otherwise, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury"); Aszman v. State, 24 N.E. 123, 126 (Ind. 1890) (holding that intoxication is relevant to question of premeditation, "which, under our statute, . . . is the distinguishing ingredient [of first-degree murder]"); Gustavenson v. State, 10 Wyo. 300, 324, 68 P. 1006, 1010 (1902) (holding that evidence of voluntary intoxication was to be considered only "in determining whether premeditation was present or absent").

distinguished first- and second-degree murder.[242] In *Gustavenson v. State*,[243] the Wyoming Supreme Court held that evidence of intoxication was to be considered only "in determining whether premeditation was present or absent."[244] "What constitutes murder in the second degree by a sober man," the court said, "is equally murder in the second degree if committed by a drunken man."[245]

It would be wrong to criticize *Gustavenson* and its kin for having failed consistently to apply the categories "general intent" and "specific intent," or for having somehow missed the fundamental point of the distinction between general and specific intent. In developing a rule for limiting the intoxication defense, the courts did not appropriate a pre-existing or commonsensical[246] distinction between crimes of general intent and specific intent. Rather, they appear to have created a new distinction from the whole cloth.[247] What is more, the better interpretation of the case law is that these terms were never intended to operate as anything but terms of art—they were never intended to be used except as names for somewhat arbitrary-seeming categories of crimes. In this role, "the doctrines concerning general and specific intent [have] operated to produce the precise results desired"[248]—namely, a "plausible mediation" between complete exculpation of the intoxicated offender and the harshness of the old common-law rule.[249]

Not surprisingly, though, courts in many recent cases have been reluctant simply to define "specific intent" as "whatever mental element happens to distin-

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[242] *See supra* text accompanying notes 13-16.
[243] Gustavenson v. State, 10 Wyo. 300, 68 P. 1006 (1902).
[244] *Id.* at 324, 68 P. at 1010.
[245] *Id.*
[246] People v. Kelley, 176 N.W.2d 435, 443 (Mich. Ct. App. 1970) ("It has been observed that neither common experience nor psychology knows of any phenomenon as 'general intent' or 'specific intent.'").
[247] Mitchell Keiter, *Just Say No Excuse: The Rise and Fall of the Intoxication Defense*, 87 J. CRIM. L. & CRIMINOLOGY 482, 492 (1997) (asserting that "[c]ourts *developed* the distinction between specific and general intent crimes in response to the problem of the intoxicated offender"); Scott Anderegg, Note, *The Voluntary Intoxication Defense in Iowa*, 73 IOWA L. REV. 935, 937 (1988) (observing that "the common-law courts developed the distinction between 'general' and 'specific' intent as a method of limiting the mitigating effect of the voluntary intoxication defense").
[248] Hall, *supra* note 232, at 1061.
[249] *Id.*; *see also* ROBINSON, *supra* note 211, § 65(e) at 298 (arguing that "the confusion over the distinction [between general and specific intent] arises from the fact that it is a device, conceived at common law, to achieve a certain result rather than reflecting a coherent theory"); People v. Gutierrez, 225 Cal. Rptr. 885, 887 (Cal. Ct. App. 1986) (explaining that "the distinction between general[-]intent and specific[-]intent crimes is at bottom founded upon a policy decision regarding the availability of certain defenses").

guish the most serious degree of an offense from the next most serious."[250] They have instead assumed, with impeccable logic but with a very poor sense of history, that the concepts "specific intent" and "general intent" must have some genuine content, and so they have set out in search of that content.[251] Over time, the courts' efforts have borne fruit in general definitions like the one adopted by the Wyoming Supreme Court in *Jennings v. State.*[252] In *Jennings*, the court said that a crime is a specific-intent crime if it "requires the state to prove that the defendant intended to commit some further act, or achieve some additional purpose beyond the prohibited conduct itself."[253] Courts applying similar definitions have arrived, again with impeccable logic, at the conclusion that intoxication is a defense to second-degree murder if second-degree murder invariably requires an intent to kill.[254]

Other courts have adopted theories of general and specific intent that carry the potential for even more dramatic change. In *State v. Brown*,[255] for example, the New Mexico Supreme Court concluded that the mental state of "extreme indifference to the value of the human life," though it does not strictly speaking qualify as *either* "specific intent" or "general intent," must be treated as the equivalent of specific intent.[256] The court reasoned that the capacity for subjective awareness of risk "may be just as affected by intoxication as the capacity to intend to do a further act."[257] Though the result reached in *Brown* itself—that intoxication can negate the required mental element of first-degree "extreme indifference" murder—is unobjectionable, the court's theory if carried to its logical conclusion would make intoxication relevant to negate every form of *mens rea* except

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[250] *But see* Commonwealth v. Graves, 334 A.2d 661, 666 (Pa.1975) (Eagan, J., dissenting) (arguing that evidence of intoxication is admissible "to lower the *degree of guilt* within a crime, but only where the Legislature has specifically provided for varying degrees of guilt within the crime").

[251] *See* GEORGE FLETCHER, RETHINKING CRIMINAL LAW 850 (1978) (observing that "[t]he distinction between general and specific intent is frequently litigated, for the simple reason that the courts tend to employ these terms as though they had a meaning beyond their function as devices for seeking a compromise verdict").

[252] Jennings v. State, 806 P.2d 1299, 1303 (Wyo. 1991).

[253] *Id.*

[254] *See*, *e.g.*, State v. Hayes, 17 P.3d 317, 322 (Kan. 2001) (holding that "[i]ntentional second-degree murder is a specific intent crime" and that a defendant charged with second-degree murder therefore "may rely on the defense of voluntary intoxication"); State v. Patterson, 752 So.2d 280 (La. Ct. App. 5 Cir. 2000) (holding that the intoxication is a defense to second-degree murder, which requires proof that "the offender has specific intent to kill or inflict great bodily harm").

[255] State v. Brown, 931 P.2d 69 (N.M. 1996).

[256] *Id*. at 76.

[257] *Id*. at 75.

negligence.[258] Intoxication would be relevant to disprove, for example, the mental element of reckless manslaughter. And the common law's pragmatic compromise between public-safety concerns and sympathy for the intoxicated offender would collapse.

Worse, this sort of theoretical approach to the definition of specific and general intent threatens to distort the courts' interpretation of statutory mental elements even in cases where intoxication is not at issue. For example, if theory appears to dictate (as it did in *State v. Brown*) that intoxication is relevant to negate any subjective mental element whatever, then courts might well strip the statute defining an offense of subjective mental elements for fear of making the defense of intoxication available. Something like this appears to have happened in cases interpreting the element of "extreme indifference." A number of courts have concluded, somewhat dubiously,[259] that "extreme indifference" describes not "a subjective state of mind, but a degree of [objective] divergence from the norm of acceptable behavior."[260] Some of these courts, as Professor Alan Michaels has cogently argued, "apparently follow this approach to avoid allowing an intoxication defense to depraved heart murder, because intoxication, which can arguably negative a mental state, plainly cannot negative objective circumstances."[261]

Roughly the same process appears to have been at work in *Crozier v. State.* In *Crozier*, the court's inquiry into the meaning of "maliciously" was undertaken for the expressed purpose of deciding whether malice was a specific-intent element

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[258] Professor Jerome Hall makes this very point, arguing that, if carried to its logical conclusion, this theory—that intoxication is a defense to any crime requiring intent—would enable the defendant to use intoxication as a defense to any charge but negligent homicide. Hall, *supra* note 232, at 1052.

[259] *See* Kenneth Simons, *Does Punishment for 'Culpable Indifference' Simply Punish for 'Bad Character'? Examining the Requisite Connection Between Mens Rea and Actus Reus*, 6 BUFF. CRIM. L. REV. 219, 312 (2002) (charactering this interpretation as "dubious").

[260] State v. Dufield, 549 A.2d 1205, 1206-07 (N.H. 1988); *see also* State v. Dodd, 503 A.2d 1302, 1305 (Me. 1986) (holding that "depraved indifference" murder requires conduct which objectively viewed manifests a depraved indifference to the value of human life); People v. Word, 689 N.Y.S.2d 36, 37 (N.Y. App. Div. 1999), *appeal denied*, 722 N.E.2d 513 (N.Y. 1999) (holding that whether an act was committed under "circumstances evincing a depraved indifference to human life" requires not an evaluation of the defendant's subjective mental state but an objective assessment of the degree of risk created by the defendant); State v. Blanco, 371 N.W.2d 406, 409 (Wis. Ct. App. 1985) (holding that a defendant's objective conduct is sufficient to demonstrate the element of a depraved mind).

[261] Alan Michaels, *Acceptance: The Missing Mental State*, 71 SO. CAL. L. REV. 953, 1008 n.211 (1998); *see also* Bernard E. Gegan, *More Cases of Depraved Mind Murder: The Problem of Mens Rea*, 64 ST. JOHN'S L. REV. 429, 436 (1990) (arguing that "[s]o tenuous is the [*Register*] court's rationale for refusing to recognize depraved indifference as a mens rea element, and so superfluous did its interpretation render the statutory language, that

which could be negated by evidence of intoxication. Before undertaking this inquiry, the court defined "general intent" very narrowly, saying that "[g]eneral intent implies that *the intent is not an element of the crime* and requires that the prohibited conduct must be undertaken voluntarily."[262] It would have been reasonable for the court to suppose, as indeed it appears to have done, that only if malice were stripped of any real content would it qualify as "general intent." This would explain why the court repeatedly implied that the element was purely objective. The court said, for example, that the word "malice" "*describe[s] the act to be committed* and not an intention to produce a desired specific result."[263] It also said—in what otherwise appears to be a complete non sequitur—that "malice may be inferred from the facts and circumstances."[264] And when forced finally to adopt a definition of malice, the court turned to a definition—taken from a North Carolina decision—that focused on the character of the *act*, not on the defendant's mental state. According to this definition, "any act evidencing 'wickedness of disposition, hardness of heart, cruelty, recklessness or consequences, and a mind deliberately bent on mischief . . . is sufficient to supply the malice necessary for second[-]degree murder."[265] Whatever this definition describes, it certainly is not a "specific intent."

The point of this long digression is, finally, that concerns about making the intoxication defense available to defendants charged with second-degree murder ought not to deter the Wyoming Supreme Court from adopting a modern definition of implied malice. There is no "underlying rationale" other than compromise for the distinction between general and specific intent. It is wrong to think, for example, that the reason why voluntary intoxication does not negate "general intent" is that the act of becoming intoxicated supplies some minimal element of blameworthiness.[266] And it is likewise wrong to think that the reason why

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one can speculate that the court was simply reaching a desirable result on the precise issue before it: whether evidence of intoxication can negate the necessary mental element of depraved mind murder"); Alan Michaels, Note, *Defining Unintended Murder*, 85 COLUM. L. REV. 786, 809 n.119 (1985) (arguing that "[s]tates which follow both the degree of risk approach and the objective circumstances approach may have adhered to these standards in fear of providing an intoxication defense").

[262] Crozier v. State, 723 P.2d 42, 52 (Wyo. 1986) (emphasis added).

[263] *Id.* at 53 (emphasis added) (quoting Dean v. State, 668 P.2d 639, 642 (Wyo. 1983)).

[264] *Id.*

[265] *Id.* at 53-54 (quoting State v. Wilkerson, 247 S.E.2d 905, 917 (N.C. 1978)).

[266] *See* Hendershott v. People, 653 P.2d 385, 396 (Colo. 1982). It cannot be true that a defendant who is convicted of, say, second-degree murder need be no more culpable than anybody else who decides to become intoxicated, and that the only thing separating the murderer from the ordinary drunk is the mere fortuity that one person's intoxication led by "bare chance" to a death while the other's did not. *See* Hall, *supra* note 232, at 1071-72 (arguing that the fact "[t]hat the accused 'voluntarily' became intoxicated, even if that is assumed to describe his conduct accurately, does not provide an ethical defense for the imposition of the severe sanctions that are typically imposed"). In truth, what principally

intoxication negates "specific intent" is that any subjective mental state may be affected by intoxication."[267] The distinction between general and specific intent comes down to nothing more than a practical compromise, as Justice Mosk once nicely explained in arguing that "implied-malice murder is not a specific intent crime":

> "General intent" and "specific intent" are shorthand devices best and most precisely invoked to contrast offenses that, as a matter of policy, may be punished despite the actor's voluntary intoxication (general intent) with offenses that, also as a matter of policy, may not be punished in light of such intoxication if it negates the offense's mental element (specific intent).[268]

In other words, the Wyoming Supreme Court's classification of second-degree murder as a general-intent crime is not grounded on the application of criteria governing membership in the class of "general-intent crimes," because no such criteria exist. The classification instead is grounded exclusively on a policy determination—namely, that voluntary intoxication, though it might occasionally serve to reduce first-degree murder to second-degree murder, ought never to reduce first- or second-degree murder to manslaughter. There is, then, no reason to suppose that the classification of second-degree murder as a general-intent crime will change if the mental elements of second-degree murder are redefined. And so there is no reason to suppose that redefinition of second-degree murder will make the intoxication defense available.

VI. CONCLUSION

In *Crozier v. State*,[269] the Wyoming Supreme Court broke with precedent in holding that second-degree murder does not require an intent to kill. This aspect of *Crozier* is not invulnerable to criticism.[270] But reinstating the requirement of intent now—after the passage of twenty years and dozens of murder prosecutions—would involve the court in the same vice to which it fell victim in *Crozier* itself: disrespect for precedent. It would be far better for the court to adhere to *Crozier*'s basic outlines while modifying what is unworkable about *Crozier*. As

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lies behind the rule denying import to voluntary intoxication in prosecutions for "general intent" crimes is a complex set of pragmatic concerns, including "the relative rarity of cases where intoxication really does engender unawareness as distinguished from imprudence" and "the impressive difficulties posed in litigating the foresight of any particular actor at the time when he imbibes." MODEL PENAL CODE § 2.08, cmt. at 359 (1985).

[267] *See* State v. Brown, 931 P.2d 69, 75 (N.M. 1996).

[268] Whitefield v. State, 868 P.2d 272, 287 (Cal. 1994) (Mosk, J., dissenting).

[269] Crozier v. State, 723 P.2d 42 (Wyo. 1986).

[270] *See* Lauer, *supra* note 4, at 553.

the jury verdict in *Lopez v. State*[271] demonstrated, what is unworkable about *Crozier* is its definition of implied-malice murder. Neither the requirement that the defendant "purposely" perform the act that causes death nor the requirement that the defendant act with "hatred, ill will, or hostility" is sufficiently demanding to mark the boundary of second-degree murder. A better definition of implied malice can be found in the Colorado and Utah decisions to which the Wyoming court turned for guidance in *Lopez*.[272] The court should follow these decisions in holding that implied malice requires extreme indifference to the value of human life.

There is no reason to fear that reinterpretation of the second-degree murder statute will lead to a flood of litigation by persons previously convicted under the statute. Even if the reinterpretation were to be given retroactive effect, defendants whose convictions already had become final would face significant procedural hurdles if they tried to take advantage of the reinterpretation.[273] They would, first, have little hope of succeeding under Wyoming's post-conviction-relief statutes, which create a procedural bar to any post-conviction claim that "could have been raised but was not raised in a direct appeal."[274] They likewise would have little hope of succeeding under Wyoming's habeas-corpus statutes, which afford relief only to prisoners who assert claims "going to the subject matter or personal jurisdiction of the court."[275] It is doubtful whether a vagueness claim targeting the old interpretation would be deemed to go to "subject matter jurisdiction."[276] And it is

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[271] Lopez v. State, 2004 WY 28, 86 P.3d 851 (Wyo. 2004).

[272] *See* People v. Jefferson, 748 P.2d 1223 (Colo. 1988); State v. Wardle, 564 P.2d 764 (Utah 1977).

[273] *See* Bousley v. United States, 523 U.S. 614, 620 (1998) (recognizing that, even if decision interpreting federal statute was given retroactive effect, defendant who sought to take advantage of change in the law would have to overcome effects of his procedural default). As a general rule, "a case becomes final after judgment and sentence is entered and an appellate decision affirming the conviction has been made, or the time for taking an appeal expires without perfection of an appeal, or after the voluntary dismissal of such an appeal." Nixon v. State, 2002 WY 118, ¶ 9, 51 P.3d 851, 853-54 (Wyo. 2002). Further, "once a criminal case becomes final pursuant to the general rule, a trial court loses its power to act in that case unless it is expressly permitted to do so by statute or court rule." *Id.* at 854.

[274] WYO. STAT. ANN. § 7-14-103(a)(i) (LexisNexis 2005).

[275] Nixon v. State, 2002 WY 118, ¶ 12, 51 P.3d 851, 854 (Wyo. 2002).

[276] *See* State v. Thomas, 685 N.W.2d 69, 84 (Neb. 2004) (holding that defendant's vagueness challenge "does not raise an issue of subject matter jurisdiction"); Sodergren v. State, 715 P.2d 170, 174-75 (Wyo. 1985) (treating constitutional vagueness argument as non-jurisdictional); *but cf.* Ochoa v. State, 848 P.2d 1359, 1362 (Wyo. 1993) (holding that defendant's vagueness challenge was jurisdictional for purposes of rule that guilty plea is a waiver of all non-jurisdictional defects).

doubtful too whether any defendants would be able to show—as they would have to—that their own conduct fell at the margins of the statutory proscription.[277]

It is doubtful because, despite the emptiness of the current definition of second-degree murder, prosecutors and juries with few exceptions have applied the statute only in cases where the defendant obviously acted either with intent to kill or with "extreme indifference to the value of human life." It is hard to quarrel with application of the second-degree murder statute in cases where, for example, the defendant shot the victim in the chest with a .41 caliber handgun;[278] where the defendant, after his first shot dropped the victim to the ground, stood over the victim and shot him twice in the face;[279] where the defendant plunged a hunting knife deep into the victim's chest as the victim tried to get away;[280] where the defendant shot the victim in the face at close range with a .38 caliber handgun;[281] where the defendant shot the victim four times in the back at close range;[282] and where the defendant shot the victim and then, after the victim had fallen to the floor, shot him again and kicked him.[283]

The consistency with which prosecutors and juries have applied the statute is reassuring. But no showing of consistency in application could obviate correction of the current definition. Due process requires that crimes be defined with "sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[284] It is not enough, then, that jurors and prosecutors *happen* to agree in their intuitions about what qualifies as second-degree murder. The standards that lie behind those intuitions must be made explicit. This the current definition of second-degree murder fails utterly to do.

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[277] *See* State v. Sherman, 653 P.2d 612, 614-15 (Wash. 1982) (holding that "[i]f one's conduct is within the hard-core arena (conduct the statute is clearly intended to proscribe), one may not bring a vagueness claim, unless the claim includes a claim of unconstitutional [i.e., First Amendment] overbreadth"); *see also* Hobbs v. State, 757 P.2d 1008, 1011 (Wyo. 1988) (reiterating that "[v]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand").
[278] Sanchez v. State, 2006 WY 12, 126 P.3d 897 (Wyo. 2006).
[279] Pena v. State, 2004 WY 115, 98 P.3d 857 (Wyo. 2004).
[280] Butcher v. State, 2005 WY 146, 123 P.3d 543 (Wyo. 2006).
[281] Wilks v. State, 2002 WY 100, 49 P.3d 975 (Wyo. 2002).
[282] Lane v. State, 12 P.3d 1057 (Wyo. 2000).
[283] Edwards v. State, 973 P.3d 41 (Wyo. 1999).
[284] Greigo v. State, 761 P.2d 973, 975 (Wyo. 1988) (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983)).

WYOMING LAW REVIEW

VOLUME 7 ***2007*** **NUMBER 1**

Editor's Note

The following bibliography is Part I of a two-part guide to the history and development of Wyoming law, compiled and annotated by University of Wyoming College of Law Associate Law Librarian Debora A. Person. Part I on Wyoming Pre-statehood Legal Materials contains both primary and selected secondary resources covering pre-Wyoming Territory, the administration of the Wyoming Territory, and the establishment of Wyoming as a state. This section was previously published in 2005 in *Prestatehood Legal Materials: A Fifty-State Research Guide, Including New York City and the District of Columbia*, edited by Michael Chiorazzi, J.D., M.L.L. and Marguerite Most, J.D., M.L.L. It is reprinted here with permission from Haworth Press, Inc.

Part II of the annotated bibliography is forthcoming in *Wyoming Law Review*, Volume 7, Number 2, which will be published in summer, 2007. The article will cover primary resources from Wyoming's early statehood period along with notable secondary sources from both pre-statehood and early statehood, including materials on Indian law and early Dakota Territory events. The combined work will provide an invaluable tool for Wyoming legal scholars and practitioners seeking hard-to-find information regarding the state's legislative, constitutional, political, and judicial history and the development of the Wyoming common law.

WYOMING PRE-STATEHOOD LEGAL MATERIALS: AN ANNOTATED BIBLIOGRAPHY

*Debora A. Person**

INTRODUCTION

At one time part of Dakota, Utah, and Idaho territories, Wyoming began its quest for autonomy shortly after the Union Pacific moved through in 1867. With little to offer permanent settlers in the way of gold and silver mines or agriculture, it became a thoroughfare for those moving to friendlier regions. In time, the expanse of arid grassland proved effective for grazing, and the need to protect emigrants, railroad workers, and settlers from Indians brought the military. The boom that began with the Union Pacific dissipated as construction moved west out of the state, but slowly the citizen population grew.

Romantic notions of the West, cowboys driving herds, ranchers fighting ranchers, lawlessness and vigilantes, covered wagons bringing our ancestors across country, the frustration and difficulty of homesteading, women sitting on frontier juries, are no more represented in fiction of the Old West than they are right here in the various histories of this state. As a background for the establishment of the territory and eventual statehood, these elements flavor the legal history of Wyoming.

This chapter is organized into a semi-chronological arrangement. Divided into categories of Pre-Wyoming Territory, Establishment of the Wyoming Territory, Administration of the Wyoming Territory, and Establishment of the State, each section is also arranged by the government entity that produced the resource, that is, federal, then state legislative, executive, and judicial materials. Primary and relevant secondary sources are included within these categories. As the distinction between primary and secondary materials can vary based on the research project, all original documents are included among the primary materials. Noted secondary materials are commentary. The final section covers general Wyoming historical sources, biographies, Wyoming bibliographies, and Web sites. A number of reports included in this bibliography are annual or biennial and continue from the territorial days to the present. Dates listed for these reports cover territorial years only.

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PRE-WYOMING TERRITORIAL

Federal

The authors of the Articles of Confederation foresaw a need to establish laws for governing these lands west of the original colonies.

Northwest Ordinance of 1787 (ordinance to establish laws for the government of the territory of the United States northwest of the River Ohio [July 13, 1787]).

Dakota Territory

From 1864 to 1869, Wyoming was part of the Dakota Territory; however, there was no Wyoming representative in the Dakota legislature until 1866. In addition to limited legislative representation, Wyoming suffered from inadequate access to the courts. Distance and geography made contact with the territorial capitol impractical. Dakota found that governing a region with temporary population, unpredictable voters, and a desperate need for local courts and justice was not advantageous. When Wyoming locals suggested they become a territory of their own, Dakota governor Andrew Jackson Faulk was comfortable supporting their appeal. In his 1867 address to the Dakota Assembly, he recommended moving forward with a memorial to the United States Congress requesting establishment of a new territory. As he stated, "I know of no good reason why they may not be clothed with all the blessings and protection of a separate organization,"[1] and he added an appeal for the sake of the "friendly Indians" corrupted by "unprincipled white men."[2]

Most Dakota Territory primary sources make only brief mention of Wyoming issues, citing the establishment of counties and city charters, and including the petition to Congress to recognize the new territory.

Executive Sources

1861-1889 DAKOTA GOVERNOR. BIENNIAL MESSAGE TO THE LEGISLATIVE ASSEMBLY.

Legislative Sources

1861-1889 Territory of Dakota Laws.

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[1] WYOMING: FROM TERRITORIAL DAYS TO THE PRESENT 187 (Frances Birkhead Beard ed., Am. Historical Soc'y 1933).
[2] *Id.* at 188.

1862-1893 TERRITORY OF DAKOTA COUNCIL. JOURNAL OF THE LEGISLATIVE ASSEMBLY.

1862-1893 TERRITORY OF DAKOTA HOUSE OF REPRESENTATIVES. JOURNAL OF THE LEGISLATIVE ASSEMBLY.

Local Sources

Lincoln Mining District, Dakota Territory, November 11, 1865 (public meeting to organize the mining district, *reprinted in* HISTORY OF WYOMING AND (THE FAR WEST), at 642 (C. G. Coutant 1966) (1899).

This is the first document in the annals of local government of the section of Dakota Territory that would later become Wyoming. As federal workers, including military, were not counted in a census as permanent population, and railroad workers and emigrants moved on, miners were one of the first groups to settle and become citizens. This documents their original attempt to organize into a community near South Pass City, Wyoming.

General Secondary Sources

Like the primary sources, Dakota secondary sources include very little coverage of the Wyoming portion of their territory.

GEORGE W. KINGSBURY, HISTORY OF DAKOTA TERRITORY (S.J. Clarke Publ'g Co. 1915).

This source reads like a legislative journal. Volumes four and five are biographical.

HOWARD ROBERTS LAMAR, DAKOTA TERRITORY, 1861-1889 (Yale Univ. Press 1956).

Specific Wyoming references are extremely limited, but many of the main issues that Dakota dealt with are also issues to Wyoming—Indians, emigrants, railroads. The approaches to these issues, however, vary significantly between territories.

ESTABLISHMENT OF THE WYOMING TERRITORY

Federal

The issue that engendered the greatest interest in the establishment of the Wyoming Territory was its name. "Wyoming" is of eastern origin, and some senators favored naming the territory something more indigenous, some wanted to

honor the recently assassinated President Lincoln by naming the territory after him.[3]

Organic Act

Act of July 25, 1868, ch. 235, 15 Stat. 178 (1868) (providing temporary government for the Territory of Wyoming).

Unenacted Bills

H.R. 633, 38th Cong. (2d Sess. 1865) (providing temporary government for the Territory of Wyoming).

Never got out of Committee on Territories.

H.R. 647, 39th Cong. (1st Sess. 1866) (providing temporary government for the Territory of Lincoln [Wyoming]).

Bill ordered printed and recommitted to Committee on Territories. Never got further.

ADMINISTRATION OF THE WYOMING TERRITORY

Federal

Territorial officials were supervised by federal government agencies. Originally the Department of State managed the territories because so many of them were obtained through foreign jurisdictions. In 1873, the supervision was moved to the Department of the Interior. In general, requests for guidance were refused by the agencies, who advised territorial administrators to "refer to the law rather than to a department superior,"[4] although the government did not supply statutes for the respective states.[5]

Territorial Papers

1878-1890 WYOMING TERRITORY GOVERNOR BIENNIAL REPORT TO THE SECRETARY OF THE INTERIOR.

In the absence of any other good information sources on the new territories, these reports were reprinted and sent back to the territories to be used as advertisements or information circulars for prospective settlers.

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[3] *Id.* at 198.

[4] EARL S. POMEROY, THE TERRITORIES AND THE UNITED STATES, 1861-1890: STUDIES IN COLONIAL ADMINISTRATION 11 (Univ. of Wash. Press 1969) (1947).

[5] *Id.* at 12.

THE TERRITORIAL PAPERS OF THE UNITED STATES (Clarence E. Carter ed., Nat'l Archives & Records Serv. 1936).

Territorial governors and secretaries wrote biennial reports in which they discussed election results, vetoes, and summarized legislation. Requests for appointments, complaints from the general public about current officials, and correspondence for leaves of absence were voluminous and together these resources make up the bulk of the territorial papers. Compliance in sending copies of executive proceedings to the president was irregular, as indicated in the correspondence from Wyoming's Governor Hoyt to President Hayes. "In this office copies of all official correspondence have [not] even been preserved."[6]

Organized by government agency and available on microfilm at most large academic and state libraries, the most relevant record groups are listed as follows. Some of these can be searched at the National Archives and Records Administration Web site (see Web sites) under *Guide to Records in the National Archives* using the record group number.

- Record Group 46, Records of the Senate. Volume 1 lists territorial judges. Contains bills introduced by the Senate regarding Wyoming's territorial legislation.
- Record Group 48, General Records of the Department of the Interior. Includes executive proceedings, 1878-1890; official correspondences with federal and territorial officials and private individuals, 1878-1890; appointment nominations and commissions of governors and secretaries, letters of recommendation, correspondence, complaints, and requests for leaves of absence.
- Record Group 59, General Record of Dept. of State. July 23, 1868-January 9, 1873, contains personal letters urging appointment of officers, journals and legislative proceedings, governor messages to the legislature, requests for leaves of absence and responses.

Additional record groups with relevance for Western territories:

- Record Group 60, General records of the Dept. of Justice. Includes territorial appointment files.
- Record Group 75, Records of Office of Indian Affairs. Includes records of Wyoming Superintendency of Indian Affairs, 1869-90. In the Western territories of this time, governors of the territories were expected to act as the superintendent of Indian affairs for their territory.
- Record Group 98, Records of U.S. Army Commands.
- Record Group 107, Records of the Office of the Secretary of War.
- Record Group 223, Records of the U.S. House of Representatives.

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[6] Letter from John W. Hoyt to Rutherford B. Hayes (July 24, 1878) THE TERRITORIAL PAPERS OF THE UNITED STATES, MISCELLANEOUS FILE 221.

Wyoming Territory

These federal materials reflected a unique situation for the new Wyoming Territory. In an interesting but chaotic development, Andrew Johnson signed the bill making Wyoming a territory. Congress, however, refused to approve any nominations for territorial office in Wyoming. Consequently, Wyoming was a territory for ten months before a government was organized.

The Organic Act established that, with the exception of mining law, Dakota law would govern Wyoming Territory until repealed by the new legislature. During the ten-month delay between the organization of the territory and the assignment of territorial officials, the population took it upon themselves to set up a court system and begged for action from the federal government. "Republicans of Cheyenne offered to bear the expense if Johnson would send officers without waiting for confirmation."[7]

Legislative

From the beginning of its history, Wyoming has not maintained records of legislative committee meetings or other materials that help in compiling legislative histories. The Wyoming Constitution provides for the legislature to meet for forty days a year. Odd-numbered years are general sessions, even-numbered years are budget sessions.

Legislative Primary Sources:

1869-1890 Territory of Wyoming Session Laws (biennial).

COMPILED LAWS OF WYOMING (1876).

REVISED STATUTES OF THE STATE OF WYOMING (1887).

1871-1890 TERRITORY OF WYOMING COUNCIL. JOURNAL OF THE LEGISLATIVE ASSEMBLY.

1871-1890 TERRITORY OF WYOMING HOUSE OF REPRESENTATIVES. JOURNAL OF THE LEGISLATIVE ASSEMBLY.

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[7] Pomeroy, *supra* note 4, at 65.

Legislative Secondary Sources:

Peter K. Simpson, "History of the First Wyoming Legislature" (1962) (unpublished M.S. thesis, University of Wyoming).

An overview of the first Wyoming territorial legislature, it addresses organization of the new government, establishment of its courts and law enforcement, and the legislature's treatment of the territory's problems.

Lawrence M. Woods, "The Evolution of Wyoming Territorial Legislation, 1869-1890" (1975) (unpublished Ph.D. dissertation, New York University).

The goal of this dissertation as stated in the preface is to

> examine the evolution of the law-making function, legislators and their constituencies and… trace changes in constituencies during the territorial period. Laws enacted are analyzed in relation to the individual interests of inhabitants, and this relationship is examined for evidence of change.

This work compares Wyoming's progression to major political theorists of the time such as Turner and Lamar.

Executive

From the early days of the territory, the Wyoming voters were frustrated by presidential appointments to the governorship. They demanded that the position be given to someone with ties to the area. When F. E. Warren's name was finally forwarded to the Senate for approval, his appointment was received with general approval from both parties as the first Wyoming resident governor of the territory.[8]

Governor Primary Sources:

1869-1890 GOVERNOR OF THE TERRITORY OF WYOMING. BIENNIAL MESSAGE TO THE LEGISLATURE OF WYOMING TERRITORY.

LETTERPRESS BOOKS OF THE GOVERNORS, 1869-1907 (Wyo. Archives & Hist. Dept., Archives & Records Div. 1960).

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[8] LEWIS L. GOULD, WYOMING: A POLITICAL HISTORY, 1868-1896 74 (Yale Univ. Press 1968).

Outgoing correspondence of territorial governors; also decisions, court rules, and Wyoming State Bar Association materials, 1879-1942

Campbell	1869-1875
Hoyt	1878-1882
Hale	1882-1885
Warren	1885-1886
Baxter	1886
Moonlight	1887-1889
Richards	1895-1903
Chatterton	1903-1905
Brooks	1905-1911

John Wesley Hoyt, Papers, 1878-1882 (on file with Wyoming State Archives).

Includes materials not in the Letterpress books.

THOMAS MOONLIGHT, SEVEN VETOES (Bristol & Knabe Printing 1888).

Veto statements of Governor Moonlight to the Tenth Legislative Assembly.

F.E. Warren, Papers (on file with The American Heritage Center, University of Wyoming).

I. Political Papers 1878-1945 (gubernatorial and senatorial papers)
II. Personal papers 1868-1974
III. Warren Livestock Company, 1884-1957
IV. Early business ventures, 1878-1961
V. Mercantile business ventures, 1867-1961
VI. Other business material, 1870-1937

Agency Primary Sources:

1893-1888 WYOMING ATTORNEY GENERAL BIENNIAL REPORT.

Begins biennial publication with 1894.

1887-1890 WYOMING STATE AUDITOR ANNUAL REPORT.

Includes territorial laws, establishes courts and counties by governor's proclamation, resolutions and memorials of the Legislature.

1920 WYOMING STATE HISTORIAN. BIENNIAL REPORT.

This was compiled with the period ending September 30, 1920. The first biennial report contains many relevant resources to pre-statehood Wyoming, more useful as general background.

RESOURCES OF WYOMING, 1889: AN OFFICIAL PUBLICATION COMPILED BY THE SECRETARY OF THE TERRITORY UNDER AUTHORITY GRANTED BY THE TERRITORIAL LEGISLATURE.

From the title page: general information relating to the soil, climate, productions; advantages and development—agricultural, manufacturing, commercial and mineral—geography and topography of the territory, also The Vacant Public Lands and how to obtain them (together with a map of Wyoming, ill., the mining laws of territory and descriptions of each county separately. Including native wildlife and plant species, Indians, banking, mineral resources, taxes, wages, cost of living, and one to three pages on each county regarding their school system, county seat, principal cities, agriculture, and mining. Each year comprises about 150 pages.

Executive Secondary Sources:

W.T. Jackson, *The Governorship of Wyoming 1885-1889: A Study in Territorial Politics* 13 PAC. HIST. REV. 1 (1944).

This article discusses the political intrigue and appointments of territorial governors Warren, Baxter, and Moonlight.

Judicial

Territorial courts had three judges, sitting individually as district court judges, and together once a year as the territorial supreme court, where they sometimes had original and appellate jurisdiction in the same case. The U.S. Supreme Court stood above territorial supreme courts.

The ten months without territorial appointments especially affected the judicial system. Never having had a firm footing within the Dakota Territory, as the circuit court judge only sat at the county seat one to two times a year, things now grew desperate. "The judges of Dacotah refused to hold court here and we are worse off than if we were not organized."[9] Eventually judges were assigned, but without deference to locals, making little or no allowances for the vast distances to travel, geography, cost of travel, and cost of living. Expenses were so high and reimbursements so low that witnesses preferred to be arrested and taken to court on the government's dollar than wait for insufficient reimbursement.[10]

Internet access to Wyoming case law only reaches back to the early 1990s at this time. However, decisions are being added retrospectively with the intention that the entire history of the court will be covered.

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[9] Letter of E. P. Snow to Seward (August 8, 1868) THE TERRITORIAL PAPERS OF THE UNITED STATES 7.

[10] John D. W. Guice, THE ROCKY MOUNTAIN BENCH: THE TERRITORIAL SUPREME COURTS OF COLORADO, MONTANA, AND WYOMING, 1861-1890 45 (Yale Univ. Press 1972).

Judicial Primary Sources:

PACIFIC REPORTER, CONTAINING ALL THE DECISIONS OF THE SUPREME COURTS OF CALIFORNIA, COLORADO, KANSAS, OREGON, NEVADA, ARIZONA, IDAHO, MONTANA, WASHINGTON, WYOMING, UTAH, AND NEW MEXICO (West Publ'g Co.).

Begins coverage of Wyoming cases with 1883. Indexed in *West's Wyoming Digest.* Includes Wyoming state appellate and federal cases.

WYOMING REPORTS: CASES DECIDED IN THE SUPREME COURT OF WYOMING, 1892-1959.

Indexed in *Wyoming Digest*. Vols. 4-22, 1892-1915 (Potter), vols. 23-59, 1915-1943 (Mullen), vols. 59-, 1943-1959 (Lazear).

REPORTS OF CASES DETERMINED IN THE SUPREME COURT OF THE TERRITORY OF WYOMING. OFFICIAL REPORTS FOR WYOMING TERRITORY (1870-1890).

Vol. 1, 1870-78 (Thomas); vol. 2, 1878-82 (Riner); vol. 3, 1883-92 (National Reporter System, West Pub. Co.). Listings of justices, table of cases, court rules, with topical index at the back of each volume. Vol. 3 by West is annotated.

WYOMING COURT RULES *in* COMPILED LAWS OF WYOMING (1876).

Judicial Secondary Sources:

JOHN D. W. GUICE, THE ROCKY MOUNTAIN BENCH: THE TERRITORIAL SUPREME COURTS OF COLORADO, MONTANA, AND WYOMING, 1861-1890 (Yale Univ. Press 1972).

Territorial courts were closely monitored by the U.S. attorney general and tightly reined in by the federal legislature. This work examines the role of federal government in the political and economic development of Wyoming's territorial and early statehood days.

Other contributions of judges to the territories besides court duties included representing the people of the state in Washington, special commissioners to Indian tribes, codifying laws, and, in the absence of an attorney general, giving advice to the legislature as they formulated laws.

Rebecca W. Thompson, *History of Territorial Federal Judges for the Territory of Wyoming: 1869-1890*, 17 LAND & WATER L. REV. 567 (1982).

Brief biographies of the federal judges in the territory of Wyoming, the background of the state, problems of reimbursement, travel, vigilantes, and low pay. The article discusses establishment of the court system, types of cases that

predominated, and women on juries. This encapsulates the more complete Guice treatise. Contains a chronological list of judges and their periods of service as justices on the Territorial Supreme Court.

ESTABLISHMENT OF THE STATE OF WYOMING

Federal

With only a little over 8,000 popular votes cast for ratification of the proposed Wyoming Constitution, Wyoming Territorial Delegate Carey introduced one of three bills to admit Wyoming into the union early in the first session of the 51st Congress.[11]

Act of Admission

Act of July 10, 1890, ch. 664, 26 Stat. 222 (1890) (providing for the admission of the state of Wyoming into the Union).

H.R. REP. NO. 51-39 (1890) (report to accompany HR 982, admission of Wyoming into the Union).

PROPOSED STATE OF WYOMING: PROCLAMATION, BILL FOR ADMISSION, REPORT, AND OTHER PAPERS RELATING TO STATEHOOD. (Daily Sun Electric Book Print 1889).

Contains governor's proclamation for election of delegates to the Constitutional Convention and apportionment of delegates among districts; boards of county commissioners' resolution preparing for election; Senate Bill 2445 on statehood; Report of Senate Committee on admission of Wyoming, February 28, 1889, accompanying Senate Bill 2445 and recommending passage; Report of House Committee on the admission of Arizona, Idaho, and Wyoming; inaugural address by Governor Warren; Memorial by Tenth Legislative Assembly to U.S. Congress for statehood.

Unenacted Federal Bills

H.R. 3830, 51st Cong. (1st Sess. 1890) (providing for Wyoming statehood).

H.R. 4561, 51st Cong. (1st Sess. 1890) (providing for Wyoming statehood).

S. 894, 51st Cong. (1st Sess. 1890) (providing for Wyoming statehood).

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[11] BEARD, *supra* note 1, at 466.

Congressional Debates

House:

51st CONG. REC. 2132 (providing for consideration of Wyoming statehood by the House as Committee as a Whole).

51st CONG. REC. 2633 (1890) (motion to vote on Wyoming statehood in Committee as a Whole).

This vote required some political finagling to overcome opposition and reach a quorum.

51st CONG. REC. 2672-2683 (1890) (debates on Wyoming's statehood).

Includes Representative Carey's address to Congress, along with numerous others arguing for and against statehood.

Senate:

51st CONG. REC. 6474-6482 (1890) (providing for consideration of Wyoming statehood).

Read report of the Committee on Territories which stated no reason against statehood.

51st CONG. REC. 1383, 4132, 4183, 6183, 6310, 6386, 6467, 6468, 6589 (1890) (provided for consideration of Wyoming statehood).

Debates concerning S. 894 above, for which the nearly identical H.R. 982 was eventually substituted.[12]

State

Constitution

The people of the Territory of Wyoming, like the founding fathers over a century before, began to feel oppressed by the lack of representation in Washington and frustrated by territorial administrators who were appointed to their positions as political favors. The push for statehood began without authorization of an Organic Act. The Constitutional Convention was held September 2 through September 30, 1889. Voters ratified the constitution on November 5, 1889.

With the constitution already written and ratified by a vote of the citizenry, the committee wrote a memorial to the U.S. Congress requesting statehood. Though Democrats in Congress objected to the back-door approach, the constitutional provisions of women's suffrage, compulsory education, and the small

[12] Beard, *supra* note 1, at 469.

election vote, the bill was passed,[13] and Wyoming was granted statehood on July 10, 1890.

The Wyoming Constitution has been criticized as an amalgam of the constitutions of states in the region recently granted statehood. There were, however, two especially important elements that brought the Wyoming Constitution notoriety: water rights and women's suffrage. Throughout Wyoming's history there has been only one constitution, amended sixty times, with forty amendments failing.[14]

Constitutional Primary Sources:

WYOMING CONSTITUTION OF 1890, *reprinted in* 1 WYO. STAT. ANN. (LexisNexis 2001).

JOURNAL AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF WYOMING (Daily Sun Book & Job Printing 1893).

Includes debates and constitutional convention, final draft of constitution, limited subject index, index of propositions, and index of members.

Territory of Wyoming Constitutional Convention Committee, Address to the People of Wyoming (1889) (unpublished manuscript, on file with Wyoming State Law Library).

Handwritten photocopy from Wyoming State Law Library, briefly explaining elements of the proposed Constitution and urging voters to ratify it.

TERRITORY OF WYOMING CONSTITUTIONAL CONVENTION COMMITTEE, MEMORIAL TO THE PRESIDENT AND CONGRESS FOR THE ADMISSION OF WYOMING TERRITORY TO THE UNION (Bristol & Knabe Printing 1889).

Contains achievements of the Territory, letters from Wyoming's Congress, governor, and county commissioners who urged the formation of the Constitutional Convention, and the Wyoming Constitution.

Constitutional Secondary Sources:

M.C. Brown, *Constitution-making, in* WYOMING STATE HISTORIAN BIENNIAL REPORT (1919-1920).

M.C. Brown, President of the Constitutional Convention, wrote this article ten years after statehood. It addresses personnel involved in the convention, the main issues of women, water rights, compulsory arbitration, complaints that the constitution has too much legislation, and Brown's point of view on this issue.

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[13] Henry J. Peterson, *The Constitutional Convention in Wyoming*, 7 U. OF WYO. PUBLICATIONS 130 (1940).

[14] Karpan, *Proposed Amendments to the Wyoming State Constitution 1890-1988* i (Oct. 1988).

ROBERT B. KEITER AND TIM NEWCOMB, THE WYOMING STATE CONSTITUTION: A REFERENCE GUIDE (Greenwood Press 1993).

Probably the best source on Wyoming constitutional history and application, this treatise discusses the Constitutional Convention, attitudes of various elements within the state at the time, and the heavy limits placed on legislative powers. There is an analysis of each article of the Constitution, including Wyoming Supreme Court interpretation. It includes a table of cases, bibliographic essay, index, references to *Journals and Debates of the Constitutional Convention*, attorney general opinions that cite the constitution, and proposed constitutional amendments.

Henry J. Peterson, *The Constitutional Convention in Wyoming*, 7 U. OF WYO. PUBLICATIONS 101 (1940).

Taken mostly from *Journals and Debates*. Contains a brief and interesting discussion of voting on the Wyoming Constitution in Washington. It addresses individual controversial elements of the Constitution.

Richard K. Prien, The Background of the Wyoming Constitution (1956) (unpublished M.A. thesis, University of Wyoming).

Focuses on comparison of the constitutions of Wyoming with those of North Dakota, South Dakota, Idaho, Montana, and Washington under the assumption that borrowing took place from those states that most recently achieved statehood. It includes an appendix of file propositions for inclusion in the Wyoming Constitution.

GENERAL SECONDARY SOURCES

Wyoming General Historical Sources

A number of general secondary sources that discuss the social and political history, climate and geography, and inhabitants of Wyoming and the region. Some of the best of these contain reproductions of primary sources and quotes from political leaders and the general population of the time.

ANNALS OF WYOMING (Wyoming State Dep't. of History 1924-)

This journal is published quarterly by the Wyoming State Historical Society in conjunction with the Department of Commerce, American Heritage Center, and the University of Wyoming Department of History. Previously published as the *Quarterly Bulletin*, *Wyoming Annals*, and *Wyoming History Journal*, this periodical includes diaries, submissions from politicians, important local historical figures, and representative works of the general public, as well as academic pieces on or by state historical figures. Indexes are bound separately. The objective of this series is a

continuous publication of Wyoming history. An electronically searchable index is available online at the Wyoming State Historical Society Web site <http://wyshs.org/annals.htm>.

ICHABOD S. BARTLETT, HISTORY OF WYOMING (S.J. Clarke Publ'g Co. 1918).

In this three-volume set, the first volume has an emphasis on pre-history, foreign jurisdiction, the Louisiana Purchase, and early white man in the area. One chapter discusses the court system, judges, attorneys, and the Wyoming State Bar Association. Volumes two and three are mostly photographs and biographical essays.

Joseph Maull Carey, "*State of Wyoming*," *in* THE PROVINCE AND THE STATES: A HISTORY OF THE PROVINCE OF LOUISIANA UNDER FRANCE AND SPAIN, THE TERRITORIES AND STATES OF THE UNITED STATES FORMED THEREFROM 333 (Weston Arthur Goodspeed ed., Western Historical Ass'n 1904).

Although the coverage is not unique, this work is exceptional because the author is Joseph Carey, first U.S. Senator for Wyoming and major political figure during the territorial and early statehood years. This source gives more local background than other resources, and coverage of the Constitutional Convention is interesting, as neither Carey nor Governor Warren were delegates, and both are believed to have disapproved of a number of elements of the final product.

C. G. COUTANT, THE HISTORY OF WYOMNG AND (THE FAR WEST) (Argonaut Press Ltd. 1966) (1899).

While the author contends that he only includes strictly historical material in this text, it contains biographical sketches and reminiscences that lend it an anecdotal air. Mostly concerned with the background of white men in Wyoming, it includes reprints of historical documents. The focus is social rather than political.

MARIE ERWIN, WYOMING HISTORICAL BLUE BOOK: A LEGAL AND POLITICAL HISTORY OF WYOMING, 1868-1943 (Virginia Cole Trenholm ed., Wyoming State Archives & Historical Dep't 1974) (Bradford-Robinson Printing Co. 1943).

This is a source for original materials of the territory and early statehood. It includes House and Senate bills, memorials to Congress, addresses of the governors, the Wyoming Constitution, sketched maps of early territories, court rules, office holders, and short biographies. This is an historical almanac in that it lists voting records, members of Congress, populations, maps, Constitutional amendments, and biographical data.

LEWIS L. GOULD, WYOMING: A POLITICAL HISTORY, 1868-1896 (Yale Univ. Press 1968) (reprinted as WYOMING, FROM TERRITORY TO STATEHOOD, High Plains Publ'g Co. 1989).

Excellent treatise with detailed coverage of Wyoming political life for the thirty years from territory to statehood, including major political upheavals and players.

GRACE RAYMOND HEBARD, HISTORY AND GOVERNMENT OF WYOMING: THE HISTORY, CONSTITUTION AND ADMINISTRATION OF AFFAIRS (C. F. Weber & Co. 11th ed. 1926) (1904).

One of many editions of a text for upper-level pre-college students, it is a great introductory work used in Wyoming schools until fairly recently. The author is one of Wyoming's major historical figures.

T. A. LARSON, HISTORY OF WYOMING (University of Nebraska Press 1965).

One of the most respected modern Wyoming historical scholars, Larson taught in the University of Wyoming History Department and published widely in this area, elaborating on constitutional issues of women's suffrage and early statehood. Much of his other work is based on this treatise.

ROBERT C. MORRIS, COLLECTIONS OF THE WYOMING HISTORICAL SOCIETY (1897).

Selected resources, personal reminiscences and memorials, early settlement, social and commercial progress, mines, agriculture, prehistoric remains, Indians, documents of statehood, and women's suffrage are among the many items in this collection. It has limited use as a comprehensive source, but is great for a taste of Wyoming social, political, economic history pre- and early statehood. Selected resources are lively and representative.

WYOMING: FROM TERRITORIAL DAYS TO THE PRESENT (Frances Birkhead Beard ed., Am. Historical Soc'y 1933).

Volume one contains nearly 300 pages covering pre-statehood and reproduces a number of original documents, including the Dakota governor's message to the Legislative Assembly, the Dakota Assembly's memorial to Congress, Senate Bill 357 providing temporary government for Territory of Wyoming, and the Wyoming Organic Act. Volumes two and three are mostly biographical essays. These are not in alphabetical order. The index in front of volume 1 serves as a finding aid.

Biographies

The Democratic presence in the new Wyoming region simply could not compete with the strength and political savvy of a few powerful Republican leaders. The names of F. E. Warren, Joseph Carey, and Willis Van Devanter appear

throughout the history of the territory and early statehood, both as authors and as subjects of works. Wyoming's early life was defined by them to a large degree.

Robert F. Franklin, "The Political Career of Senator Francis E. Warren, 1902-1912" (unpublished Master's thesis, University of Wyoming).

Dating after Wyoming's territorial days, its relevance is in the importance of the political figures to Wyoming's development.

Lewis Ludlow Gould, "Willis Van Devanter in Wyoming Politics, 1884-1897" (1966) (unpublished Ph.D. dissertation, Yale University).

Van Devanter spent his early adulthood in Cheyenne, where he worked as an attorney and judge, attached himself to F.E. Warren and served as chairman of the Wyoming Republican Party. He is the only U.S. Supreme Court justice to have ties with Wyoming and achieved this position through the political maneuverings of his patron, Warren.

This book is less a biography than an exploration of the development of Wyoming's political system in the 1880s and 1890s. It discusses the regional competitiveness, establishment of state institutions and federal government working in the territory.

Kepler Hoyt, Life of John Wesley Hoyt (n.d.) (unpublished typescript, on file with The Wyoming State Historical Society).

This is a biography of one of Wyoming's territorial governors covering his life from 1831-1912. Hoyt was an outdoor enthusiast and one of the only non-Wyoming territorial governors accepted by the local population. His interest in the region is reflected in his biennial reports to the Secretary of the Interior.

Betsy Ross Peters, "Joseph M. Carey and the Progressive Movement in Wyoming" (1971) (unpublished Ph.D. dissertation, University of Wyoming).

Dating after Wyoming's territorial days, its relevance is in the importance of the political figures to Wyoming's development.

Willis Van Devanter, papers of Willis Van Devanter, 1884-1941 (unpublished manuscript on file with the Manuscripts Division, Library of Congress).

General Wyoming Bibliographies

RAY JORDAN, WYOMING: A CENTENNIAL BIBLIOGRAPHY (1988).

ROSE MARY MALONE, WYOMINGANA: TWO BIBLIOGRAPHIES (University of Denver Press 1950).

Web Sites

American Heritage Center
University of Wyoming
< http://ahc.uwyo.edu/>

The American Heritage Center is one of the primary depositories for early Western materials. With a very strong focus in Western history, this is an institution to keep in mind when researching Wyoming and the history of the region.

National Archives and Records Administration
Rocky Mountain Region
<www.archives.gov/research_room/arc/index.html>

Selected finding aids for archival holdings at Denver regional archives. Search refinements are limited, for instance, there is no date option, but one may search the inventories by following the link to name change archival research catalog. Some items available digitally.

Wyoming State Archives
<http://wyoarchives.state.wy.us>

Brief articles on famous Wyomingites, railroads, water, and women's history. No links to primary sources, and no search capabilities.

Wyoming State Historical Society
<http://wyshs.org>

Annals of Wyoming index online, 1923-1994 and Table of Contents from 1997-2001. Not full text. The Wyoming State Historical collection is housed in the Wyoming State Archives.

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COMMENT

Fixing *O'Boyle v. State*—Traffic Detentions under Wyoming's Emerging Search-and-Seizure Standard

*Mervin Mecklenburg**

I. Introduction 69
II. Background 73
A. *How We Got Here* 73
B. *Establishing Independent State Ground* 76
C. *Search and Seizure* 79
D. *Reasonableness* 85
E. *Traffic Detentions under the Fourth Amendment* 89
F. *Traffic Detentions under Article 1, Section 4* 92
III. Analysis 96
A. *Analysis of the Six "Neutral Non-exclusive Factors"* 96
1. *Text and Textual Differences* 96
2. *Constitutional and Common-law History* 98
3. *Structural Differences* 98
4. *Issues of Local and State Concern* 99
B. *Recommended Traffic Detention Rule* 101
IV. Conclusion 105

I. Introduction

This comment focuses on how an independent search-and-seizure standard, now being re-created by the Wyoming Supreme Court under the state's constitution, should treat traffic detentions.[1] Traffic detentions encompass the span of time after the traveler halts the vehicle, when the officer inspects the driver's credentials and writes the citation.[2] The brief stop forms a significant nexus between people's lives and law enforcement, providing opportunity for the officer to view the driver, look at the interior of the vehicle, examine the passengers and ask questions about the driver's business.[3] During these routine activities, the officer may come to believe that the driver or the vehicle is involved in a crime—frequently

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[1] Vasquez v. State, 990 P.2d 476, 485 (Wyo. 1999) (stating that Article 1, Section 4 of the Wyoming Constitution "deserves and requires the development of sound principles upon which to decide the search and seizure issues arising from state law enforcement").

[2] Lindsay v. State, 108 P.3d 852, 857 (Wyo. 2005).

[3] *See* 4 Wayne R. LaFave, Search and Seizure, a Treatise on the Fourth Amendment § 9.3 (4th ed. 2004) ("[T]he renewed interest in traffic enforcement is attributable to a federally-sponsored initiative related to the 'war on drugs.'").

the transportation of contraband.[4] Police often use these observations to develop probable cause to investigate matters that lie outside of the limited scope of traffic violations, leading to detention of the driver or a search of the vehicle.[5]

Since the early 1960s, the Fourth Amendment has governed traffic detentions in Wyoming, and the Wyoming Supreme Court has held that protections provided under the Wyoming Constitution and the Fourth Amendment were the same.[6] But in 1999, the Wyoming Supreme Court recognized in *Vasquez v. State* its duty to create an independent search-and-seizure standard under the Wyoming Constitution, stating that sound principles should be developed under the state constitution for deciding search-and-seizure issues.[7] According to the court, The Wyoming Constitution "is a unique document, the supreme law of [the] state, and this is sufficient reason to decide that it should be at issue whenever an individual believes a constitutionally guaranteed right has been violated."[8] The new standard "may provide greater protection [of citizen's rights] . . . ; or may provide less, in which case the federal law would prevail . . . ."[9]

The Wyoming Supreme Court's decision to create an independent standard arose out of its dissatisfaction with how the Fourth Amendment was being applied to traffic stops.[10] The court noted that a significant amount of traffic traverses Wyoming on its way to other areas of the country, and accompanying that traffic is a considerable amount of drugs.[11] As a result, federal drug interdiction efforts

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[4] *See id.*

[5] O'Boyle v. State, 117 P.3d 401, 419 (Wyo. 2005) (expressing dissatisfaction over the aggressive tactics of law enforcement seeking to search vehicles).

[6] *Vasquez*, 990 p.2d at 483-84 ("This practice was essentially required in order to comply with the [United States] Supreme Court's expansive protection provided to individual rights during the 1960s and 1970s . . . .").

[7] *Id.* at 485. The court stated,

> Just as we have done with other state constitutional provisions which have no federal counterpart, we think that Article 1, Section 4 deserves and requires the development of sound principles upon which to decide the search and seizure issues arising from state law enforcement action despite its federal counterpart and the activity it generates for the United States Supreme Court.

Id.

[8] *Id.*

[9] *Id. See* Saldana v. State, 846 P.2d 604, 612 (Wyo. 1993) (noting that the United States Supreme Court permits states to provide more protections than those offered federally, at the state's legislative or judicial discretion). In *Vasquez*, the court declared that Article 1, Section 4 is separate from the Fourth Amendment and "requires an independent interpretation regardless of its similarities to or differences from the Federal Constitution." *Vasquez*, 990 P.2d at 486.

[10] *See* O'Boyle v. State, 117 P.3d 401, 411 (Wyo. 2005).

[11] *Id.*

have targeted the state's highways.[12] Consequently, state citizens traveling upon Wyoming highways have been imposed upon by aggressive investigatory techniques, disapproved of by the Wyoming Supreme Court, but allowed under the Fourth Amendment.[13] An independent standard relieves the Wyoming Supreme Court from the burden of following the federal standard, giving the court some control over how it treats the state's citizens.[14] But employing an independent standard requires turning away from the well-established body of case law related to traffic stops under the Fourth Amendment.[15] This federal case law provides officers at traffic stops specific guidance regarding what actions are reasonable and what actions are not, and it strives to balance the rights of citizens against legitimate governmental interests, including investigation and prevention of crime.[16]

In *O'Boyle v. State*—the one opportunity the Wyoming Supreme Court has had to address traffic detention under the Wyoming Constitution—the court failed to achieve the clarity and balance existent under the Fourth Amendment.[17]

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[12] *Id.*

[13] *Id.*

[14] *See id. at* 422. (Voigt, J., concurring). While agreeing with the majority decision to create an independent search-and-seizure standard, Justice Voigt criticized how federal courts have regulated traffic detentions under the federal standard. *Id.* He called the practice of routinely turning traffic stops into drug investigations "intellectually dishonest." *Id.* Also, he stated that courts have applied the standard inconsistently, and rather than trying to stretch the federal traffic-detention rule to include drug control efforts, he stated that a rule should be devised which identifies "what investigative steps directed at drug interdiction" during a traffic detention "are constitutionally reasonable." *Id.*

[15] See 4 LAFAVE, *supra* note 3, § 9.3, for an analysis of the Fourth Amendment traffic-detention doctrine.

[16] *See id.*

[17] O'Boyle v. State, 117 P.3d 401 (Wyo. 2005). The Wyoming Supreme Court has decided other cases under Article 1, Section 4 that included traffic stops, but they focused on issues other than traffic detention. *See* Vasquez v. State, 990 P.2d 476 (Wyo., 1999) *and* Johnson v. State, 137 P.3d 903 (Wyo. 2006). *Vasquez* concerned a search subsequent to an arrest. 990 P.2d at 478. The facts provided no information about the stop and provided no basis for a traffic-detention analysis. *See id.* at 479. *Johnson* was an inventory search. 137 P.3d at 909. The case provided an analysis of the stop, but the analysis mixed state and federal authorities and made no effort to distinguish state law. *Id.* at 906 (citing cases decided under the state constitution, *O'Boyle* and *Vasquez*, in the same analysis as Campbell v. State, 97 P.3d 781 (Wyo. 2004), which relied upon federal law). In *Johnson*, the Wyoming Supreme Court made no attempt to create a standard independent from federal law because the court held that the federal and state standards for inventory searches are identical. *Johnson*, 137 P.3d at 908-09. The recently decided case *Fertig v. State* held that a traffic stop initiated by an officer who witnesses a traffic violation is reasonable under Article 1, Section 4, even when the stop was made as a pretext for other investigation. Fertig v. State, 2006 WY 148, ¶ 28. Although the reason for and execution of the stop is likely to impact how the court perceives the traffic detention, how the stop was conducted

The traffic-detention holding in *O'Boyle* gave no guidance to officers, and it failed to explain what factors the court found relevant when evaluating an officer's reasonableness, leaving no basis for predicting the court's future actions.[18] As a consequence, the state's current traffic-detention rule fails to meet basic governmental needs, making Wyoming's rule a mere pale cousin to its federal counterpart.[19]

A traffic detention rule that fails to address basic governmental needs is inconsistent with the history of Article 1, Section 4, which may be distinct from the Fourth Amendment, but arises from the same sources in England and early America.[20] In the first part of the last century, a significant amount of contraband liquor traversed the state's highways during the Prohibition Era.[21] Under the Wyoming Constitution, the court regulated law enforcement's efforts to control this traffic, while extending guidance to officers and proper explanation of factors relevant to the court's reasoning.[22] Therefore, a traffic-detention rule that provides specific guidance to officers and legitimizes the need to investigate criminal activity is not only desirable, but consistent with the Wyoming Constitution and its history.[23]

A Wyoming traffic-detention rule scrupulously based on Wyoming law would also address a separate, but related issue—the federal requirement that state constitutional rulings be based upon "adequate state ground."[24] The United States Supreme Court held that it has the power to review decisions by state courts that intermix state and federal constitutional doctrines, or that fail to provide an adequate state rationale for a constitutional decision.[25] A close look at *O'Boyle* reveals that the Wyoming Supreme Court explained the unreasonableness of some of the officer's actions by drawing upon federal concepts that have no officially

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is a separate issue from the traffic detention, as *Fertig*, itself, acknowledged. *Id.* ¶ 23 ("Significantly, however, in *O'Boyle*, the focus of our constitutional analysis involved an evaluation of police conduct after the stop. We did not question an officer's authority to initiate a traffic stop after an observed traffic violation. . . .").

[18] *See infra* notes 178-93 and accompanying text.

[19] *See* 4 LAFAVE, *supra* note 3, § 9.1(a) (observing that the practice of stopping and frisking suspicious persons is a "time-honored police procedure," and police have long recognized it as a distinct procedure from other police procedures such as arrest, or search incident to arrest).

[20] *See* State v. Peterson, 194 P. 342, 344-45 (Wyo. 1920) (noting that provisions against unreasonable search and seizure are "one of the fundamental props of English and American liberty").

[21] *See* State v. Young, 281 P. 17 (Wyo. 1929).

[22] *See id* at 19-20 (adopting holdings from other states that provide examples of reasonable officer conduct at traffic stops). *See also infra* notes 103-37 and accompanying text.

[23] *See infra* notes 103-37 and accompanying text.

[24] Michigan v. Long, 463 U.S. 1032, 1037-44 (1983).

[25] *Id.* at 1040-41.

recognized basis in Wyoming law.[26] This not only illustrates the insufficiency of the state's current traffic-detention doctrine—which appears incapable of providing an adequate rationale for the court's decision—it intermixes state and federal ideas in a manner which is inconsistent with the dictates of *Michigan v. Long*.[27] A sufficient traffic-detention doctrine based upon Wyoming law would meet the standard advanced by the United States Supreme Court in *Long* and ensure that decisions made under the Wyoming Constitution are consistent with Wyoming's legal history.[28]

In summary, the Wyoming Supreme Court articulated in *O'Boyle* under the Wyoming Constitution a traffic-detention rule that fails to recognize legitimate governmental interests, and the rule is so insufficiently grounded in state law that it cannot be understood without drawing upon Fourth Amendment concepts. However, the history of search-and-seizure in Wyoming provides ample basis for a doctrine that is adequately grounded in state law and sufficient to address governmental interests. This comment, first, describes how Wyoming's current search-and-seizure doctrine evolved historically. Next, it examines federal and state law to determine the framework that the Wyoming Supreme Court must operate within if it is to have a doctrine that is truly independent from the United States Constitution. Third, this comment provides a rationale for creating an independent search-and-seizure doctrine, using six factors identified by the Wyoming Supreme Court as relevant in a state constitutional argument. Finally, this analysis recommends a traffic-detention standard based upon the case law and constitutional history of Wyoming.

II. BACKGROUND

A. *How We Got Here*

In 1889, the delegates to the Wyoming Constitutional Convention gathered in Cheyenne and drafted the Wyoming Constitution in twenty-five days.[29] Fittingly, one of the reasons for this flurry of activity was dissatisfaction over how the Wyoming territory was being managed by federal authorities, and a perception by key persons of the desirability for the territory to become independent from the

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[26] *See infra* notes 167-91 and accompanying text.

[27] *See Long*, 463 U.S. at 1042.

[28] Saldana v. State, 846 P.2d 604, 623 (Wyo. 1993) (Golden, J. concurring) ("Only by the customary process of research and reasoning can there be principled development of a body of state constitutional law that does not seek merely to sidestep review by the United States Supreme Court in isolated cases but one that truly supports the state constitution, as state court judges and lawyers are charged to do.").

[29] ROBERT B. KEITER & TIM NEWCOMB, THE WYOMING STATE CONSTITUTION, A REFERENCE GUIDE 1 (G. Alan Tarr ed., Greenwood Press, Reference Guides to the State Constitutions of the United States No. 7) (1993).

federal government under a state constitution.[30] For the purposes of this discussion of search and seizure at traffic stops, the convention succeeded—creating a constitution that stood apart from the Fourth Amendment and operated on its own.[31] The Wyoming Constitution had to operate independently because in that era the federal constitution had no power over state and local authorities.[32] Therefore, once the state constitution was approved by Congress, a sheriff was subject to Article 1, Section 4 of the Wyoming Constitution, but not the Fourth Amendment of the United States Constitution.[33] If the sheriff unreasonably searched a traveler, he answered not to the United States Supreme Court in Washington, D.C., but to the Wyoming Supreme Court in Cheyenne.[34] Therefore, the Wyoming Supreme Court was part of a two-tiered system for protecting citizens' rights: The actions of federal authorities were regulated by the United States Constitution, and the Wyoming Supreme Court was the sole protector of citizens' rights from violations by state authorities.[35] Consequently, for the next seventy years Wyoming courts considered the reasoning of federal courts regarding the Fourth Amendment persuasive, but not controlling, and the highest law for state officials was the Wyoming Constitution.[36]

This changed in 1961 when the United States Supreme Court decided *Mapp v. Ohio*.[37] *Mapp* incorporated the Fourth Amendment into the Fourteenth Amendment, requiring states to offer search-and-seizure protections that were at least equivalent to those that regulated federal authorities.[38] After the passage of *Mapp*, the Wyoming Supreme Court's search-and-seizure standard was no longer independent, and decisions could be reviewed by the United States Supreme Court.[39] Like most state courts, the Wyoming Supreme Court's reaction to *Mapp* was to interpret search-and-seizure issues using the Fourth Amendment, meaning the Wyoming Constitution no longer acted as the primary protector of citizens' rights.[40] But the Wyoming Supreme Court continued to refer to the state constitu-

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[30] *Id.* at 1.
[31] State v. Peterson 194 P. 342, 350 (Wyo. 1920). ("As to the Fourth Amendment to the Constitution of the United States, it has been held to operate solely on the federal government, its courts and officers, and not as a limitation upon the powers of the states.").
[32] *See id.*
[33] *See id.*
[34] *See id.*
[35] *See id.*
[36] *See id.*
[37] Mapp v. Ohio, 367 U.S. 643 (1961).
[38] Vasquez v. State, 990 P.2d 476, 483-84 (Wyo. 1999) (citing Mapp v. Ohio, 367 U.S. 643, 654-55 (1961)). For an explanation of the rationales underlying *Mapp* and the effect that *Mapp* had on the application of state search-and-seizure law in Wyoming and other states, see *infra* notes 85-93.
[39] *Vasquez*, 990 P.2d at 483-84. *See also infra* notes 92-93 and accompanying text.
[40] *Vasquez*, 990 P.2d at 483-84. *See also infra* notes 92-93 and accompanying text.

tion in its search-and-seizure analyses, causing an intermixing of state and federal search-and-seizure authorities.[41] Through the 1960s, state courts across the nation found the pre-eminence of the United States Constitution satisfactory because the progressive Warren Court was aggressively protecting citizens' rights.[42]

After the Warren Court, however, United States Supreme Court began to lessen protections extended to defendants, and state courts across the nation resumed their role in the two-tiered system of state and federal protections that existed prior to *Mapp*.[43] State courts could offer equal or greater protections than the United States Constitution, but if they offered less, then the Federal Constitution applied.[44] In 1999, the Wyoming Supreme Court announced that it, too, would resume its role as the provider of an independent standard of search-and-seizure protections.[45]

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[41] *See* Jessee v. State, 640 P.2d 56, 62 (Wyo. 1982). *Jessee* relied upon a federal doctrine expounded in Ker v. State of California, 374 U.S. 23 (1963), while stating that the doctrine was consistent with holdings in the Wyoming case State v. George, 231 P. 683 (Wyo. 1924). *Jessee*, 640 P.2d at 62.

[42] *Vasquez*, 990 P.2d at 485 ("But now, in the aftermath of the Warren Court's criminal procedure rulings, the Wyoming Supreme Court appears to follow federal precedent and typically treats this provision as offering no greater protection than does the Fourth Amendment."). *See also* Justice Walter J. Brennan, Jr., *State Constitutions and the Protections of Individual Rights*, 90 HARV. L. REV. 489, 490-95 nn.2-36 and accompanying text (1977) (describing how federal protections expanded during the 1960s under the United States Constitution).

[43] *See* Robert B. Keiter, *An Essay on Wyoming Constitutional Interpretation*, 21 LAND & WATER L. REV. 525, 528 (1986). According to the author, following the "Burger Court's retreat from the activist posture assumed by the Warren Court [during the 1960s] in the area of individual rights," lawyers nationwide discovered that state courts provided protections unavailable under the Federal Constitution. *Id.* Justice William J. Brennan, in a seminal law-review article, urged state courts to "step into the breach" and use their own constitutions to replace rights no longer being protected under the Federal Constitution:

> With the federal locus of our double protections weakened, our liberties cannot survive if the states betray the trust the [United States Supreme] Court has put in them. And if that trust is, for the Court, strong enough to override the risk that some states may not live up to it, how much more strongly should we trust state courts whose manifest purpose is to expand constitutional protections. With federal scrutiny diminished, state courts must respond by increasing their own [scrutiny].

William J. Brennan, Jr., *State Constitutions and the Protections of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977).

[44] O'Boyle v. State, 117 P.3d 401, 408 (Wyo. 2005) (citing Mapp v. Ohio, 367 U.S. 643, 654 (1961)).

[45] Vasquez v. State, 990 P.2d 476, 485 (Wyo. 1999).

The intermingling of state and federal authorities by state courts across the nation following *Mapp* complicated the United States Supreme Court's task of supervising the Federal Constitution.[46] Although the Court serves as the protector of the United States Constitution, the Tenth Amendment prohibits it from interpreting state constitutional law.[47] As a result of the commingling, the United States Supreme Court occasionally had difficulty determining whether a search-and-seizure decision by a state court was grounded upon the federal or state constitution.[48] A series of tests evolved for determining when decisions were based upon federal law; however, the Court became dissatisfied with these because they could not be applied consistently.[49] In 1983, the Court responded with *Michigan v. Long*, which created the standard that the Wyoming Supreme Court must meet if it is to have a search-and-seizure rule which is invulnerable to federal review, and therefore, truly independent.[50]

B. Establishing Independent State Ground

The approach used in Wyoming to distinguish protections offered under the Wyoming Constitution from those provided federally starts with the premise that the Wyoming Constitution is an independent source of citizens' rights that operates in parallel to the United States Constitution.[51] The seminal explanation of the Wyoming approach was provided by Justice Golden in his concurrence to *Saldana*

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[46] *See* Michigan v. Long, 463 U.S. 1032, 1038-39 (1983).
[47] Saldana v. State, 846 P.2d 604, 612 (Wyo. 1993).
[48] *Long*, 463 U.S. at 1038-39.
[49] *See id.* at 1039.
[50] *Id.* at 1039-40. The dictates of *Michigan v. Long* have been handled inconsistently by both state courts and the United States Supreme Court. *See* Ken Gormley, *The Silver Anniversary of New Judicial Federalism*, 66 ALB. L. REV. 797, 801-05 (2003) (noting that over-technical decisions by the United States Supreme Court have caused unnecessary review of state decisions and frustrated state courts) *and* Patricia Fahlbusch & Daniel Gonzalez, Case Comment, *Michigan v. Long: The Inadequacies of Independent and Adequate State Ground*, 42 U. MIAMI L. REV. 159 (1987) (exploring the variety of ways that state courts have responded to *Long*). *Michigan v. Long* included an escape provision that allowed state courts to avoid review by including a plain statement indicating that the decision was based on state, not federal, law. 463 U.S. 1032, 1041 (1983). As long as the plain statement was present, the United States Supreme Court said it would refrain from reviewing the decision under the United States Constitution. *Id.* Consequently, some state courts have relied upon use of a plain statement to prevent review while continuing to intermix state and federal constitutional doctrine. State v. Gunwall, 720 P.2d 808, 811-12 (Wyo. 1986) (noting that relying upon a statement that a decision rests on state law rather than providing an explanation of the underlying rationale for the decision provides no "rational basis for counsel to predict the future course of state decisional law").
[51] *See* Saldana v. State, 846 P.2d 604, 622-24 (Wyo. 1993) (Golden, J., concurring). For a comparison of the text of Article 1, Section 4 and the Fourth Amendment, *see infra* notes 196-99 and accompanying text.

v. State.[52] He stated that an appellant seeking to have an issue considered under the Wyoming Constitution "must do more than ask, he must show" that the argument presented deserves consideration under the state constitution.[53] Justice Golden explained that the court will refuse to consider arguments under the state constitution unless they are accompanied by sufficient analysis and authority.[54] Lacking that, the Wyoming Supreme Court will decide the issue under federal constitutional law.[55] Justice Golden noted six "non-exclusive neutral factors" the court finds relevant when weighing which constitution, the state or the federal, offers greater protections: "(1) the textual language [of the constitutional provision]; (2) the differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern."[56]

Justice Golden drew this approach from the Washington case *State v. Gunwall*.[57] The Washington Supreme Court in *Gunwall* stated that the six factors were useful for "suggesting to counsel where briefing might . . . be directed" when advancing an argument that a case should be decided on independent state constitutional grounds.[58] The six factors also help to ensure that should the court rely upon independent state constitutional grounds, the decision is based upon sound legal reasons, and not "merely substituting [the court's] notion of justice for that of duly elected legislative bodies or the United States Supreme Court."[59] The Washington court provided the following explanations of the six factors:

> 1. *The textual language of the state constitution.* The text of the state constitution may provide cogent grounds for a decision different from that which would be arrived at under the federal constitution. It may be more explicit or it may have no precise federal counterpart at all.

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[52] *Id.* at 622-25 (Golden, J., concurring).
[53] *Id.* at 621 (Golden, J., concurring).
[54] *Id.* (Golden, J., concurring) ("It is not the function of this court to frame appellant's argument or draw his issues for him.").
[55] *Id.* (Golden, J., concurring).
[56] *Saldana*, 846 P.2d at 622 (Golden, J., concurring).
[57] *Id.* at 621-23 (Golden, J., concurring) (citing State v. Gunwall, 720 P.2d 808 (Wash. 1986)). In *Gunwall*, the Washington court determined whether the Washington Constitution allowed law enforcement to obtain, without "proper legal process," long-distance phone records and pen registers listing calls dialed from a particular phone number. 720 P.2d at 811. After an analysis of the six factors, the Washington court determined that the Washington Constitution provided greater protections than the Fourth Amendment, requiring that authorities go through a judicial process before obtaining phone numbers from long-distance records and pen registers. *Id.* at 816.
[58] *Gunwall*, 720 P.2d at 816.
[59] *Id.*

2. *Significant differences in the texts of parallel provisions of the federal and state constitutions.* Such differences may also warrant reliance on the state constitution. Even where parallel provisions of the two constitutions do not have meaningful differences, other relevant provisions of the state constitution may require that the state constitution be interpreted differently.

3. *State constitutional and common law history.* This may reflect an intention to confer greater protection from the state government than the federal constitution affords from the federal government. The history of the adoption of a particular state constitutional provision may reveal an intention that will support reading the provision independently of federal law.

4. *Preexisting state law.* Previously established bodies of state law, including statutory law, may also bear on the granting of distinctive state constitutional rights. State law may be responsive to concerns of its citizens long before they are addressed by analogous constitutional claims. Preexisting law can thus help to define the scope of a constitutional right later established.

5. *Differences in structure between the federal and state constitutions.* The former is a grant of enumerated powers to the federal government, and the latter serves to limit the sovereign power which inheres directly in the people and indirectly in their elected representatives. Hence the explicit affirmation of fundamental rights in . . . [the] state['s] constitution may be seen as a guaranty of those rights rather than as a restriction on them.

6. *Matters of particular state interest or local concern.* Is the subject matter local in character, or does there appear to be a need for national uniformity? The former may be more appropriately addressed by resorting to the state constitution.[60]

According to Justice Golden, an analysis based on these factors fosters "principled" decisions that provide a sufficient basis for predicting the court's direction.[61] He stated that merely "sidestepping" review by the United States Supreme Court under *Long* is not enough: "A grudging parallel citation to a state constitution, or

[60] *Id.* at 812-13 (emphasis added).
[61] *Saldana*, 846 P.2d at 623 (Golden, J., concurring).

an argument that the state particularly values the rights of its citizens, in a brief devoted to federal law does nothing to aid in the development of state jurisprudence . . . ."[62] Those reading the decision should be able to tell what factors would lead the court "to decide one way or the other."[63] The goal is to create, through "the customary process of research and reasoning," a "principled . . . body of state constitutional law" that "truly supports the state constitution, as state court judges and lawyers are charged to do."[64] As a result, a "principled basis for repudiating federal precedent" is created that provides a "rational basis for counsel to predict the future course of state decisional law."[65] Therefore, Wyoming's traffic-detention rule should sufficiently describe the relevant factors so that those reading a decision can know why the court determined the reasonableness or unreasonableness of the officer's actions, and decisions made under the rule should provide a basis for predicting the court's future actions.[66]

C. Search and Seizure

A Wyoming traffic-detention rule must be consistent with Wyoming's overall search-and-seizure doctrine. Though the Fourth Amendment of the United States Constitution and Article 1, Section 4 of the Wyoming Constitution are nearly identical textually, the two provisions evolved independently, and the courts have given them differing interpretations.[67] Early Wyoming cases held that Article 1, Section 4 was bound tightly to the right against self-incrimination, which is expressed in the Wyoming Constitution through Article 1, Section 11.[68] This caused Article 1, Section 4 and the Fourth Amendment to receive distinct interpretations and has given the right against self-incrimination considerable force in

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[62] *Id.* (Golden, J., concurring).
[63] *Id.* (Golden, J., concurring).
[64] *Id.* (Golden, J., concurring).
[65] *Gunwall*, 720 P.2d at 812.
[66] *Saldana*, 846 P.2d at 623 (Golden, J., concurring).
[67] William J. Brennan, Jr., *State Constitutions and the Protections of Individual Rights*, 90 HARV. L. REV. 489, 500 n.78 (1977) ("[E]xamples abound where state courts have independently considered the merits of constitutional arguments and declined to follow opinions of the United States Supreme Court they find unconvincing, even where the state and federal constitutions are similarly or identically phrased."). *See also* Wallace P. Carson, Jr., *"Last Things Last": A Methodological Approach to Legal Argument in State Courts*, 19 WILLAMETTE L. REV. 641, 652 (1983) (stating that a constitutional provision in Oregon should receive a different interpretation than a similar provision of the United States Constitution, even though both have identical language). For a comparison of the text of Article 1, Section 4 and the Fourth Amendment, *see infra* notes 195-99 and accompanying text.
[68] State v. George, 231 P. 683, 685 (Wyo. 1924) (holding that using evidence gathered from a defendant through an illegal search is equivalent to forcing the defendant to testify against himself).

Wyoming.[69] The tie between self-incrimination and search and seizure was such that the Wyoming Supreme Court used the connection as the basis for Wyoming's version of the exclusionary rule.[70]

The court described the connection in *State v. George*.[71] Relying upon the United States Supreme Court case *Boyd v. United States*, the Wyoming court held that an unreasonable seizure of a person's papers, and use of those papers as evidence, was the equivalent of forcing the defendant to testify against herself.[72] Then the Wyoming court took the principle further, stating that no difference existed between using papers that were unreasonably confiscated as evidence and using *any other property* seized unreasonably from a person's premises.[73] The court equated use of evidence seized unreasonably from a person's possession to using testimony acquired through duress:

> What is the difference in principle in forcing a defendant to speak against himself by word of mouth, and in forcing, by an unlawful search, the secret things of his home to give evidence against him? We see none. His home is as sacred from illegal force as his person. When his home speaks, he speaks—they speak with the same voice.[74]

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[69] *See* Tobin v. State, 255 P. 788, 788-89 (Wyo. 1927) (indicating that the warrantless entry of a premises without permission of owner, and subsequent confiscation of contraband found therein, violated protections against unreasonable search and seizure, due process and self-incrimination); State v. George, 231 P. 683, 686 (Wyo. 1924) (holding that use of evidence taken from a defendant's possession through an unreasonable search is equivalent to forcing him to testify against himself); Wiggin v. State, 206 P. 373, 376 (Wyo. 1922) (noting that an arrest made under an illegal warrant, which led to the confiscation of the hide from a stolen cow, implicated both Article 1, Section 4 and Article 1, Section 11 of the Wyoming Constitution); State v. Peterson, 194 P. 342, 352-54 (Wyo. 1920) (holding that return of contraband liquor confiscated through an illegal warrant was necessary because to do otherwise would violate search-and-seizure rights as well as the right against self-incrimination); Maki v. State, 112 P. 334, 336 (Wyo. 1911) (holding that persons placed in detention must be advised that they have the right to remain silent, fifty years before federal courts reached a similar decision in Miranda v. Arizona, 383 U.S. 436 (1966)).

[70] *George*, 231 P. at 686.

[71] *Id.* at 684 ("Both of the foregoing constitutional provisions [Article 1, Section 4 and Article 1, Section 11] were referred to in the *Peterson* [194 P. 342 (Wyo. 1920)] case, as well as the *Wiggin* [206 P. 373 (Wyo. 1922)] case, but their interrelation was not clearly pointed out, and it will be necessary here to do so in view of the contentions that are made herein by the defendant.").

[72] *Id.* at 685 (referring to Boyd v. United States, 116 U.S. 616 (1886)).

[73] *Id.* ("There does not, however, appear to be any difference in principle between documents which may be used in evidence against a defendant and any other property which may be so used.").

[74] *Id.* (quoting Tucker v. State, 90 So. 845 (Miss. 1922)).

Based on this reasoning, the Wyoming court concluded that unreasonably seized evidence could not be used against a defendant.[75] In a later case, the Wyoming court held it immaterial that evidence uncovered in an unreasonable search was contraband, forbidding the use of contraband after it was unreasonably seized from a premises.[76]

An examination of the history of the Fourth Amendment shows that federal restrictions regarding the use of unreasonably seized material proceeded along a different path than those offered in Wyoming, although the two began from a similar starting point. In the late Nineteenth Century, the United States Supreme Court also connected search and seizure with the right against self-incrimination, but the connection under the federal doctrine eventually lost its force.[77] The federal courts made this connection through *Boyd v. United States*—the same case relied upon by the Wyoming Supreme Court.[78] However, the protections provided under the federal doctrine were more limited than those offered in Wyoming, reaching private papers and books, but not other types of personal property.[79]

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[75] *Id.* at 686.

[76] Tobin v. State, 255 P. 788, 789 (Wyo. 1927).

[77] *See* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT § 2.6(e) (4th ed. 2004).

[78] *See supra* note 72 and accompanying text.

[79] 1 LAFAVE, *supra* note 77, § 2.6(e). It should be noted that though the Wyoming Supreme Court's decision to extend protections under *Boyd* to personal property other than papers and books appears to depart from federal doctrine, as a practical matter the Fourth Amendment and the Wyoming provision had a similar reach because of a Fourth Amendment concept called the "mere-evidence rule." *See* 1 *id.* § 2.6(d). The mere-evidence rule, which has since fallen into disuse, stated that possessions that were not fruits or instrumentalities of a crime were "mere evidence," and therefore, could not be subject to a search warrant. *See* 1 *id.* § 2.6(e), at 703-05 nn.150-59 and accompanying text. Therefore, like Wyoming's extension of the right against self-incrimination, the mere-evidence rule protected personal property other than books or writings. *See* 1 *id.* § 2.6(e), at 707 nn.167-69 (describing how the mere evidence rule and the link that existed between the Fourth Amendment and the Fifth Amendment provided similar protections). The mere-evidence rule came into American law from England through *Boyd*, the same case that linked search and seizure with the right against self-incrimination. *Compare* 1 *id.* § 2.6(d), at 703-04 nn.150-52 (noting that the mere-evidence rule was introduced into American law through *Boyd*, which relied upon the famous English case Entick v. Carrington, 19 How.St.Tri. 1029 (1765)) *and* State v. George, 231 P. 683, 685 (Wyo. 1924) (relying upon *Boyd* and *Entick* to link Section 4 and Section 11 of Article 1). The term "mere evidence" was never used in connection with search and seizure by Wyoming courts, and every time the Wyoming Supreme Court cited *Boyd*, the reference was firmly connected with the right against self-incrimination; therefore, though the mere-evidence rule had considerable force under federal law, it was never incorporated into Wyoming's search-and-seizure doctrine. *See* Tobin v. State, 255 P. 788, 798 (Wyo. 1927) (citing *Boyd* to support the notion that the United States Supreme Court has stressed the importance of protecting rights offered under the Fourth Amendment and Fifth Amendment, in

As the doctrine evolved, lower courts administered the link between the Fourth Amendment and Fifth Amendment inconsistently, causing the doctrine to remain controversial until the United States Supreme Court settled the issue in *Andresen v. Maryland* in 1976.[80]

Andresen weakened the link between search and seizure and the right against self-incrimination by creating a distinction between the act of compelling a defendant to produce papers, and the use of papers as evidence after the papers became available to authorities through legitimate means.[81] After *Andresen*, use of a writing against a defendant was not a violation of the right against self-incrimination if authorities acquired the writing by a means that involved no compulsion.[82] Some saw this as a retreat. Supreme Court Justice William J. Brennan, Jr., noted that the overturning of *Boyd* was one of several decisions by the Burger court that withdrew protections granted by the United States Supreme Court during the 1960s under the Bill of Rights.[83] Reacting to this withdrawal, Brennan urged state

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support of the link between search and seizure and self-incrimination under state law); State v. Crump, 246 P. 241, 242 (Wyo. 1926) (using *Boyd* to support the notion that just as Section 4 and Section 11 are linked under state law, under federal law, the "Fifth Amendment protects every person from incrimination by the use of evidence obtained through search or seizure made in violation of his rights under the Fourth Amendment"). The mere-evidence rule became plagued with exceptions, and in the end was so ineffective that the United States Supreme Court put it to death in 1967 with *Warden v. Heyden,* 387 U.S. 294 (1976). *See* 1 LAFAVE *supra*, § 2.6(d), at 706-77 nn.164-66.

[80] 1 LAFAVE, *supra* note 77, § 2.6(e), at 708 nn.172-75 and accompanying text (referencing Andresen v. Maryland, 472 U.S. 463 (1976)).

[81] 1 LAFAVE, *supra* note 77, § 2.6(e), at 708 nn.172-75 and accompanying text.

[82] 1 LAFAVE, *supra* note 77, § 2.6(e), at 710 n.184 (citing State v. Barrett, 401 N.W.2d 184 (Iowa 1987) (using as evidence a personal journal containing death threats is permissible when the journal was given to police by a restaurant employee after it was left at the restaurant) *and* State v. Andrei, 574 A.2d 295 (Me. 1990) (holding that a diary can be used as evidence after being presented to police by the writer's spouse because the police acquisition of the diary involved no compulsion).

[83] Justice Walter J. Brennan, Jr., *State Constitutions and the Protections of Individual Rights*, 90 HARV. L. REV. 489, 496-97 nn.45-54 and accompanying text (1977). In support of his assertion that the Court had withdrawn protections previously offered between 1962 and 1969 under the Bill of Rights, Brennan cited the following cases: Hudgens v. N.L.R.B., 424 U.S. 507 (1976) (finding the First Amendment "insufficiently flexible to guarantee access to essential public forums when in our evolving society those traditional forums are under private ownership in the form of suburban shopping centers"); Young v. American Mini-Theatres, Inc., 427 U.S. 50 (1976) (holding the First Amendment no longer invalidated "a system of restrictions on motion-picture theaters based upon the content of their presentations"); United States v. Watson, 423 U.S. 411 (1976) (finding it reasonable for a postal authority to make a warrantless arrest in a public place when there existed probable cause based upon reliable information, and when the arrest was conducted under a statute authorizing arrests based upon a reasonable belief that a crime was occurring in the postal authority's presence); United States v. Robinson, 414 U.S. 218

courts to "step into the breach" and grant independent protections that replaced those no longer offered federally.[84]

The federal tenet departed further from that offered in Wyoming when tensions between the federal doctrine and search-and-seizure doctrines employed by states led to the total demise of *Boyd*, and eventually to *Mapp v. Ohio*.[85] The notoriety of *Boyd* deteriorated largely at the hands of state officials through the "silver platter doctrine."[86] The "silver-platter doctrine" allowed state officials to acquire evidence in a manner prohibited by federal law, who then passed that evidence on to federal officials.[87] Then the federal officials could introduce the suspect evidence in federal court.[88] This diminished the effectiveness of the federal exclusionary rule.[89] In its repudiation of the "silver-platter doctrine" in *Elkins v. United States*, the United States Supreme Court recognized that the lack of uniformity between state and federal exclusionary doctrines had led to violations of the Fourth Amendment.[90] This set the stage for *Mapp v. Ohio*, which required states to grant search-and-seizure doctrines that were, at least, equivalent to those offered by federal courts.[91]

Wyoming, like other states, followed the precepts of *Mapp* by applying the federal Fourth Amendment search-and-seizure doctrine instead of its own.[92] Thus, the federal exclusionary rule became the mechanism that caused Wyoming's search-and-seizure doctrine to fall into hibernation for thirty-eight years, until the Wyoming Supreme Court revived it in 1999 with *Vasquez v. State*.[93]

(1973) *and* Gustafson v. Florida, 414 U.S. 260 (1973) *and* South Dakota v. Opperman, 428 U.S. 364 (1976) (refusing to hold unreasonable warrantless searches subsequent to arrest and warrantless inventory searches of automobiles); United States v. Watson, 423 U.S. 411 (1976) *and* Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (holding that authorities need not demonstrate that a suspect in custody knew of his right to refuse before granting consent to allow a search); United States v. Janis, 428 U.S. 433 (1976) (holding that unreasonably collected evidence can be used when the search or seizure was conducted by authorities acting in good faith); Brennan, *supra* note 83, at 496-97 nn.45-54 and accompanying text.

[84] Brennan, *supra* note 83, at 503.

[85] *See* 1 LaFave, *supra* note 77, § 1.1(d) (referring to Mapp v. Ohio, 367 U.S. 643 (1961)).

[86] *See* 1 LaFave, *supra* note 77, § 1.1(d).

[87] *See* 1 *id.*

[88] *See* 1 *id.*

[89] *See* 1 *id.*

[90] Elkins v. United States, 364 U.S. 206, 223-24 (1960).

[91] *See* Vasquez v. State, 990 P.2d 476, 484 (Wyo. 1999) (citing Mapp v. Ohio, 367 U.S. 643, 654-55 (1961)). Of course, states can still have search-and-seizure doctrines under their own constitutions, but to be enforced those doctrines must, at a minimum, grant protections equivalent to those offered under the Fourth Amendment. *Id.*

[92] *Id.*

[93] *Id.* at 485.

Significantly, the concurrence to *Mapp* written by Justice Black unknowingly gave final acknowledgement to the common sources of the Wyoming and federal exclusionary doctrines by stating that an exclusionary rule based solely upon the Fourth Amendment was unconvincing, but when the Fourth Amendment was considered together with the Fifth Amendment's ban against compelled self-incrimination, "a constitutional basis emerges which not only justifies but actually requires the exclusionary rule."[94] Since *Mapp*, the United State Supreme Court has drawn distinctions between the Fourth Amendment and the Fifth Amendment, stating that the two provisions have different purposes, and therefore, the exclusionary rules provided under the two provisions are subject to different analysis.[95] Therefore, the federal search-and-seizure doctrine is distinct from Wyoming's in that under the federal rule, the link between the Fourth Amendment and the Fifth Amendment is tenuous.[96]

The Wyoming Supreme Court has yet to acknowledge, in the post-*Vasquez* era, that a link exists between search and seizure and the right against self-incrimination.[97] This does not mean that the link has not operated in the background; for example, in *O'Boyle*, the Wyoming Supreme Court relied upon *Tobin v. State*, which like other pre-*Mapp* cases placed a pre-eminence upon the right against self-incrimination.[98] Consequently, even if the Wyoming Supreme Court has yet to recognize the close link between search and seizure and the right against self-incrimination, the concept already has impacted the court's search-and-seizure decisions.[99]

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[94] *Mapp*, 367 U.S. at 661-62 (Black, J., concurring).

[95] *See* Brown v. Illinois, 422 U.S. 590, 601 (1975) (holding that the exclusionary rule, when used to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth Amendment, since it is directed at all unlawful searches and not merely those that happen to produce incriminating material); *see also* 1 LAFAVE, *supra* note 77, § 2.6(e). Significantly, the United States Supreme Court has limited use of the exclusionary rule to those instances where the rule acts as a disincentive to unreasonable officials. 1 LAFAVE, *supra* note 77, §§ 1.1(f)-1.2(f). The Wyoming Supreme Court never applied a similar limitation to Wyoming's exclusionary rule.

[96] 1 LAFAVE, *supra* note 77, §§ 1.1(f)-1.2(f).

[97] *See* Page v. State, 63 P.3d 904, 911 (Wyo. 2003) (stating that the Wyoming Supreme Court has yet to be called upon to determine whether the good-faith exception applies to the Wyoming exclusionary rule).

[98] O'Boyle v. State, 117 P.3d 401, 413 (Wyo. 2005). *See* Tobin v. State, 255 P. 788, 788 (Wyo. 1927) (accepting the defendant's argument that sheriff's actions were in violation of Section 4 (search and seizure), Section 11 (right against self-incrimination), and Section 6 (due process) of Article 1 of the Wyoming Constitution).

[99] *See O'Boyle*, 117 P.3d at 412 (relying upon *Tobin* for the court's holding that peaceful submission does not grant consent to search, which is consistent with Wyoming's pre-*Mapp* stance on the right against self-incrimination).

In summary, even though Article 1, Section 4 of the Wyoming Constitution and the Fourth Amendment of the United States Constitution are nearly identical textually, over time the documents have received distinctive interpretations.[100] Early in the last century, the Wyoming Supreme Court bound Article 1, Section 4 up with the right against self-incrimination, which finds its expression under the Wyoming Constitution in Article 1, Section 11.[101] In contrast, the most recent holdings of United States Supreme Court state that the Fourth Amendment and the Fifth Amendment serve distinct purposes, and the two should receive separate analysis.[102] Therefore, in spite of the textual similarities between Article 1, Section 4 and the Fourth Amendment, the two are supported by a different set of rationales, and it cannot be assumed that the two provisions provide identical protections to travelers who become subject to search-and-seizure activities during a traffic detention.

D. Reasonableness

A traffic-detention rule must also be consistent with the Wyoming provision that allows officers to investigate if they have a reasonable belief that a crime is underway.[103] For example, in *State v. George* a deputy, who was on property legally, discovered sheep he reasonably believed to be stolen.[104] Following up on this, the deputy later went to the suspect's residence with other men and met the suspect in the yard.[105] The deputy had a warrant, but because the warrant had been granted improperly, it was invalid.[106] The deputy arrested the man and seized stolen sheep from a group located within sight near the residence.[107] Then the deputy and the men with him proceeded to another band located on the open range and seized thirty-two other sheep that appeared to be stolen.[108] The Wyoming Supreme

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[100] *See supra* notes 67-99.
[101] *See supra* notes 68-76.
[102] *See supra* note 95 and accompanying text.
[103] State v. Young, 281 P. 17, 19 (Wyo. 1929) (citing favorably State *ex rel.* Hansen v. District Court, 233 P. 126, 129 (Mont. 1925) (holding that an officer may conduct reasonable investigations when the facts and circumstances would cause a reasonable man, acting in good faith, to believe that a crime was being committed in his presence).
[104] State v. George, 231 P. 683, 684 (Wyo. 1924).
[105] *Id.*
[106] *Id.* The court stated that the affidavit was "substantially in the form as the [improper] warrant considered . . . in the case of *Wiggin v. State*," adding that the prosecution in *George* "conceded" that the form was improper. *Id.* (citing Wiggin v. State, 206 P. 373 (Wyo. 1922)). In *Wiggin*, an affidavit was issued based upon the officer's "belief" that evidence of a crime could be found at a location, rather than on information with enough particularity to allow the magistrate to independently assess whether the officer had probable cause. 206 P. at 376. (citing State v. Peterson, 194 P. 342 (Wyo. 1920)).
[107] *George*, 231 P. at 684.
[108] *Id.*

Court held that even though the warrant was improper, the officer had probable cause to believe that a felony had occurred, and the officer had a right to be at the arrest location, so the arrest was reasonable.[109] Furthermore, because the officer had legal access to the location of the sheep, the court allowed the seizure of the stolen livestock.[110]

Consistent with *George*, the court held in *State v. Kelly* that in some circumstances a warrantless search of a motorized vehicle may be allowed.[111] However, the court also noted that an officer must have good reason to make the initial stop:

> [It] would ordinarily be intolerable and unreasonable, if an officer or anyone else were authorized to stop every automobile on the chance of finding liquor and thus subject persons lawfully using the highways to the inconvenience and indignity of a search without a search warrant; that those entitled to use the public highways, have a right of free passage without interruption of search, unless a competent official authorized to search has probable cause for believing that a vehicle is carrying contraband or illegal goods.[112]

The Wyoming Supreme Court noted "the distinction that has always been observed in the laws of the United States between a home and vehicles."[113] While a warrantless search of a home is prohibited in almost all circumstances, a search of an automobile without a warrant is subject to a lower standard, meaning the warrantless search of a vehicle "cannot be said to be unreasonable under all circumstances."[114]

Many of the pre-*Mapp* cases indicate factors that could be relevant for weighing the reasonableness of an officer's actions at modern traffic stops.[115] Of these

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[109] *Id.* at 690.
[110] *Id.* at 689 (noting that when the officer has lawful access and evidence of a crime is visible to the officer, "ready to be taken," the evidence may be seized upon lawful arrest of the defendant).
[111] State v. Kelly, 268 P. 571, 572 (Wyo. 1928) (noting that "a search of an automobile without a warrant, authorized by law, cannot be said to be unreasonable under all circumstances").
[112] *Id.* (relying upon Carroll v. United States, 267 U.S. 132 (1925)).
[113] *Id.*
[114] *Id.*
[115] The Wyoming Supreme Court actively interpreted Article 1, Section 4 during the Prohibition Era (1920-1933), when law enforcement resources were focused upon the interdiction of forbidden liquor. *See* State v. Munger, 4 P.2d 1094 (Wyo. 1931); State v. Young, 281 P. 17 (Wyo. 1929); State v. Kelly, 268 P. 571 (Wyo. 1928).

early cases, *State v. Young* is of particular interest.[116] Although the chief holding of the case concerned a search incident to a lawful arrest, within the case the court adopted a series of search-and-seizure holdings from other states related to traffic detentions.[117] These included *State ex rel. Hansen v. District Court* (Montana), holding that no violation of the state search-and-seizure provisions occurred when facts were such that "a reasonable man, acting in good faith, [would] believe that a crime was being committed in his presence"; *Sands v. State* (Oklahoma), holding no violation of the state's search-and-seizure provision occurred when an officer, attracted by the odor of whiskey, discovers whiskey kegs by using a flashlight to look through the isinglass of an automobile; *State v. Loftis* (Missouri), holding that an officer may use all senses, including the sense of smell, to reach a reasonable belief that a crime is occurring in the officer's presence; and *State v. Connor* (Missouri), holding it reasonable for an officer to investigate because of the "unusual parking of [a] car," which led to the smelling of whiskey from the car, which led to observing a jug through an open car window and then through an open door, which led, finally, to a physical examination and seizure of the jug.[118] From these holdings, it can be determined that the Wyoming Constitution allows officers involved in traffic detentions to investigate when the facts are such that a reasonable man would conclude a crime is occurring in his presence; officers can use their senses, including sight and smell, to reach that reasonable belief; and they can take reasonable steps to investigate, such as look inside a window using a flashlight.[119]

The pre-*Mapp* cases also illustrate that an officer's conduct must be reasonable in all circumstances, supporting the principle that the officer must have a just reason for initiating the contact that leads to the search.[120] In *State v. Munger*, an officer contacted two people sitting in a car, a passenger and a driver.[121] The driver, who was the defendant in the case, was charged later for possession of a bottle of liquor, while the passenger was arrested at the scene for being intoxicated.[122] The officer seized the bottle of liquor after finding it in the front of the car between the two men.[123] But the officer's discovery of the liquor occurred after the officer removed the driver's friend from the passenger side of the vehicle while making the arrest.[124] The court found that being drunk was not a crime statutorily or under

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[116] *Young*, 281 P. 17 (Wyo. 1929).
[117] *Id*. at 19-21.
[118] *Id.* (citing State *ex. rel* Hansen, 233 P. 126, 129 (Mont. 1925); Sands v. State, 252 P. 72 (Okla. 1927); State v. Loftis, 292 S.W. 29 (Mo. 1927); State v. Connor, 300 S.W. 685 (Mo. 1927)).
[119] *Id.*
[120] *See* State v. Munger, 4 P.2d 1094, 1095 (Wyo. 1931).
[121] *Id.* at 1094.
[122] *Id.*
[123] *Id.*
[124] *Id.*

the common law, so the arrest was unlawful.[125] Because the arrest was unreasonable and the officer made no showing to indicate that he had probable cause to believe the vehicle contained alcohol, fruits from the arrest were not allowed, and the bottle of liquor was excluded from evidence.[126] This case demonstrated that unreasonable actions by an officer early in a traffic detention can cause evidence discovered later in the stop to be inadmissible.[127]

Although the Wyoming Supreme Court, prior to *Mapp*, placed a premium upon the state's sovereignty, the Wyoming court also stated expressly that the state's search-and-seizure rule should consider the needs of the nation as a whole when weighing what search-and-seizure actions are reasonable.[128] The court not only stated this expressly, but demonstrated this through its close examination of the Fourth Amendment, and through the scrutiny it gave federal cases before deciding its own issues under the Wyoming Constitution.[129] The court's concern seemed to be that the state act in unison with the United States rather than be a disruptive influence.[130] Therefore, even though Wyoming's pre-*Mapp* search-and-seizure cases were not in lock-step with the Fourth Amendment, the cases would not appear to support a traffic-detention doctrine that varies wildly from protections provided under federal law.[131]

Finally, it should be noted that even though the pre-*Mapp* cases relevant to a Wyoming traffic-detention rule have never been overturned and appear to be good law, many of them have lain dormant since the passage of *Mapp v. Ohio* in 1961.[132] The Wyoming Supreme Court's refusal to acknowledge arguments unless properly raised in the lower courts using the six *Saldana* factors have resulted

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[125] *Munger*, 4 P.2d at 1095.
[126] *Id.* (citing State v. Peterson, 194 P. 342 (Wyo. 1920).
[127] *See id.*
[128] State v. George, 231 P. 683, 686-87 (Wyo. 1924). The court stated,

> The Government of the United States is not a foreign government in its relation to the Government of the States, the agents of the former are not agents of a foreign government in relation to the latter, and any contrary doctrine could not but be deprecated as sowing pernicious seeds of ultimate disruption of the nation. These factors, and others, should be duly considered when the specific [search-and-seizure] question presented comes before us.

Id. at 687.
[129] *See* State v. Peterson, 194 P. 342, 352-53 (Wyo. 1920) (adopting the United States Supreme Court's reasoning from Weeks v. United States, 232 U.S. 383 (1914)).
[130] *See George*, 231 P. at 686-87.
[131] *See supra* note 128.
[132] *See* Vasquez v. State, 990 P.2d 476, 484 (Wyo. 1999) (referencing Mapp v. Ohio, 376 U.S. 643 (1961)).

in a piecemeal reintroduction of the pre-*Mapp* search-and-seizure doctrine.[133] Only a limited number of search-and-seizure issues have been brought current by the Wyoming Supreme Court through recent decisions.[134] In *Vasquez*, the court addressed searches incident to arrest, refusing to adopt the federal *Belton* rule because the rule was inconsistent with early state doctrine.[135] In *O'Boyle*, the court relied upon *Tobin v. State*, holding that state must show by "clear and convincing testimony" that consent to search at a traffic stop was voluntarily given.[136] In *Johnson v. State*, the court held that Wyoming's inventory search rule is identical to the federal rule.[137] Whether the Wyoming Supreme Court will choose to revive the entirety of the pre-*Mapp* search-and-seizure reasonableness doctrine remains uncertain.

E. Traffic Detentions under the Fourth Amendment

A sufficient traffic-detention doctrine must base itself upon the nature of traffic stops.[138] Under the Fourth Amendment, the purpose of a traffic stop is not to support the investigation of crimes, but to enforce traffic laws.[139] Therefore, the stop is limited in scope and short in duration.[140] These characteristics resemble those of investigative detention.[141] Consequently, federal search-and-seizure doctrine holds that the limited characteristics of traffic stops are consistent with the two-prong test of *Terry v. Ohio*.[142] The two-prong test requires, first, that the reason for the stop be justified, and, second, that all actions during the stop remain within the scope defined by the stop's purpose—in the case of a traffic detention, the issuance of a traffic citation.[143] What an officer can do without exceeding the scope of a traffic stop has been strictly established.[144]

Therefore, under the *Terry* doctrine, the Wyoming Supreme Court has established specific guidelines regarding what is reasonable for an officer to do during a traffic stop.[145] Traffic stops must be "temporary, lasting no longer than necessary to effectuate the purpose of the stop," and the officer must carefully tailor the

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[133] For an explication of the six *Saldana* factors, *see supra* notes 57-66 and accompanying text.
[134] *See Vasquez*, 990 P.2d at 476 *and* O'Boyle v. State, 117 P.3d 401 (Wyo. 2005).
[135] *Vasquez*, 990 P.2d at 489 (referring to New York v. Belton, 453 U.S. 454 (1981)). For an explication of the *Belton* rule, *see infra* note 181.
[136] *O'Boyle*, 117 P.3d at 413 n.9 (relying upon Tobin v. State, 255 P. 788 (Wyo. 1927)).
[137] 137 P.3d 907, 908-09 (Wyo. 2006).
[138] *See* Lindsay v. State, 108 P.3d 852, 857 (Wyo. 2005).
[139] *See id.*
[140] *See id.*
[141] *See id.*
[142] *Id.* at 856-57.
[143] *Lindsay*, 108 P.3d at 856-57.
[144] *Id.* at 857.
[145] *Id.*

stop to "its underlying justification."[146] An officer may request the driver's proof of insurance, operating license, and vehicle registration, and may run a computer check and issue a citation.[147] Once the officer issues the citation and checks the documentation, the traveler "must be allowed to proceed without further delay."[148] To justify any "searches" beyond these actions, the officer must point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[149]

Although the Fourth Amendment case law is very specific with regard to what an officer can do at a traffic stop when the stated governmental interest is the enforcement of traffic laws, an officer who is legitimately in pursuit of another interest might be allowed greater freedom.[150] The case law weighs the interest against the intrusiveness of the search or seizure.[151] Some interests warrant more intrusion than others; for example, safety creates a higher interest than the enforcement of laws.[152] Therefore, in *Terry v. Ohio* the United States Supreme Court found it reasonable for the officer to pat down the outside of the defendant's clothing in search of weapons, though a pat-down would have been impermissible if conducted merely to investigate the suspect's suspicious behavior.[153] When the government invades a protected interest, *Terry* holds that the only test for reasonableness is whether the action's intrusiveness outweighs the government's need to search.[154] The Fourth Amendment, therefore, employs a balancing test—weighing the need for governmental action against the privacy interest that the government seeks to invade.[155]

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[146] Campbell v. State, 97 P.3d 781, 784 (Wyo. 2004) (quoting United States v. Wood, 106 F.3d 942, 945 (10th Cir. 1997)).
[147] *Campbell*, 97 P.3d at 785 (citing Damato v. State, 64 P.3d at 700, 706 (Wyo. 2003)).
[148] *Id.*
[149] Terry v. Ohio, 392 U.S. 1, 21 (1968). Federal circuit courts differ over what is allowable during a traffic stop. For example, the Tenth Circuit held that the officer cannot ask the traveler directly about suspected illegal activities without expanding the scope of the traffic stop, unless the questions concern issues pertinent to officer safety. United States v. Holt, 264 F.3d 1215, 1221 (10th Cir. 2001). However, the Fifth Circuit held such questions allowable in any case. United States v. Shabazz, 993 F.2d 431, 436 (5th Cir. 1993). *See* United States v. Flowers, 2004 U.S. Dist. LEXIS 10111 (D. Fla. 2004) (comparing the rules in the Tenth and Fifth Circuits).
[150] *See Terry*, 392 U.S. at 21.
[151] *See Terry*, 392 U.S. at 23-24 (noting that officer safety is a higher interest than the investigation of crime and warrants a greater amount of intrusion into the subject's person).
[152] *Id.*
[153] *Id.*
[154] *Id.* at 21.
[155] *See id.* at 23-24.

The amount of intrusion of an officer's actions is measured by how much inconvenience the intrusion creates, or the privacy interest that it invades.[156] For example, an officer can arrange to routinely run a drug dog around the outside of a car while a traffic ticket is being issued so long as use of the dog does nothing to delay the traveler's departure.[157] The Fourth Amendment permits this because, according to the Court, the use of an adequately trained drug dog only reveals the presence of illegal drugs, which are contraband and, therefore, not an interest that "society is prepared to consider reasonable."[158] But use of the dog becomes a seizure under the Fourth Amendment if the use delays the traveler and causes inconvenience.[159] The delay expands the scope of the stop into a drug investigation, which cannot be pursued unless the officer has some level of proof that a crime is occurring.[160] Therefore, the amount of delay is one consideration the court finds relevant in determining an officer's reasonableness.[161] Other considerations include the amount of intimidation or official show of force made by the officer, whether the officer's request for consent to search was coercive, whether a reasonable person, given the entirety of the circumstances, would feel free to leave.[162]

Thus, the Fourth Amendment's traffic detention rule is specifically designed to fit the limitations and scope inherent in a traffic stop.[163] The rule provides specific guidance to officers conducting the stop, indicating what actions are reasonable and what are not.[164] Furthermore, Fourth Amendment decisions include discussions that indicate what factors courts consider relevant when deciding whether an officer's actions are reasonable, providing a basis for predicting future decisions.[165] Therefore, the Fourth Amendment's traffic-detention rule is sufficient

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[156] *See id.*

[157] Illinois v. Caballes, 543 U.S. 405, 407-08 (2005).

[158] *Id.* at 408.

[159] *Id.* at 407-08 (noting with approval that the Illinois Supreme Court held in People v. Cox, 782 N.E.2d 275 (2002) that a use of a drug dog that lengthened a stop created a seizure requiring at least reasonable suspicion).

[160] United States v. Place, 462 U.S. 696, 702 (1983) (citing Terry v. Ohio, 392 U.S. 1, 22 (1968)) (noting that police have authority to make a "forcible stop" when the officer has "reasonable, articulable suspicion that the person has been, is, or is about to be engaged in criminal activity").

[161] *See supra* note 159 and accompanying text.

[162] *See* 4 LAFAVE, *supra* note 3, § 9.3. LaFave criticizes some courts for exceeding the bounds of *Terry* by allowing officers to seek consent from the travelers for a vehicle search though the officers have no reasonable suspicion that contraband is present. 4 *Id.* § 9.3(e), at 397 nn.213-17 and accompanying text.

[163] *See supra* notes 138-49 and accompanying text.

[164] *See supra* notes 145-49 and accompanying text.

[165] *See supra* notes 156-62 and accompanying text for a discussion of factors relevant to determining whether the employment of a drug dog during a traffic detention is reasonable.

to meet all of the requirements put forth by Justice Golden in *Saldana v. State* for the Wyoming Constitution, providing a "principled basis for the decisions" and a "rational basis for counsel to predict the future course of . . . decisional law."[166]

F. Traffic Detentions under Article 1, Section 4

As mentioned earlier, the one opportunity the Wyoming Supreme Court has had to decide a traffic-detention issue since its decision to revitalize Wyoming's search-and-seizure doctrine came in *O'Boyle v. State.*[167] The *O'Boyle* decision analyzed three phases of the traffic stop: The traffic stop and the initial detention, a second detention and further questioning, and the defendant's consent to search.[168] Each phase was considered twice, once under the Wyoming Constitution and once under the Fourth Amendment.[169] This comment focuses on the first stage, the traffic stop and the initial detention. The other two holdings are not relevant to this discussion because they occurred after the traffic detention.[170]

The circumstances of *O'Boyle* arose out of a typical traffic stop. Kevin O'Boyle was pulled over for driving 79 in a 75 mile-per-hour zone on Interstate 80 near Cheyenne, Wyoming.[171] The trooper asked O'Boyle to walk back and sit in the cruiser while the trooper conducted the usual procedures associated with a traffic stop.[172] The trooper requested O'Boyle's criminal history from dispatch, and as he waited for the reply, he questioned O'Boyle extensively, asking over thirty questions.[173] As the trooper waited for the criminal history and continued

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[166] *See supra* notes 61-66 and accompanying text.
[167] *See supra* note 17 and accompanying text.
[168] *See* O'Boyle v. State, 117 P.3d 401, 409 (Wyo. 2005).
[169] *Compare id.* at 409-14 (Article 1, Section 4) *with id.* at 414-19 (Fourth Amendment).
[170] *See supra* notes 2-5 and accompanying text.
[171] *O'Boyle*, 117 P.3d at 404.
[172] *Id.*
[173] *Id.* The Wyoming Supreme Court's interpretation of the Fourth Amendment held that a trooper could not ask directly about drug trafficking or other wrongdoing without, first, having a reasonable articulable suspicion that the allegation was true, so the questioning may have been an attempt to raise a suspicion by uncovering discrepancies in O'Boyle's cover story. *See* Campbell v. State, 785 P.3d 781, 785 (Wyo. 2004). The interrogation included a series of questions that would be routine if asked by themselves, including, where was O'Boyle headed, how long did he plan to stay, where was he coming from, what did he do for a living, how long had he had been doing it, who was filling in for him while he was gone, how long had his son been in Boston, what college did his son attend, what courses was his son taking in college, was his son living on campus, where would O'Boyle stay while visiting his son, why was he driving rather than flying, why was the rental car in his daughter's name, where was his daughter at the time, how many daughters did he have, and what was the price of airfare from San Francisco to Boston. *O'Boyle*, 117 P.3d at 404.

questioning, he requested that a second trooper bring a drug dog.[174] Finally, the trooper indicated that O'Boyle was free to leave and returned the suspect's documents.[175] But as O'Boyle walked back to his vehicle, the officer questioned him again, ultimately obtaining O'Boyle's agreement to search the vehicle.[176] Inside the vehicle, the trooper found five pounds of marijuana.[177]

The traffic-detention rule articulated in *O'Boyle* by the Wyoming Supreme Court holds that "only unreasonable searches are forbidden, and whether or not a search is reasonable is a question of law to be decided from all the circumstances of a case."[178] This same rule is used by the court in all search-and-seizure analyses under the Wyoming Constitution, and the court makes no effort to distinguish traffic detentions from other search-and-seizure problems.[179] The first prong of this test—"only unreasonable searches are forbidden"—appears to permit any official pursuit of information, provided that the pursuit is reasonable.[180] The second prong—"whether or not a search is reasonable is a question of law to be decided from all the circumstances of a case"—seems to eschew the simplicity of bright lines, requiring that the court consider the circumstances in their entirety.[181]

The court's rubric in *O'Boyle*—"whether or not a search is reasonable is a question of law to be decided from all the circumstances of a case"—failed to indi-

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[174] *O'Boyle*, 117 P.3d at 404.
[175] *Id.*
[176] *Id.*
[177] *Id.*
[178] *Id.* at 409-10.
[179] *Id.* at 410. The court states: "In the broader context of searches and seizures *in general* and for purposes of considering Mr. O'Boyle's claim . . . what is important about Vasquez is our holding that Article 1, Section 4 requires that searches and seizures be reasonable under all the circumstances.") *Id.* (emphasis added).
[180] State v. George, 231 P. 683, 687 (Wyo. 1924)("Not all searches and seizures are forbidden, but only those that are unreasonable.").
[181] Vasquez v. State, 990 P.2d 476, 489 (Wyo. 1999) (holding that Article 1, Section 4 eschews the bright-line rule of *Belton*, and "maintains a standard that requires a search be reasonable under all of the circumstances as determined by the judiciary, in light of the historical intent of [Wyoming's] search and seizure provision"). The holding of New York v. Belton, 453 U.S. 454 (1981) was designed to simplify a series of conflicting United States Supreme Court cases regarding searches of automobile passenger compartments subsequent to the arrest of the driver. *Id.* at 480 (interpreting *Belton*, 453 U.S. at 458). The *Belton* rule allowed police to search the entire passenger compartment, including areas of the car out of reach of the driver such as sealed containers. *Id.* at 481 (interpreting *Belton*, 453 U.S. at 460-61). The Wyoming Supreme Court held that the *Belton* rule was designed to serve a "national citizenry" and should not be applied to Wyoming. *Id.* at 489. Rejecting the bright line offered by *Belton*, the court limited the search to areas of the vehicle within the driver's reach, adopting a seamless standard that requires the court to consider all the circumstances of the case. *Id.* ("Is this result a narrower application than *Belton*? We think so.").

cate what factors the court found relevant under Wyoming law for determining the reasonableness of the officer's actions, forcing the court to rely upon Fourth Amendment concepts.[182] For example, the court observed that "Mr. O'Boyle had been detained and subjected to persistent and sustained questioning that unreasonably *expanded the scope of the stop far beyond the speeding offense into a full-blown drug investigation*."[183] But the notion that a traffic stop has a "scope" that should not be exceeded arises not from the Wyoming Constitution, but from the Fourth Amendment and the *Terry* two-prong test.[184] Furthermore, the opinion stated that the officer lacked "reasonable suspicion of other criminal activities."[185] The term "reasonable suspicion" is borrowed from *Terry* and its progeny and has no direct counterpart in Wyoming law.[186]

The Wyoming Supreme Court's analysis did include one doctrine grounded in Wyoming law when it noted that at "no time during this phase of the detention did [the trooper] ask Mr. O'Boyle for his consent to this type of questioning or detention."[187] The trooper's questions could be seen as an attempt to illicit incriminating information from the defendant, which is discouraged by case law interpreting the Wyoming Constitution.[188] However, without pertinent authority

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[182] *See* O'Boyle v. State, 117 P.3d 401, 410-11 (Wyo. 2005).
[183] *Id.* at 410 (emphasis added).
[184] Terry v. Ohio, 392 U.S. 1, 19-20 (1968) ("And in determining whether the seizure and search were 'unreasonable' our inquiry is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place."). Wyoming law has never defined a traffic detention as having a scope. *See* State v. Young, 281 P. 17 (1929). The concept of "scope" would be useful if applied to a Wyoming traffic stop; however, to do so without expressly adopting the term blurs the distinction between Article 1, Section 4 and the Fourth Amendment. Wallace P. Carson, Jr., *"Last Things Last": A Methodological Approach to Legal Argument in State Courts*, 19 WILLAMETTE L. REV. 641, 651 (1983) (advising those who make state constitutional arguments to avoid "commonplace federal jurisprudential buzz words" because "[t]hey may very well impede your argument rather than clarify it.").
[185] O'Boyle v. State, 117 P.3d 401, 410 (Wyo. 2005).
[186] The test promulgated by Wyoming courts differed from that of *Terry* in that *Terry* was designed to prevent crime, while the Wyoming test was designed to uncover crimes in progress. *Compare* 4 LAFAVE, *supra* note 3, § 9.2(a), at 282-83 nn.2-4 and accompanying text (noting that under *Terry*, crime *prevention* is the basis for the officer's reasonable belief that a crime is afoot) *and* State v. Young, 281 P. 17, 19 (Wyo. 1929) (quoting State *ex rel.* Hansen, v. District Court, 233 P. 126, 129 (Mont. 1929) ("Applying the test laid down by this court in the cases heretofore cited, were those facts and circumstances such as to cause a reasonable man, acting in good faith, to believe that a crime *was being committed in his presence*?")) (emphasis added).
[187] *O'Boyle*, 117 P.3d at 410-11.
[188] *See supra* notes 67-102 and accompanying text.

or explanation, the doctrine's use in this case provided no basis for understanding the court's decision or for predicting future decisions.[189]

Therefore, the *O'Boyle* traffic-detention rule failed to provide specific guidance to officers regarding what actions are reasonable and unreasonable, and the description of factors that the court considered relevant to determining the reasonableness of a traffic stop provided an insufficient basis for determining the court's future actions.[190] Consequently, the decision fell short of Justice Golden's ideal, as expressed in *Saldana v. State*, that state constitutional decisions provide a "principled . . . body of state constitutional law" that "truly supports the state constitution, as state court judges and lawyers are charged to do."[191]

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[189] *See* Saldana v. State, 846 P.2d 604, 623 (Wyo. 1993) (Golden, J., concurring).

[190] *See id.* Unfortunately, in *Fertig* the court not only acknowledged, but legitimized the use of federal concepts to support Wyoming's search-and-seizure law. Fertig v. State, 2006 WY 148, ¶ 19 ("In *O'Boyle* we tacitly endorsed the two-pronged *Terry* inquiry as providing an appropriate analytical framework for our reasonableness inquiry under Article 1, Section 4."). Furthermore, in *Fertig* the Wyoming Supreme Court relied upon federal law, and it referred to law in other states, but it offered nothing more than a general acknowledgement of Wyoming case law. *Id.* ¶¶ 17-27. While recognizing that the Fourth Amendment is persuasive in Wyoming and should be considered, reliance upon federal law without any consideration of Wyoming cases and history does nothing to create the "principled" body of state law advocated in *Saldana v. State* by Justice Golden and blurs the distinction between federal and state search-and-seizure doctrines. *See* Saldana v. State, 846 P.2d 604 (Wyo. 1993) (Golden, J., concurring). Even though the analysis in *Fertig* never cited Wyoming law, Wyoming cases could have been used to support the result. First, the facts were such that a reasonable person would believe that a traffic violation occurred in the officer's presence, which justified the initial stop. *Id.* ¶ 10 ("Mr. Fertig does not dispute that he was speeding or was clocked traveling 38 mph in a 30 mph zone."). *See* State v. Young, 281 P. 17, 19 (Wyo. 1929) (citing State *ex rel.* Hansen v. District Court, 233 P. 126 (Mont. 1925) (noting that an arrest is not unreasonable when the conditions surrounding the arrest are such to cause a reasonable man to believe a crime was occurring in the officer's presence). Furthermore, the officer observed Fertig's drug paraphernalia by standing outside the vehicle in a place the officer was permitted to be. *Fertig*, 2006 WY 142, ¶ 6. *See* State v. George, 231 P. 686 (Wyo. 1924) (holding that an officer had the power to seize stolen sheep because he was authorized to be on the property). The defendant, with his own actions, exposed the drug paraphernalia to the officer's view through the vehicle's window. *Fertig*, 2006 WY 142, ¶ 6. *See Young*, 281 P. at 19 (citing Sands v. State, 252 P. 72 (Okla. 1927) (noting an arrest is not unreasonable when an officer, standing outside of a vehicle, observes contraband within the vehicle).

[191] *Saldana*, 846 P.2d at 623.

III. ANALYSIS

A. Analysis of the Six "Neutral Non-exclusive Factors"

The question naturally arises, what would a properly grounded traffic-detention rule look like under the Wyoming Constitution? As was established earlier, this question requires an analysis of six factors that the Wyoming Supreme Court considers relevant to deciding whether the state constitution extends rights which differ from those offered by the United States Constitution: 1) the textual language of the provisions; 2) differences in the texts; 3) constitutional history; 4) state law which existed prior to the Wyoming Constitution; 5) structural differences between the two constitutions; and 6) matters of particular state or local concern.[192] Not only must a traffic-detention rule be consistent with these factors, it must fit in with Wyoming's general search-and-seizure doctrine as it has evolved over time.[193] This inquiry will proceed with an analysis of the six factors, asking of each, does the factor support a traffic-detention rule which provides greater or lesser protection than the Fourth Amendment?

1. Text and Textual Differences

An analysis of the first and second *Saldana* factors considers the text of Article 1, Section 4, and any differences between the text of the Wyoming provision and the Fourth Amendment, to determine whether protections at traffic detentions under the Wyoming Constitution should differ from those offered federally.[194] As mentioned already, the text of Article 1, Section 4 is identical to the Fourth Amendment except that the Wyoming provision requires an affidavit.[195] The Fourth Amendment reads as follows,

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

The text of Article 1, Section 4, reads,

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon prob-

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[192] *Id.* at 622.
[193] O'Boyle v. State, 117 P.3d 401, 410 (Wyo. 2005).
[194] *See supra* note 60 and accompanying text.
[195] State v. Peterson, 194 P. 342, 344-45 (Wyo. 1920).

> able cause, supported by affidavit, particularly describing the place to be searched or the person or thing to be seized.

According to the Wyoming Supreme Court, the affidavit requirement creates a higher standard than the Fourth Amendment because the Wyoming document requires a permanent record.[196] But in *Vasquez*, the court rejected arguments that the mere presence of the affidavit requirement demonstrated an intent by the framers to provide greater protections overall, holding that the "slight textual difference demonstrates little."[197] Furthermore, the warrant requirement has minimal importance for traffic detentions because of the exigency that allows warrantless searches of mobile vehicles.[198] Consequently, the differences in the text, in itself, appears to say little regarding whether protections provided under Article 1, Section 4 for travelers during traffic detentions should be greater or lesser than those provided under the Fourth Amendment, other than to indicate that the two provisions are not identical.[199] However, as mentioned earlier, the texts of the two provisions are supported by distinctive rationales.[200] Consequently, even though their texts resemble each other, historically they have been given differing interpretations, and the two provisions have produced unique analytical methods, leading to similar, but not identical results.[201] Therefore, determining whether the first and second *Saldana* factors support greater or lesser protection at traffic detentions depends upon how those analytical methods apply to each case.[202] The only conclusion that can be reached is that the two provisions may be similar, but they are not identical.[203]

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[196] Vasquez v. State, 990 P.2d 476, 483 (Wyo. 1999) (quoting State v. Peterson, 194 P. 342, 346 (1920)).
[197] *Id.* at 485.
[198] *See supra* notes 111-14 and accompanying text.
[199] *See Vasquez*, 990 P.2d at 485 ("[T]he slight textual difference demonstrates little.").
[200] *See supra* notes 68-104 and accompanying text.
[201] *See* J. William J. Brennan Jr., *State Constitutions and the Protections of Individual Rights*, 90 HARV. L. REV. 489, 500 (1977) ("[E]xamples abound where state courts have independently considered the merits of constitutional arguments and declined to follow opinions of the United States Supreme Court they find unconvincing, even where the state and federal constitutions are similarly or identically phrased.").
[202] *Vasquez*, 900 P.2d at 485 ("It is a unique document, the supreme law of our state, and this is sufficient reason to decide that it should be at issue whenever an individual believes a constitutionally guaranteed right has been violated.").
[203] *But see supra* notes 128-31 and accompanying text (noting that Wyoming law requires that holdings under the Wyoming Constitution consider the needs of the nation as a whole and do not appear to support search-and-seizure rules that vary wildly from federal law).

2. *Constitutional and Common-law History*

The Wyoming Supreme Court has held that too little evidence can be found in Wyoming's constitutional history to support a notion that the framers intended to offer greater protections than the Fourth Amendment.[204] During debates, the members of the Wyoming Constitutional Convention referred more frequently to constitutions from other states than to the United States Constitution.[205] For example, the delegates referred to the Colorado Constitution more than twenty times, Pennsylvania seven times, Montana and Illinois five, and Nebraska and Nevada four.[206] In comparison, the United States Constitution was referenced three times.[207] The delegates passed Article 1, Section 4 with very little discussion.[208] Based on this, nothing conclusive can be drawn from the history other than the framers drew upon a variety of sources, as well as the United States Constitution, during the drafting of Article 1, Section 4.[209] For purposes of establishing an independent traffic-detention rule, this history provides no indication that Article 1, Section 4 is derivative of the Fourth Amendment.[210] However, some authorities have indicated that Wyoming Supreme Court judges early in the Twentieth Century, some of whom served as delegates to the 1889 constitutional convention, believed that the Article 1, Section 4 provided greater protections.[211]

3. *Structural Differences*

Because the law that existed during the adoption of the Wyoming Constitution appears to offer little that is relevant to a discussion regarding traffic detentions, this analysis skips the fourth of the six *Saldana* factors and turns to the fifth:

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[204] Vasquez v. State, 990 P.2d 476, 484-85 (Wyo. 1999) (citing KEITER *supra* note 29, at 11-12) ("Although the Wyoming Declaration of Rights was passed 'without rancorous debate,' there is evidence the framers 'endorsed the principle of liberal construction of the Declaration of Rights.'").

[205] KEITER, *supra* note 29, at 4.

[206] *Id.*

[207] *Id.*

[208] *See* JOURNAL AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF WYOMING (1889) (Cheyenne: Daily Sun, Book and Job Printing Co., 1893).

[209] *See* KEITER, *supra* note 29, at 4.

[210] *See Vasquez*, 990 P.2d 476, 484-85.

[211] *Id.* at 485 (noting that this belief led the Wyoming Supreme Court to adopt the equivalent to *Miranda* rights fifty years before they were adopted in federal court). Delegates to the Wyoming Constitutional Convention who also served on the Wyoming Supreme Court around the turn of the last century included Asbury B. Conway, from September 11, 1890 to December 8, 1897; Charles N. Potter, from 1895 until 1926; Jesse Knight, from 1898 to 1905. MARIE ERWIN, 2 WYOMING BLUE BOOK 200-05 (Virginia Cole Trenholm ed., Wyoming State Archives and Historical Department) (1974).

structural differences between the two constitutions.[212] The Washington Supreme Court—which requires an analysis of the same six factors for issues raised under its state constitution—discerned that state constitutions and the Federal Constitution differ in structure because the two perform different functions.[213] The Federal Constitution is a "grant of power from the states," while the "state's constitution is a limit on the state's power."[214] These structural differences "always" suggest that the state should offer an independent standard of its own.[215] Therefore, the structural differences indicate that a separate analysis under the state constitution is warranted, but they provide no indication as to whether the protections provided under Article 1, Section 4 of the Wyoming Constitution should be greater, lesser, or equal to those under the Fourth Amendment.

4. Issues of Local and State Concern

The Wyoming Supreme Court expressed an issue of local and state concern in *O'Boyle v. State* that, according to the court, differentiates Wyoming and creates a need for a search-and-seizure standard for traffic stops unique to the state.[216] The court observed that the state's strategic location makes it a conduit for drugs headed to other areas of the country.[217] In response, a state and national law-enforcement effort has subjected travelers on the state's highways to aggressive drug interdiction tactics that impact the innocent and the guilty, and according to the court, Wyoming citizens have had rights impinged upon for the benefit of

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[212] *See supra* note 60 and accompanying text. The fourth *Saldana* factor is "pre-existing state law." *See supra* note 60 and accompanying text.

[213] State v. Young, 867 P.2d 593, 596 (Wash. 1994).

[214] *Id.* (citing State v. Smith, 814 P.2d 652, 663 (Wash. 1991) ("[T]he United States Constitution is a grant of limited power authorizing the federal government to exercise only those constitutionally enumerated powers, whereas the state constitution imposes limitations on the otherwise plenary power of the state.")).

[215] *Id.*

[216] O'Boyle v. State, 117 P.3d 401, 411 (Wyo. 2005).

[217] *Id.* The court stated,

> The State of Wyoming is bisected north and south and east and west by two major interstate highways. Interstate 80 provides drug traffickers with easy west to east access across the United States and is a well-known route for transporting drugs. The annual average daily traffic on I-80 near Cheyenne, where Mr. O'Boyle was stopped, is over 20,000 vehicles. Wyoming citizens operate a significant number of these vehicles. Traffic stops along I-80 are a routine part of the national drug interdiction program. Although precise figures detailing the number of searches conducted pursuant to consent are not—and probably can never be—available, there is no dispute that these type of searches affect tens of thousands, if not hundreds of thousands, of people every year.

Id. (quotations and citations omitted).

people living in other areas.[218] The court objected to stops initiated as pretexts to searches for drugs and their "resulting intrusion upon the privacy rights of Wyoming citizens," and it criticized troopers who routinely ask travelers aggressive questions about travel plans without articulable reasons to suspect the travelers carried contraband.[219]

The Wyoming Supreme Court's observations gave no recognition to a countervailing problem that can also be expressed as an issue of state and local concern—not all drugs on Wyoming's highways are headed elsewhere.[220] Some drugs are consumed in Wyoming communities, as evidenced by the increasing number of drug cases in Wyoming courts.[221] Therefore, drug interdiction is not just a national concern, and if Wyoming's traffic detention doctrine is to have any legitimacy, it must articulate how drug interdiction is to be pursued without violating people's rights.[222]

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[218] *Id.* The court stated,

> Our location along a nationally recognized drug trafficking corridor likely results in a disproportionately large percentage of Wyoming's comparatively small population being subjected to what have become routine requests to relinquish their privacy rights by detention, invasive questioning and searches—all without reasonable suspicion of criminal activity other than the offense giving rise to the stop.

Id. The court provided no evidence that drug interdiction has unfairly impacted Wyoming citizens other than its expression that victimization was "likely." *See id.*

[219] *Id.* ("We previously have expressed disapproval of the use of traffic violations as a pretext to conduct narcotics investigations.") (citing Damato v. State, 64 P.3d 700, 706 (Wyo. 2003)).

[220] U.S. Dep't of Justice, Nat'l Drug Intelligence Cntr., Wyoming Drug Threat Assessment, Prod. No. 2002-SO389WY-001 December 2001, at 8, *available at* http://www.usdoj.gov/ndic/pubs07/712/712p.pdf (last visited November 26, 2006). The Department of Justice describes Wyoming as "both a destination and a transit area" for methamphetamine. *Id.* at 15. The primary method of transportation through Wyoming is by private vehicle using interstate highway. *Id.*

[221] *Id.* at 9. Between 1999 and 2000, twenty-three sheriff's departments and forty-three police departments in Wyoming reported the following increases in drug arrests: arrests of female juveniles increased from 106 to 122; arrests of adult females from 254 to 301; arrests of adult males from 1381 to 1479; but arrests of juvenile males decreased from 448 to 362. *Id.* Categories increased in related areas; for example, arrests of adult males for manufacturing and sale of illicit drugs increased from 173 to 195. *Id.*

[222] *See O'Boyle*, 117 P.3d at 422 (Voigt, J. concurring). Justice Voigt chided courts in general for being intellectually dishonest, stating that in many cases traffic stops are really attempts to interdict drugs, and if treated as such, the discussion would be less "phony": "[t]he real question should be, given the major drug problem facing this country and the huge amount of drugs being transported on our nation's highways, what investigatory steps directed at drug interdiction are constitutionally reasonable in a traffic stop situation." *Id.* However, Justice Voigt gave no indication as to what those "reasonable" drug interdiction steps might include. *Id.*

In summary, the relevant *Saldana* factors show that a method for independently analyzing traffic detentions under the Wyoming Constitution is warranted. However, only two of the factors indicate that the protections provided under the Wyoming Constitution might be greater than those provided under the Fourth Amendment, and both these indications appear suspect upon closer examination. For example, a look at the third factor—Wyoming's constitutional history—reveals that Wyoming Supreme Court justices early in the last century believed that the Wyoming Constitution provided greater Bill of Rights-type protections than the United States Constitution; therefore, those early courts required that suspects be given warnings similar to those now demanded by *Miranda*.[223] But in the 1960s, the Warren Court greatly expanded Fourth Amendment protections, so no one can know whether those same justices, if they were available for consultation today, would believe that protections provided by Article 1, Section 4 continue to be greater.[224] Regarding the sixth *Saldana* factor—state and local concern—the Wyoming Supreme Court has held that nationwide drug interdiction has unfairly impacted Wyoming citizens, necessitating a traffic-detention rule that grants additional protections to travelers detained by authorities.[225] The Wyoming Supreme Court's reasoning, however, offers no evidence that Wyoming citizens are impacted any more than citizens of other states, and the court ignores a countervailing state and local concern—Wyoming's very serious drug problem, which creates a strong governmental interest in drug interdiction.[226] Given this, the analysis of the six factors provides no clear indications as to whether protections under Article 1, Section 4 should be greater or lesser than the Fourth Amendment. Therefore, the court must discern the reasonableness of individual traffic detentions using factors identified in the state's cases.

B. Recommended Traffic Detention Rule

The Wyoming Supreme Court remains the true arbiter of the state's constitution, and the court has considerable discretion regarding how Article 1, Section 4 should be interpreted. For this reason, it seems unwise to make specific predictions regarding what the court might do. Therefore, this analysis avoids specific recommendations and instead looks to define what is consistent with Wyoming law as it currently stands, considering the six factors the court indicated were relevant in *Saldana*.[227] This comment also notes that Wyoming case law continues to hold

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[223] *See supra* note 211 and accompanying text (referring to Miranda v. Arizona, 384 U.S. 436 (1966)).
[224] *See supra* notes 37-42 and accompanying text.
[225] *See supra* notes 216-19 and accompanying text.
[226] *See supra* notes 220-22 and accompanying text.
[227] *See supra* notes 51-66 and accompanying text.

that the Fourth Amendment is persuasive with regard to Article 1, Section 4, and conceivably, the court could do as other state courts have done and incorporate portions of federal law into Wyoming's traffic-detention rule.[228]

Most of the factors mentioned in this analysis have not been recognized by the Wyoming Supreme Court since it announced in *Vasquez v. State* its intention to consider search-and-seizure cases under the Wyoming Constitution.[229] Therefore, this analysis assumes that though the pre-*Mapp* cases appear to be good law, their precedential value remains questionable until their holdings are recognized by the current court.[230]

A typical traffic detention occurs when an officer pulls over a traveler for a minor traffic offense. The detention lasts from the moment of the stop until the officer returns the traveler's documents and says that the traveler is free to go.[231] Until the documents are returned, the traveler cannot leave, and therefore, is in the officer's custody.[232] According to Wyoming cases, the following factors are relevant to determining the reasonableness of the stop:

The reasonableness of the initial stop and the continued reasonableness of the officer's actions. In Wyoming a traffic detention must be consistent with the state's general search-and-seizure standard as articulated in *State v. Peterson*.[233] That standard holds that "only unreasonable searches are forbidden, and whether or not a search is reasonable is a question of law to be decided from all the circumstances of a case."[234] Hence, Wyoming cases indicate that the officer's actions must be reasonable in their entirety, and that any information that comes to light because of an officer's unreasonableness cannot be used as evidence.[235] The cases also indicate that an investigation must be initiated in "good faith."[236] The require-

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[228] Saldana v. State, 846 P.2d 604, 611 (Wyo. 1993) ("Even though the federal law establishes minimum requirements for individual protection and does not mandate any maximum criteria as to the degree of protection afforded an individual under state law, federal interpretations of the Fourth Amendment are regarded as persuasive . . . .").
[229] *See supra* notes 132-37.
[230] *See supra* notes 132-37.
[231] *See supra* notes 2-5 and accompanying text.
[232] *See supra* notes 2-5 and accompanying text.
[233] State v. Peterson, 194 P. 342, 345 (Wyo. 1920); Vasquez v. State, 990 P.2d 476, 489 (Wyo. 1999); O'Boyle v. State, 117 P.3d 401, 409-10 (Wyo. 2005).
[234] *O'Boyle*, 117 P.3d at 409-10.
[235] State v. Munger, 4 P.2d 1094, 1095 (Wyo. 1931). *See supra* notes 120-27.
[236] State v. Young, 281 P. 17, 19 (Wyo. 1929) (quoting State *ex rel.* Hansen v. District Court, 233 P. 126, 129 (Mont. 1925)).

ment that the officer act in good-faith appears to be a higher standard than the Fourth Amendment provides in that the requirement seems to weigh the officer's intentions, which under the Fourth Amendment is not considered material.[237] Although how much higher remains unclear.[238] In any event, the officer must have a valid reason for initiating the traffic stop, and all of the officer's actions must be reasonable in the light of the circumstances.[239]

Whether the suspect was compelled to produce evidence. The close connection between Section 4 and Section 11 of Article 1 means the court is likely to discourage any action by authorities that appears to compel self-incrimination, which Wyoming law interprets very broadly.[240] For example, Wyoming's definition of self-incrimination includes the unreasonable seizure of personal property from a suspect's possession for use as evidence.[241] Consequently, Wyoming's case law requires close scrutiny of any questioning by the officer about travel plans, as well as a close examination of efforts to obtain consent to search a vehicle.[242] Any seizure of personal property from a vehicle for use as evidence would seem to risk violating the prohibition against compelled self-incrimination, unless the property is contraband or the fruit of a crime.[243]

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[237] *See* Scott v. United States, 436 U.S. 128, 138 (1978) (noting that an officer's state of mind cannot invalidate "an action taken [by an officer] as long as the circumstances, viewed objectively, justify that action").

[238] *See* O'Boyle, 117 P.3d at 411 (citing Damato v. State, 64 P.3d 700 (Wyo. 2003) ("In *Damato*, we joined in another state court's expression of concern about sanctioning conduct 'where a police officer can trail a targeted vehicle with a driver merely suspected of criminal activity, wait for the driver to exceed the speed limit by one mile per hour, arrest the driver for speeding, and conduct a full-blown inventory search of the vehicle with impunity.'")). Based upon the reasoning of *Damato*, an officer's intentions must figure into the analysis somehow; however, the Wyoming Supreme Court held in *Fertig* that a reasonable traffic stop cannot be made unreasonable because an officer's intentions were to investigate another matter. Fertig v. State, 2006 WY 148, ¶ 27 (noting that efforts to enforce traffic laws are objectively reasonable because they are based on violations of the law). For an analysis of the stop in *Fertig* using Wyoming case law, *see supra* note 190. The provision that the officer act in good faith would certainly prohibit the officer from *misleading* a defendant, and thereby obtaining evidence, because that would compel the defendant to provide self-incriminating evidence. Wiggin v. State, 206 P. 373, 377-78 (Wyo. 1922) ("A search pursuant to an admission gained unlawfully by stealth, force or coercion is illegal. . . .").

[239] *See supra* notes 111-14 and accompanying text.

[240] *See supra* notes 68-102 and accompanying text.

[241] *See supra* notes 73-76 and accompanying text. For an analysis of the related Fourth Amendment doctrine, see *supra* notes 77-84 and accompanying text.

[242] O'Boyle, 117 P.3d at 411-15.

[243] *See supra* notes 68-102.

However, the cases are not so restrictive as to deny officers of all avenues of investigation.[244] For example, the cases allow officers to ask about contraband, provided that the questioning is not coercive.[245] Also, the protections of personal property do not appear to extend to property that is stolen, contraband or otherwise illegal.[246] And an officer who reasonably believes a felony is in progress can arrest the suspect without a warrant.[247] Therefore, during a traffic detention, an officer who has sufficient evidence can make arrests and confiscate evidence, provided that the officer's actions are reasonable.

Sufficiency of the evidence. Once in contact with a suspect, an officer can act on information indicating a crime is underway provided that the officer's actions are "in good faith," and the evidence is such that "a reasonable man, acting in good faith, [would] believe that a crime was being committed in his presence."[248]

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[244] Wiggin v. State, 206 P. 373, 376 (Wyo. 1922) ("The law is well settled that an officer has the right to search the party arrested and take from his person and from his possession property reasonably believed to be connected with the crime, and the fruits, means or evidences thereof, and he may take and hold them to be disposed of as the court directs.").

[245] *Id.* at 378. In dicta, the court stated that an officer should be able to ask a defendant in custody about stolen property that the officer reasonably believed to be in the suspect's possession, provided the questioning was not coercive. *Id. But see id.* at 377-78 ("A search made pursuant to an admission gained unlawfully by stealth, force or coercion is illegal, and it has been held that coercion is implied when the officer displays his badge or shows an illegal warrant and thus obtains the acquiescence for admission.") *and* Maki v. State, 112 P. 334, 336 (Wyo. 1911) ("The person so under arrest and charged . . . and who is without counsel is entitled to be informed of his right to decline to be a witness, or to answer any question and properly cautioned as essential elements in determining the voluntary character of his statements then and there made.").

[246] *See* State v. George, 231 P. 683, 689 (Wyo. 1924) (holding that an officer may confiscate contraband upon the arrest of the suspect).

[247] *Id.* at 690 ("Where a felony has been committed, . . . a peace officer may arrest without a warrant, one whom he has reasonable or probable grounds to suspect of having committed the felony."). The case law is more limited regarding the arrest of misdemeanors, for which the power to arrest without a warrant is limited to instances where the offense occurred in the presence of an officer. *Id.* at 689-90.

[248] State v. Young, 281 P. 17, 19 (Wyo. 1929) (quoting State *ex rel.* Hansen v. District Court, 233 P. 126, 129 (Mont. 1925)). The language of *Hansen*, quoted in *Young*, suggests an objective test based upon a hypothetical reasonable observer. *Id.* ("[W]ere those facts and circumstances such as to cause a *reasonable man*, acting in good faith, to believe that a crime was being committed in his presence?") (emphasis added). Noting that the test evokes the *reasonable man*, rather than the *reasonable officer*, the Wyoming Supreme Court may need to resolve what role officer training plays in the application of this test, considering that a reasonable man, lacking a reasonable officer's training and experience, might reach a different conclusion when confronted with identical information. *See* 4 LAFAVE, *supra* note 3, § 9.5(e)-(f) (indicating that in some circumstances the Fourth Amendment allows investigative detentions when officer training indicates that the suspect fits a drug profile or when a suspect acts suspiciously).

To gather this evidence, all of the officer's senses can come into play, including the sense of smell.[249] As an officer reasonably acquires incriminating information, the investigation can expand.[250] For example, an officer acted reasonably when he approached a car after noticing it was parked in an unusual manner, who then smelled whiskey through a window, looked—first through the window, then through an open door—and saw a jug of whiskey, and then examined the jug and seized it.[251] Given this, an officer involved in a traffic detention who observes an odor or something to cause him to reasonably believe a crime is underway, can act on those beliefs.

Naturally, the factors mentioned in this comment create a mere skeleton of a complete traffic-detention rule and should be developed with additional research and future court decisions. Also, nothing prevents the court from incorporating portions of the federal traffic-detention doctrine into Wyoming law, as other courts have done, or from redefining terms already in existence within state law. If, however, the Wyoming Supreme Court chooses to incorporate federal doctrine, it should do so expressly, and clearly describe how the amended doctrine is to be applied, thereby ensuring that it meets its goal of creating a "principled" traffic-detention doctrine based on Wyoming legal concepts.[252]

IV. CONCLUSION

The current traffic detention doctrine under the Wyoming Constitution as articulated in *O'Boyle* is insufficient. It provides no practical guidance to law enforcement, an insufficient explanation of the factors that the court finds relevant, and no basis for predicting future court decisions. Therefore, the state rule is a poor substitute for the federal traffic-detention rule under *Terry v. Ohio*, which gives not only ample guidance to law enforcement, but a basis for predicting future court decisions. Furthermore, the concepts employed by the court to explain the unreasonableness of certain actions by the officer in *O'Boyle* cannot be understood without referring to federal case law. Therefore, that portion of the *O'Boyle* decision fails to meet the Wyoming Supreme Court's stated goal of creating a "principled" basis for decisions based upon the state constitution. This

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[249] *Young*, 281 P. at 19 (quoting State v. Loftis, 292 S.W. 29 (Mo. 1927) (noting that it was reasonable for an officer to discover whiskey kegs by looking into a vehicle after being attracted by the odor of whiskey)).

[250] *See id.*

[251] *See id.* at 20 (citing State v. Connor, 300 S.W. 685) (Mo. 1927) ("Under such circumstances, no search warrant was necessary, because the deputy sheriff had before him ample facts and information upon which to base, not only a conclusion of probable cause, but a well-founded belief that the car contained contraband goods and that a felony had been committed.").

[252] Saldana v. State, 846 P.2d 604, 623 (Golden, J., concurring).

insufficient traffic-detention rule is inconsistent with Wyoming case law and the Wyoming Constitution, which contains ample basis for a sufficient traffic-detention rule. The Wyoming Supreme Court should pursue its stated goal and create a principled traffic-detention rule based upon Wyoming law.

University of Wyoming
College of Law

Wyoming Law Review

Volume 7 2007 Number 1

GENERAL LAW DIVISION

WYOMING LAW REVIEW

VOLUME 7 *2007* NUMBER 1

THE 115 YEAR-OLD NINTH CIRCUIT—WHY A SPLIT IS NECESSARY AND INEVITABLE

*Hon. John M. Roll**

Twelve geographic United States Courts of Appeals exercise jurisdiction over the entire country. While some federal circuits have jurisdiction over somewhat larger geographic areas than others, only one circuit stands out as aberrational. Although in theory it is merely one of twelve, the Ninth Circuit dwarfs its fellow circuit courts in caseload, population, number of states, and number of judges. Five Supreme Court justices and two national commissions have concluded that the Ninth Circuit is too big to function properly as a decisional unit.

Thirty percent of all federal appeals are pending in the Ninth Circuit. In addressing this enormous caseload, the Ninth Circuit produces an unmanageable number of decisions. Not surprisingly, the Ninth Circuit is the slowest circuit in decisional time.

Nearly sixty million people—one fifth of the nation's population—reside in the Ninth Circuit. The Ninth Circuit, with nine states, a territory, and a commonwealth (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam, and the Northern Mariana Islands, respectively) contains more states than any of the other eleven geographic circuits. Not only is the number of states in the Ninth Circuit extraordinary, but the states themselves

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are far from average—the Ninth Circuit contains the nation's mega-state[1] and two fastest growing states,[2] as well as six other states.

The number of judges on the Ninth Circuit—twenty-eight authorized active circuit judges—is also aberrational. The high number of judges diminishes collegiality. The mere numerosity of judges has serious adverse consequences, including a structurally flawed limited en banc procedure. The Ninth Circuit's size also results in under-representation in the U.S. Judicial Conference, the policy-making body for the federal courts. All circuits are designated the same number of representatives. Thus, the Ninth Circuit is allotted the same number of Judicial Conference representatives as the tiniest of circuits.

National Impact

The negative effects of the Ninth Circuit's disproportionate size are not limited to the circuit itself; the nation as a whole suffers. Having thirty percent of all current federal appeals pending in the Ninth Circuit undermines the concept of shared responsibility among the twelve regional circuit courts. Indeed, the very idea of regional circuits is frustrated by the current configuration. Although the Ninth Circuit is in theory merely one of twelve regional circuits, it contains California—with a population of thirty-six million[3]—and eight other states. It is unfathomable to classify nine states, forty percent of the nation's land mass, and nearly sixty million people—as "a region."[4] The disproportionate number of judges requires the Ninth Circuit to use a structurally flawed limited en banc procedure. The enormous caseload prevents the entire court from keeping abreast of all the court's work product and offering revision where needed, which in turn undermines the overall quality of federal appellate precedent. A circuit of such vast proportions is likely to be viewed by many as the dominant circuit. When one of twelve regional circuits is viewed as dominant because of its unimpeded, happenstance growth relative to other circuits, the other circuits are deprived of their appropriate status.

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[1] California. *See* Press Release, U.S. Census Bureau, U.S. Dep't of Comm. (Dec. 22, 2005), http://www.census.gov/Press-Release/www/releases/archives/population/006142.html [hereinafter Press Release].

[2] Arizona and Nevada. *See id.*; U.S. Census Bureau, U.S. Dep't of Comm., Population Change and Distribution 1990 to 2000: Census 2000 Brief (Apr. 2001), *available at* http://www.census.gov/prod/2001pubs/c2kbr01-2.pdf.

[3] *See* Press Release, *supra* note 1. *See also* U.S. Census Bureau, U.S. Dep't of Comm., File 1: Annual Projections of Total Population (2005), *available at* http://www.census.gov/population/www/projections/projectionsagesex.html (under III. Downloadable Files) [hereinafter Population Projections].

[4] Letter from Justice Anthony M. Kennedy to Hon. Byron R. White, Chair, White Commission (Aug. 17, 1998) at 4, *available at* http://www.library.unt.edu/gpo/csafca/hearings/submitted/pdf/kennedy.pdf [hereinafter Justice Kennedy Letter].

If new boundaries were appropriately drawn, such as is provided for in legislation recently proposed in Congress, all nine states of the Ninth Circuit—and the administration of justice nationwide—would be well-served. Those who advocate against a split make the demonstrably inaccurate claim that the Ninth Circuit Court of Appeals is functioning well, and identify various reasons why a split should not occur. These arguments are easily dispatched. None of the arguments posed by split opponents—and they have been creative, imaginative, and many—justifies retaining the Ninth Circuit in its current configuration. On the other hand, objective analysis demonstrates the compelling need for a split of the Ninth Circuit.

In this Article, Part I describes the history of the structure of the Ninth Circuit and proposals to split it; Part II sets forth the current dimensions of the Ninth Circuit and discusses the impact of passage of pending legislation; Part III explains the several adverse consequences of continuation of the current configuration of the Ninth Circuit, one of which is the need to resort to a structurally-flawed limited en banc procedure; and Part IV summarizes and responds to various objections raised by those who oppose a split.

I. A BRIEF HISTORY

How to divide the Ninth Circuit has been a subject of debate for over a century—and in earnest, over the past fifty years. Numerous congressional hearings have been held. Two national commissions created by Congress have recommended drastic action. Nevertheless, the boundaries of the Ninth Circuit have not been diminished for 115 years.

Early Proposals

In 1891, the Evarts Act[5] created a circuit court for each of the nine then-existing circuits.[6] At that time, the Ninth Circuit contained only six states:[7] California,[8]

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[5] Circuit Court of Appeals Act, ch. 517, 26 Stat. 826 (1891). The act was referred to as the Evarts Act, after Senator William M. Evarts (R-NY), Chairman of the Senate Committee on the Judiciary and sponsor of the bill. WHITE REPORT, *infra* note 25, at 11.

[6] *Id.* Congress created the nine geographic circuits in 1866. Act of July 23, 1866, ch. 210, 14 Stat. 209. At that time, the Ninth Circuit consisted of California, Oregon, and Nevada. Other states were added to the circuit over time. *See infra* notes 8-13 and accompanying text.

[7] Alaska, Arizona, and Hawaii were added later. *See infra* notes 17-19 and accompanying text.

[8] California was part of the original Ninth Circuit created by the Judicial Circuits Act of 1866. Act of July 23, 1866, ch. 210, 14 Stat. 209. Prior to its inclusion in the Ninth Circuit in 1866, the state of California had been designated as a separate circuit for eight years. Act of Mar. 2, 1855, ch. 142, 10 Stat. 631. In 1863, the California Circuit was abolished, and California was placed in the Tenth Circuit for a short time. Act of Mar. 3,

Idaho,[9] Montana,[10] Nevada,[11] Oregon,[12] and Washington.[13] Even then, there was some disagreement as to whether these states should be assigned to a single circuit. During debate on the Evarts Act, it was suggested that the far west be divided into two circuits, rather than one.[14] Then, as now, much of the debate centered on California. One senator noted, "[t]he Senator from Oregon states that he does not want California included in the Pacific coast circuit. Very well, but where is it to go?"[15] Ultimately, only one circuit was formed from the six states and the vast expanse of land in the far western United States. At that time, the population of the Ninth Circuit was less than three million people.[16] The Ninth Circuit later

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1863, ch. 100, 12 Stat. 794. When Congress eliminated the Tenth Circuit in the Judicial Circuits Act of 1866, California was placed in the Ninth Circuit. Act of July 23, 1866, ch. 210, 14 Stat. 209.

[9] Idaho was added to the Ninth Circuit upon its admission as a state in 1890. Act of July 3, 1890, ch. 656, § 16, 26 Stat. 215, 217.

[10] Congress added Montana to the Ninth Circuit in the Enabling Act of 1889, shortly before its admission as a state on November 8, 1889. Act of Feb. 22, 1889, ch. 180, § 21, 25 Stat 676, 682. *See* Proclamation of Nov. 8, 1889, No. 7, 26 Stat. 1551 (formally admitting Montana as a state).

[11] Nevada had been placed in the Ninth Circuit—along with California and Oregon—in the Judicial Circuits Act of 1866. Act of July 23, 1866, ch. 210, 14 Stat. 209. Prior to that, Nevada was part of the Tenth Circuit. *See* Act of Feb. 27, 1865, ch. 64, 13 Stat. 440.

[12] Oregon was originally placed in the Tenth Circuit with California. Act of Mar. 3, 1863, ch. 100, 12 Stat. 794. Congress moved Oregon to the Ninth Circuit in 1866. Act of July 23, 1866, ch. 210, 14 Stat. 209.

[13] Like Montana, Washington was placed in the Ninth Circuit by the Enabling Act of 1889. Act of Feb 22, 1889, ch. 180, § 21, 25 Stat. 676, 682.

[14] 21 CONG. REC. 10283 (1890) (statement of Sen. Joseph N. Dolph (R-OR)).

[15] 21 CONG. REC. 10285 (1890) (statement of Sen. John James Ingalls (R-KS)).

[16] U.S. CENSUS BUREAU, DEP'T OF COM., THIRTEENTH CENSUS OF THE UNITED STATES TAKEN IN THE YEAR 1910 vol. 1, ch. 2, at 30, *available at* http://www2.census.gov/prod2/decennial/documents/36894832v1ch02.pdf [hereinafter 1910 CENSUS].

expanded to include three more states—Alaska,[17] Arizona,[18] and Hawaii[19]—a territory,[20] and a commonwealth.[21]

As Ninth Circuit Judge Andrew J. Kleinfeld has observed, "it is entirely an accident that the Ninth Circuit Court of Appeals is as big as it is. The court was created for a jurisdiction that consisted of California, San Francisco mainly, and empty space. The space is filled in."[22]

By the 1940s and 1950s, members of both houses of Congress attempted to address the size of the Ninth Circuit, and formal circuit-splitting bills began to appear with regularity.[23] In 1941, both houses of the 77th Congress considered

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[17] The Circuit Court of Appeals Act granted the United States Supreme Court the authority to assign U.S. territories to particular circuits. Act of Mar. 3, 1891, ch. 517, § 15, 26 Stat. 826, 830. Pursuant to that authority, the Supreme Court assigned the territory of Alaska to the Ninth Circuit in 1891. Order Assigning Territories, 139 U.S. 707 (May 11, 1891). In 1900, Congress granted the Ninth Circuit appellate jurisdiction over the territory of Alaska. Act of June 6, 1900, ch. 786, § 504-05, 31 Stat. 321, 414-15. The state of Alaska was assigned to the Ninth Circuit in 1958. Act of July 7, 1958, Pub. L. No. 85-508, § 14-15, 72 Stat. 339, 349.

[18] The Supreme Court assigned the territory of Arizona to the Ninth Circuit in 1891. Order Assigning Territories, 139 U.S. 707 (May 11, 1891). Congress assigned Arizona to the Ninth Circuit upon its admission as a state in 1912. Act of June 16, 1906, ch. 3335, § 37, 34 Stat. 267, 283. *See* Proclamation of Feb. 14, 1912, 37 Stat. 1728 (formally admitting Arizona as a state).

[19] In 1900, Congress granted the Ninth Circuit appellate jurisdiction over the territory of Hawaii. Act of Apr. 30, 1900, ch. 339, § 86, 31 Stat. 141, 158. In 1901, the Supreme Court assigned the territory of Hawaii to the Ninth Circuit. Order Assigning Hawaii, 181 U.S. 625 (Apr. 15, 1901). The state of Hawaii was assigned to the Ninth Circuit in 1959. Act of Mar. 18, 1959, Pub. L. No. 86-3, § 13, 73 Stat. 4, 10.

[20] Guam was added in 1951. Act of Oct. 31, 1951, 65 Stat. 723.

[21] The Northern Mariana Islands were added in 1977. Act of Nov. 8, 1977, Pub. L. No. 95-157, 91 Stat. 1265. The Northern Mariana Islands are placed in the same circuit as Guam.

[22] *Review of the Report by the Commission on Structural Alternatives for the Federal Courts of Appeals Regarding the Ninth Circuit and the Ninth Circuit Reorganization Act Before the Subcomm. on Administrative Oversight and the Courts of the S. Comm. on the Judiciary*, 106th Cong. 82 (July 16, 1999), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_senate_hearings&docid=f:66528.pdf [hereinafter 1999 Sen. Subcomm. Hearing] (oral statement of Hon. Andrew J. Kleinfeld, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit).

[23] *See* S. 1793, 77th Cong. (1941) (sponsored by Sen. Homer Truett Bone (D-WA)); H.R. 5489, 77th Cong. (1941) (sponsored by Rep. Warren Magnuson (D-WA)). These bills would have divided the Ninth Circuit into a new Ninth Circuit consisting of Arizona, California, Hawaii, and Nevada, and a new Eleventh Circuit consisting of Idaho, Montana, Oregon, and Washington.

legislation which would have divided the Ninth Circuit by creating a new Eleventh Circuit consisting of four of the Ninth Circuit's states: Idaho, Montana, Oregon, and Washington. In 1953, Democrats in the 83rd Congress introduced proposals to split the Ninth Circuit along the same lines, with the addition of Alaska to the new Eleventh Circuit.[24]

In 1954, the Ninth Circuit itself voted to split, and the U.S. Judicial Conference endorsed a split of the Ninth Circuit later that year.[25] The Ninth Circuit later retracted its vote, and the Judicial Conference followed suit by withdrawing its support of a split.[26] Nevertheless, circuit splitting bills continued to appear thereafter in both houses of Congress throughout the 1950s and 1960s,[27] proposed by Democrats and Republicans alike.

Hruska Commission

In 1972, Congress established the Commission on Revision of the Federal Court Appellate System[28]—commonly referred to as the "Hruska Commission"[29]—to study and make recommendations for "changes in the geographical boundaries of the circuits as may be most appropriate for the expeditious and effective disposition of judicial business."[30] At that time, the Ninth Circuit had a caseload

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[24] S. 2579, 83rd Cong. (1953) (sponsored by Sen. Wayne Morse (I-OR)); H.R. 8727, 83rd Cong. (1954) (sponsored by Rep. Pat Hillings (R-CA)); S. 3314, 83rd Cong. (1954) (sponsored by Sen. Warren G. Magnuson (D-WA) and Sen. Henry M. Jackson (D-WA), and Sen. Wayne Morse (I-OR)).

[25] COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, FINAL REPORT 33 (1998), *available at* http://www.library.unt.edu/gpo/csafca/final/appstruc.pdf [hereinafter WHITE REPORT].

[26] *Id.* at 33 n.80. *See also* 1999 Sen. Subcomm. Hearing, *supra* note 22, at 127-28 (oral statement of Hon. William D. Browning, District Judge, U.S. District Court for the District of Arizona).

[27] In 1955, Sen. Warren G. Magnuson (D-WA) and Sen. Henry M. Jackson (D-WA) introduced a bill that would have divided the Ninth Circuit and created a new Pacific Northwest circuit consisting of Alaska, Idaho, Montana, Oregon, and Washington. S. 2174, 84th Cong. (1955). *See also* H.R. 6967, 84th Cong. (1955) (sponsored by Rep. Alfred John Westland (R-WA)) & H.R. 7063, 84th Cong. (1955) (sponsored by Rep. Donald H. Magnuson (D-WA)). Similar bills followed. H.R. 9458, 83rd Cong. (1954) (sponsored by Rep. Donald H. Magnuson (D-WA)); H.R. 5677, 85th Cong. (1957) (sponsored by Rep. Donald H. Magnuson (R-WA)); S. 1876, 88th Cong. (1963) (sponsored by Sen. Olin D. Johnston (D-SC) and Sen. Warren G. Magnuson (D-WA)).

[28] Act of Oct. 13, 1972, Pub. L. No. 92-489, 86 Stat. 807.

[29] The commission was chaired by Senator Roman L. Hruska (R-NE). COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, THE GEOGRAPHIC BOUNDARIES OF THE SEVERAL JUDICIAL CIRCUITS: RECOMMENDATION FOR CHANGE, 62 F.R.D. 223, 224 (1973) [hereinafter HRUSKA REPORT].

[30] Act of Oct. 13, 1972, Pub. L. No. 92-489, § 1(a), 86 Stat. 807.

second only to the Fifth Circuit,[31] and the Hruska Commission recommended that both circuits be split,[32] noting that "the vast majority of the witnesses recognized that some change in the structure of the [Ninth Circuit] is necessary."[33] The Hruska Commission recommended that the Ninth Circuit be divided into two circuits: a new Ninth Circuit consisting of Alaska, Washington, Oregon, Idaho, Montana, Hawaii, Guam, and the Eastern and Northern Districts of California; and a new Twelfth Circuit consisting of Arizona, Nevada, and the Southern and Central Districts of California.[34] California quickly and vehemently opposed this recommendation.[35]

Authorization of Limited En Banc Panels

Congress did not enact the Hruska Commission proposals. Five years later, however, Congress authorized a procedure that unquestionably extended the lifespan of the current configuration of the Ninth Circuit—the use of limited en banc panels, permitting any court of appeals with more than fifteen active circuit judges to conduct en banc hearings with fewer than all active circuit judges.[36] At the same time, Congress increased the number of judgeships for both the Fifth and the Ninth Circuits.[37] After the Fifth Circuit conducted its first full en banc hearing with twenty-six active circuit judges, the judges agreed that a division was

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[31] HRUSKA REPORT, *supra* note 29, at 227-28.
[32] *Id.* at 228.
[33] *Id.* at 235.
[34] *Id.*
[35] *See* WHITE REPORT, *supra* note 25, at 57 (noting the "strong objections" to the Hruska recommendations); Arthur D. Hellman, *Legal Problems of Dividing a State Between Federal Judicial Circuits*, 122 U. PA. L. REV. 1188 (1974). This position has not changed. *See* COMMISSION ON STRUCTURAL ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS, PUBLIC HEARING IN SAN FRANCISCO, CALIFORNIA 351 (May 29, 1998) [hereinafter WHITE COMMISSION HEARING] (statement of Michael Traynor and Joseph P. Russoniello, California Attorneys). *See also* Letter from Sen. Dianne Feinstein (D-CA) to Hon. Byron R. White, Chair, White Commission (Dec. 3, 1998), *available at* http://www.ce9.uscourts.gov/Web/restructure.nsf/Impacts?OpenPage [hereinafter Sen. Feinstein Letter] (explaining her opposition to the division of California). Sen. Feinstein has continued to voice her opposition to any division of California. *Examining the Proposal to Restructure the Ninth Circuit: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (Sep. 20, 2006), *available at* http://judiciary.senate.gov/hearing.cfm?id=2071 [hereinafter 2006 Sen. Hearing] (statement of Sen. Dianne Feinstein (D-CA)).
[36] The Omnibus Judgeship Act of 1978, Pub. L. No. 95-486, § 6, 92 Stat. 1629 (1978). Only three circuits qualify for limited en banc hearings: the Fifth Circuit, the Sixth Circuit, and the Ninth Circuit. 28 U.S.C. § 44.
[37] The Omnibus Judgeship Act of 1978, § 3.

necessary,[38] and in 1980, the Fifth Circuit was divided into a new Fifth Circuit and an Eleventh Circuit.[39]

The Ninth Circuit, however, opted to conduct limited en banc hearings rather than have the circuit be divided. It adopted the limited en banc procedure in 1979, and has been the only circuit court to use it.[40] While the limited en banc procedure has congressional authorization, it is viewed by many—including some members of the Supreme Court and the Ninth Circuit—as inherently structurally flawed.[41] An important intermediate step toward division of the Ninth Circuit would be congressional revocation of authority to conduct limited en banc hearings.[42]

Post-Hruska Developments

After the Hruska Commission's report and the Ninth Circuit's adoption of the limited en banc procedure, the circuit-split controversy only intensified, and proposals to split the Ninth Circuit were once again introduced with regularity. Typically, though not always, these proposals suggested that a new northwest circuit be carved from the existing Ninth Circuit. In 1989, one such bill[43] was introduced by nine senators, including Senator Max Baucus (D-MT).[44] In 1995,

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[38] WHITE REPORT, *supra* note 25, at 21.

[39] Act of Oct. 14, 1980, Pub. L. No. 96-452, 94 Stat. 1994. *See generally* DEBORAH J. BARROW & THOMAS G. WALKER, A COURT DIVIDED: THE FIFTH CIRCUIT COURT OF APPEALS AND THE POLITICS OF JUDICIAL REFORM (1998).

[40] U.S. Ct. of App. 9th Cir. R. 35-3 (1979) (amended 2006). Chief Judge Mary M. Schroeder has testified that the limited en banc was the lynchpin of the Ninth Circuit not being divided. WHITE COMMISSION HEARING, *supra* note 35, at 73 (statement of Hon. Mary M. Schroeder, Chief Judge, U.S. Court of Appeals for the Ninth Circuit).

[41] *See infra* notes 149-54 and accompanying text.

[42] In 2005, Rep. Michael K. Simpson (R-ID) introduced a bill to revoke this authority. H.R. 1064, 109th Cong. (2005).

[43] S. 948, 101st Cong. (1989). Under S. 948, the new Ninth Circuit would consist of Arizona, California, and Nevada, and the Twelfth Circuit would consist of Alaska, Hawaii, Montana, Oregon, Washington, Guam, and the Northern Mariana Islands. *See* 135 CONG. REC. S4979-02, S5026 (1989) (statement of Sen. Slade Gorton (R-WA)). The bill was reported out of the Judiciary Committee in 1995 but was not passed by the full Senate. Ninth Circuit Court of Appeals Reorganization Act of 1995, S. 956, 104th Cong. (1995).

[44] Senator Baucus recently spoke out against the split proposed in S. 1845. 2006 Sen. Hearing, *supra* note 35. The other eight sponsors of the 1989 bill were Sen. Slade Gorton (R-WA), Sen. Conrad R. Burns (R-MT), Sen. Mark O. Hatfield (R-OR), Sen. James A. McClure (R-ID), Sen. Frank H. Murkowski (R-AK), Sen. Bob Packwood (R-OR), Sen. Ted Stevens (R-AK), and Sen. Stephen Symms (R-ID). S. 948, 101st Cong. (1989).

at a hearing before the Senate Committee on the Judiciary, Ninth Circuit Judge Diarmuid F. O'Scannlain testified regarding pending proposals to split the Ninth Circuit, at which time he stated: "First, I believe that Congress should make legislative findings that there is a limit on the size of any federal court of appeals, and that no court of appeals should continue to expand indefinitely."[45] In 1997, Senator Judd Gregg (R-NH) proposed dividing the Ninth Circuit into two circuits: a new Ninth Circuit consisting of California, and a new Twelfth Circuit consisting of the remaining Ninth Circuit states.[46]

White Commission

In response to the mounting controversy over the possible restructuring of the Ninth Circuit, in 1997, Congress created the Commission on Structural Alternatives for the Federal Courts of Appeals.[47] It was chaired by former United States Supreme Court Justice Byron R. White and became known as the White Commission.[48] The other four distinguished members appointed to the White Commission were Ninth Circuit Judge Pamela Ann Rymer, former Chief District Judge for the District of Arizona William D. Browning, Sixth Circuit Judge Gilbert S. Merritt, and attorney N. Lee Cooper, former president of the American Bar Association.[49] Professor Daniel J. Meador was selected as the executive director of the Commission.[50]

In its final report, the White Commission concluded that adjudicatively—but not administratively—the Ninth Circuit Court of Appeals required restructuring. To accomplish the necessary adjudicative restructuring, the White Commission recommended that the Ninth Circuit be subdivided into three semi-autonomous divisions: a Northern Division consisting of Alaska, Idaho, Montana, Oregon, and Washington; a Middle Division consisting of the Eastern District of California, the Northern District of California, Guam, Hawaii, Nevada, and the Northern Mariana Islands; and a Southern Division consisting of Arizona, the Southern District of California, and the Central District of California.[51] The White Commission concluded that it is preferable to have smaller decisional units of active circuit judges. To effectuate this goal in the Ninth Circuit, it recommended

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[45] *The Ninth Circuit Split: Hearing Before the S. Comm. on the Judiciary*, 104th Cong., 1995 WL 544471 (Sep. 13, 1995) (statement of Hon. Diarmuid F. O'Scannlain, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit).

[46] Frank J. Murray, *Senate Panel Passes Measure to Split Up Appeals Court*, THE WASHINGTON TIMES (D.C.), July 16, 1997, at A6.

[47] Act of November 26, 1997, Pub. L. No. 105-119, § 305, 111 Stat. 2440.

[48] WHITE REPORT, *supra* note 25, at 1.

[49] *Id.*

[50] At its first meeting, the Commission voted to ask Professor Meador to serve as Executive Director, and he accepted. *Id.* at 1-2.

[51] *Id.* at 43.

that each of the three semi-autonomous divisions conduct full en banc hearings.[52] The decisions of any division were not to be binding on the other two divisions.[53] Only in the event of intra-circuit "substantial and square conflict," would a limited en banc panel (consisting of the Chief Judge of the Ninth Circuit and four active circuit judges from each of the three semi-autonomous divisions) entertain further review.[54] In the words of Judge Kleinfeld, the White Commission recommended that "as a decisional body, the Ninth Circuit should be divided . . . [a]lthough as an administrative body, it should not be divided."[55]

The Commission offered several reasons as to why restructuring was necessary.[56] Restructuring would result in smaller decisional units, which are preferable to a court of twenty-eight active circuit judges.[57] It would also reduce the number of opinions for which judges of the decisional units would be responsible, enabling judges to keep up with all opinions.[58] The White Commission believed that the much smaller decisional units would likely both improve collegiality and largely eliminate the need for limited en banc hearings.[59]

On July 16, 1999, a Senate subcommittee held a hearing on S. 253, a bill that would have implemented the recommendations of the White Commission.[60] Opposition to the White Commission's recommendations was fierce.

Then-Ninth Circuit Chief Judge Procter Hug, Jr., characterized the White Commission's Report as recommending a "de facto split"[61] and said that its proposals were "seriously flawed."[62] He dismissed the White Commission's rec-

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[52] *Id.* at 43, 62, 94.
[53] *Id.* at 43.
[54] Hon. Pamela Ann Rymer, *How Big Is Too Big?*, 15 J.L. & POL. 383, 384 (1999); WHITE REPORT, *supra* note 25, at 45.
[55] 1999 Sen. Subcomm. Hearing, *supra* note 22, at 80 (statement of Hon. Andrew J. Kleinfeld, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit).
[56] WHITE REPORT, *supra* note 25, at 40.
[57] *Id.* at 47. Smaller decisional units promote consistency and predictability. *Id.*
[58] The Ninth Circuit labored under a staggering caseload at the time, and the number of cases has only increased since the White Commission made its recommendation. In fiscal year 1997, 8,692 appeals were filed in the Ninth Circuit Court of Appeals. WHITE REPORT, *supra* note 25, at 32. By September 30, 2006, that number has grown to a staggering 14,636 appeals filed per year. *Table B: U.S. Courts of Appeals, Appeals Commenced, Terminated, and Pending, by Circuit, during the Twelve Month Periods Ending Sept. 30, 2005 and 2006*, U.S. COURTS CASELOAD STATISTICS 1 (2006), http://jnet.ao.dcn/img/assets/4647/AppealsSept2006.pdf [hereinafter *2006 Caseload Statistics*].
[59] WHITE REPORT, *supra* note 25, at 47-50.
[60] Federal Ninth Circuit Reorganization Act, S. 253, 106th Cong. (1999) (sponsored by Sen. Frank H. Murkowski (R-AK) and Sen. Slade Gorton (R-WA)).
[61] Hon. Procter Hug, Jr., *Potential Effects of the White Commission's Recommendations on the Operation of the Ninth Circuit*, 34 U.C. DAVIS L. REV. 325, 330 (2000).
[62] 1999 Sen. Subcomm. Hearing, *supra* note 22, at 43, 47.

ommendations as "radical" and "untested," providing for a divisional approach that "abrogates circuit-wide stare decisis," thereby jeopardizing "uniformity, coherence, and predictability."[63] Chief Judge Hug also wrote that the White Commission's proposal would cause the law of the Ninth Circuit to "steadily drift apart."[64] At a House subcommittee hearing, Chief Judge Hug testified in opposition to the White Report's recommendations, and noted that his "view that the disadvantages far outweigh any advantages of the proposed restructurings is shared by a great majority of the judges on the Ninth Circuit Court of Appeals . . . ."[65] The American Bar Association and the Federal Bar Association opposed the White Commission's recommendation of three semi-autonomous divisions,[66] as did the Department of Justice.[67] Senator Dianne Feinstein (D-CA) expressed her adamant opposition to the division of California.[68]

Judges O'Scannlain and Kleinfeld were among the witnesses who testified in support of S. 253. Judge O'Scannlain stated that "there is nothing sinister, immoral, fattening, politically incorrect, or unconstitutional about the restructuring of judicial circuits."[69] He further stated: "No Court, not even mine, . . . has a God-given right to an exemption from the laws of nature. There is nothing sacred about the Ninth Circuit keeping essentially the same boundaries for over 100 years."[70]

The White Commission's recommendations were not enacted into law.

Recent Proposals, Including S. 1845

Every Congress since the release of the White Report has seen the introduction of bills to split the Ninth Circuit. The proposals have included the following: (1) a circuit split placing California and Nevada in a new Ninth Circuit and the

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[63] Hon. Procter Hug, Jr. & Carl Tobias, *A Split by Any Other Name . . .*, 15 J.L. & POL. 397, 407-08 (1999).
[64] Hon. Procter Hug, Jr., *supra* note 61, at 330.
[65] 1999 Sen. Subcomm. Hearing, *supra* note 22, at 45.
[66] Elizabeth Rogers, *ABA Opposes Plan to Restructure 9th Circuit Court of Appeals*, 85 A.B.A. J. 101 (Nov. 1999); Bruce Moyer, *FBA Opposes Ninth Circuit Division Proposal*, 46 FED. LAW. 8 (Aug. 1999).
[67] 1999 Sen. Subcomm. Hearing, *supra* note 22, at 122 (statement of Eleanor D. Acheson, Assistant Attorney General, representing the U.S. Department of Justice). Interesting in light of the Department of Justice's current position in support of a split, 2006 Sen. Hearing, *supra* note 35, were repeated statements from opponents of the White Commission's recommendations that the position of the Department of Justice merited significant weight. *See, e.g.*, 1999 Sen. Subcomm. Hearing, *supra* note 22, at 5-6 (statement of Sen. Dianne Feinstein (D-CA)). *See also id.* at 46-47 (statement of Hon. Procter Hug, Jr., Chief Judge, U.S. Court of Appeals for the Ninth Circuit).
[68] *See* Sen. Feinstein Letter, *supra* note 35.
[69] 1999 Sen. Subcomm. Hearing, *supra* note 22, at 88.
[70] *Id.* at 88.

remaining states in a new Twelfth Circuit;[71] (2) a three-way division of the Ninth Circuit consisting of a new Ninth Circuit of California, Hawaii, Guam, and the Northern Mariana Islands, a new Twelfth Circuit of Arizona, Nevada, Idaho, and Montana, and a new Thirteenth Circuit of Oregon, Washington, and Alaska;[72] (3) a circuit split placing California, Nevada, and Arizona in a new Ninth Circuit, and the remaining states in a new Twelfth Circuit;[73] (4) a circuit split placing California and Hawaii in a new Ninth Circuit and the remaining states in a new Twelfth Circuit;[74] and (5) a configuration that would have moved Arizona to the Tenth Circuit and created a new Ninth Circuit of California and Nevada and a new Twelfth Circuit of the remaining states.[75]

Numerous hearings have also been held. In 2002, Judge O'Scannlain testified before a House subcommittee in favor of a split, and Ninth Circuit Chief Judge Mary M. Schroeder and Ninth Circuit Judge Sidney R. Thomas testified in opposition to a split.[76] Judge O'Scannlain also testified in favor of a split at a 2003 House hearing, at which Chief Judge Schroeder and Ninth Circuit Judge Alex Kozinski—who is next in line to become chief judge—testified in opposition to a split.[77] At a Senate subcommittee hearing in 2004, Judge O'Scannlain, joined by

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[71] S. 562, 108th Cong. (2003) (sponsored by Sen. Lisa Murkowski (R-AK), Sen. Ted Stevens (R-AK), Sen. Conrad Burns (R-MT), Sen. Larry E. Craig (R-ID), Sen. Mike Crapo (R-ID), Sen. James M. Inhofe (R-OK), Sen. Gordon H. Smith (R-OR)).

[72] S. 1301, 109th Cong. (2005) (sponsored by Sen. John Ensign (R-NV), Sen. Larry E. Craig (R-ID), Sen. John Cornyn (R-TX), Sen. Tom Coburn (R-OK), and Sen. James M. Inhofe (R-OK)); H.R. 211, 109th Cong. (2005) (sponsored by Rep. Mike Simpson (R-ID) and Rep. Tom DeLay (R-TX)); S. 2278, 108th Cong. (2004) (sponsored by Sen. John Ensign (R-NV) and Sen. Larry E. Craig (R-ID)); H.R. 4247, 108th Cong. (2004) (sponsored by Rep. Rick Renzi (R-AZ) and Rep. Jon Porter (R-NV)).

[73] H.R. 212, 109th Cong. (2005) (sponsored by Sen. Mike Simpson (R-ID)); H.R. 2723, 108th Cong. (2003) (sponsored by Rep. Mike Simpson (R-ID)); H.R. 1203, 107th Cong. (2001) (sponsored by Rep. Mike Simpson (R-ID)); S. 2184, 106th Cong. (2000) (sponsored by Sen. Frank Murkowski (R-AK), Sen. Orrin Hatch (R-UT), Sen. Larry E. Craig (R-ID), Sen. Mike Crapo (R-ID), Sen. James M. Inhofe (R-OK), Sen. Gordon H. Smith (R-OR), and Sen. Ted Stevens (R-AK)).

[74] S. 1296, 109th Cong (2005) (sponsored by Sen. Lisa Murkowski (R-AK), Sen. Ted Stevens (R-AK), Sen. Conrad Burns (R-MT), Sen. Larry E. Craig (R-ID), Sen. Mike Crapo (R-ID), Sen. Jon Kyl (R-AZ), and Sen. Gordon H. Smith (R-OR)); H.R. 3125, 109th Cong. (2005) (sponsored by Rep. Mike Simpson (R-ID)).

[75] H.R. 1033, 108th Cong. (2003) (sponsored by Rep. Mike Simpson (R-ID), Rep. Greg Walden (R-OR), Rep. George Nethercutt (R-WA), and Rep. C.L. "Butch" Otter (R-ID)).

[76] *The Breakup of the Ninth U.S. Circuit Court: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 107th Cong. (July 23, 2002).

[77] *The Ninth Circuit Court of Appeals Judgeship and Reprganization Act of 2003: Hearing on H.R. 2723 Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 108th Cong. (Oct. 21, 2003).

Ninth Circuit Judge Richard C. Tallman and Eleventh Circuit Judge Gerald Bard Tjoflat, testified in support of a split, and Chief Judge Schroeder, former Ninth Circuit Chief Judge J. Clifford Wallace, and District Judge John C. Coughenour of the Western District of Washington testified in opposition.[78]

On March 4, 2005, James F. Sensenbrenner, Jr., Chairman of the House Committee on the Judiciary, traveled to San Francisco to meet with judges concerning the future of the Ninth Circuit.[79] He met with seventeen circuit and district judges, six of whom openly supported a split.[80]

> Two weeks later, Chairman Sensenbrenner addressed the U.S. Judicial Conference. In part, he stated:
>
> It is misleading for critics to assert that split opponents are motivated for the worst of reasons; that is, to change the Ninth's case law or dilute its effect . . . The Ninth is too big in so many ways. It leads all circuits in total appeals filed and pending. It represents too many people and too many litigants over too large an expanse of geography . . . It is not a question of *if* the Ninth will be split, but *when*.[81]

Chairman Sensenbrenner also linked the addition of any new judgeships in the federal judiciary to a division of the Ninth Circuit.[82]

Chief Judge Schroeder attributed efforts to split the Ninth Circuit to "dissatisfaction in some areas with some of our decisions."[83] She said: "This has a long historic basis, beginning with some fishing-rights decisions in the '60s and going forward to the Pledge of Allegiance case and . . . some of the immigration decisions."[84]

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[78] *Improving the Administration of Justice: A Proposal to Split the Ninth Circuit: Hearing Before the Subcomm. on Administrative Oversight and the Courts of the S. Comm. on the Judiciary*, 108th Cong. (Apr. 7, 2004) [hereinafter 2004 Sen. Subcomm. Hearing].

[79] Jeff Chorney, *Circuit Split Meeting Proves Divisive*, RECORDER (San Francisco), Mar. 17, 2005, at 1.

[80] *Id.* The six judges who openly supported a split were Ninth Circuit Judges Diarmuid F. O'Scannlain, Richard C. Tallman, and Cynthia Holcomb Hall, and U.S. District Judges William Fremming Nielsen (E.D. Wash.), Sam E. Haddon (D. Mont.), and John M. Roll (D. Ariz.).

[81] Sen. James F. Sensenbrenner, Jr., Chairman, House Committee on the Judiciary, Speech Before the U.S. Judicial Conference (Mar. 15, 2005), *available at* http://judiciary.house.gov/newscenter.aspx?A=459 (emphasis added).

[82] Jonathon D. Glater, *Lawmakers Trying Again to Divide Ninth Circuit*, N.Y. TIMES, June 19, 2005, at 116.

[83] *Id.*

[84] *Id.*

On October 26, 2005, a subcommittee of the Senate Committee on the Judiciary held a hearing regarding proposals to split the Ninth Circuit.[85] Proponents testifying in support of a split included Ninth Circuit Judges O'Scannlain, Kleinfeld, and Tallman, as well as the author. Split opponents who testified included Chief Judge Schroeder, Judge Kozinski, Judge Thomas, and District Judge Marilyn L. Huff of the Southern District of California. On November 14, 2005, the Department of Justice, in a letter to Chairman Sensenbrenner, announced its support of a circuit split, although it did not announce support for any particular configuration.[86]

In October of 2005, a House bill—H.R. 4093—was introduced which would have divided the Ninth Circuit into two circuits, with California and Hawaii, Guam, and the Northern Mariana Islands being placed in a new Ninth Circuit and the other seven states of the current Ninth Circuit being placed in a new Twelfth Circuit.[87] Also in October of 2005, nine senators co-sponsored S. 1845, a bill that provided for a split identical to H.R. 4093.[88] Both bills would have created seven additional judgeships for the new Ninth Circuit. Ultimately, in 2006, H.R. 4093 was reported out of the House Committee on the Judiciary.

During the fall of 2005, *Engage*, the official publication of the Federalist Society, published an article by Judge O'Scannlain in support of a split.[89] In the spring of 2006, Chief Judge Schroeder, joined by thirty-two active and senior circuit judges of the Ninth Circuit, co-authored a response.[90]

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[85] *Revisiting Proposals to Split the Ninth Circuit: An Inevitable Solution to a Growing Problem: Hearing Before the Subcomm. on Administrative Oversight and the Courts of the S. Comm. on the Judiciary*, 109th Cong. (Oct. 26, 2005) [hereinafter 2005 Sen. Subcomm. Hearing].

[86] Letter from William E. Moschella, Assistant Attorney General, U.S. Department of Justice, to Rep. James Sensenbrenner, Chair, House Committee on the Judiciary (Nov. 14, 2005); Congressional Research Service, *CRS Report for Congress: Proposals in the 109th Congress to Split the Ninth Circuit Court of Appeals*, (Dec. 14, 2005), at 12; 2006 Sen. Hearing, *supra* note 35 (statement of Rachel Brand, Assistant Attorney General, U.S. Department of Justice).

[87] H.R. 4093, 109th Cong. (2005) (Rep. James Sensenbrenner (R-WI), Rep. Mike Simpson (R-ID), Rep. Tom Feeney (R-FL), Rep. C.L. "Butch" Otter (R-ID), Rep. Ric Keller (R-FL), Rep. John Coble (R-NC), Rep. Spencer Bachus (R-AL), Rep. Brown-Waite (R-FL), Rep. Doc Hastings (R-WA), Rep. Thaddeus G. McCotter (R-MI), Rep. Patrick T. McHenry (R-NC)).

[88] S. 1845, 109th Cong. (2005) (sponsored by Sen. John Ensign (R-NV), Sen. Lisa Murkowski (R-AK), Sen. Conrad Burns (R-MT), Sen. Larry E. Craig (R-ID), Sen. Mike Crapo (R-ID), Sen. James M. Inhofe (R-OK), Sen. Jon Kyl (R-AZ), Sen. Gordon H. Smith (R-OR), and Sen. Ted Stevens (R-AK)).

[89] Hon. Diarmuid F. O'Scannlain, *Ten Reasons Why the Ninth Circuit Should Be Split*, 6(2) ENGAGE 58 (Oct. 2005).

[90] Hon. Mary M. Schroeder, et al., *A Court United: A Statement of a Number of Ninth Circuit Judges*, 7(1) ENGAGE 63 (Mar. 2006). The thirty-two Ninth Circuit judges who

On September 20, 2006, the Senate Committee on the Judiciary held a hearing on S. 1845. Senate proponents speaking in favor of the bill included Senators John Ensign (R-NV) and Lisa Murkowski (R-AK). Other witnesses who testified in favor of a circuit split were Judges O'Scannlain and Tallman, the author, Assistant United States Attorney General Rachel L. Brand, and Professor John C. Eastman. Senators Dianne Feinstein (D-CA), Max Baucus (D-MT), and Barbara Boxer (D-CA) made statements opposing S. 1845. Witnesses who testified in opposition included Chief Judge Schroeder and Judge Thomas, as well as William H. Neukom, President-Elect of the American Bar Association and former California senator and governor Pete Wilson. During the hearing, Senator Feinstein commented that no split of California would be acceptable.[91]

II. THE CURRENT PREDICAMENT OF THE NINTH CIRCUIT AND WHY THE CONFIGURATION PROPOSED IN S. 1845 IS THE ANSWER

The Ninth Circuit: A Failed Experiment

In 1998, United States Supreme Court Justice Anthony M. Kennedy wrote to the White Commission in support of a circuit split.[92] Speaking from the unique perspective of having served on the Ninth Circuit before his appointment to the Supreme Court, he wrote that the Ninth Circuit was too big.[93] He pointed out that having a circuit of the Ninth Circuit's size was an experiment—a view he has held since 1975.[94] He has concluded that "the large circuit has yielded no discernible advantages over smaller ones."[95] The "relative absence of persuasive, specific justifications for retaining [the Ninth Circuit's] large size" is striking.[96] "What began as an experiment should not become the status quo when it has not yielded real success. In my view, the judicial system would be better served if the states of the present Ninth Circuit were to comprise more circuits than one."[97] No matter what metric is used—caseload, population, the number of states, or the number of authorized judges—the Ninth Circuit is simply too large.

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joined Chief Judge Schroeder in co-authoring the article were Judges James R. Browning, Alfred T. Goodwin, J Clifford Wallace, Procter Hug, Jr., Otto R. Skopil, Betty B. Fletcher, Jerome Farris, Harry Pregerson, Warren J. Ferguson, Dorothy W. Nelson, William C. Canby, Jr., Robert Boochever, Stephen R. Reinhardt, Melvin Brunetti, Alex Kozinski, John T. Noonan, Jr., David R. Thompson, Michael D. Hawkins, A. Wallace Tashima, Sidney R. Thomas, Barry G. Silverman, Susan P. Graber, M. Margaret McKeown, Kim M. Wardlaw, William A. Fletcher, Raymond C. Fisher, Richard A. Paez, Marsha S. Berzon, Johnnie B. Rawlinson, Richard R. Clifton, Consuelo M. Callahan, and Carlos T. Bea.

[91] Sen. Feinstein Letter, *supra* note 35.

[92] Justice Kennedy Letter, *supra* note 4.

[93] *Id.* at 2-4.

[94] *Id.* at 1.

[95] *Id.* at 2.

[96] *Id.*

[97] *Id.* at 5.

A. Disproportionate Caseload

Recent statistics show that the Ninth Circuit has 17,299 appeals pending.[98] This represents over thirty percent of all pending federal appeals[99]—almost five times the average pending caseload for the other eleven geographic circuits.[100] As of September 30, 2006, it ranked first in case filings by a margin of 5,157 filings.[101]

On July 16, 1999, Judge Rymer told a Senate subcommittee that "the court's output is too large to read, let alone for each judge personally to keep abreast of, think about, digest or influence," with a resulting toll, over time, "on coherence and consistency, predictability, and accountability."[102] Since Judge Rymer offered this testimony, the Ninth Circuit's caseload has doubled.[103]

The current Ninth Circuit's disproportionate caseload is due in large part, if not in whole, to the caseload of California, as demonstrated by a comparison of the filings of the individual Ninth Circuit states to those of the Eighth Circuit's seven states and the Tenth Circuit's six states.[104]

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[98] *2006 Caseload Statistics*, *supra* note 58, at 1. Through September 30, 2006. *Id.* The statistics for September 2006 indicate a slight drop from the June 2006 numbers. Nonetheless, despite decrease in filings nationwide, and an 8.7% decrease in filings in the Ninth Circuit over the past year, the number of pending cases in the Ninth Circuit has increased 7.5% since September 2005. The Ninth Circuit continues to have thirty percent of all pending appeals. *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] 1999 Senate Subcomm. Hearing, *supra* note 22, at 60 (statement of Hon. Pamela Ann Rymer, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit, and Member, White Commission).

[103] *U.S. Court of Appeals for the Ninth Circuit Filings by State during the Twelve Month Period Ending March 30, 2006*, AIMS Database (2006) (table on file with author) [hereinafter *AIMS*] *2006 Caseload Statistics*, *supra* note 58. At the time of the White Report, the Ninth Circuit's caseload was about 8,500 cases. WHITE REPORT, *supra* note 25, at 32. As of September 30, 2006, there were 17,299 cases pending in the Ninth Circuit. *2006 Caseload* Statistics, *supra* note 58, at 1.

[104] Ninth Circuit Judge A. Wallace Tashima recently noted that more than half of the Ninth Circuit's caseload comes from a single California district—the Central District of California. Kenneth Ofgang, *Ninth Circuit Split Inevitable, Tashima Tells Gathering*, METROPOLITAN NEWS-ENTERPRISE (Los Angeles), Oct. 30, 2006, *available at* http://www.metnews.com/articles/2006/tash103006.htm.

8th Circuit Filings

State	Filings
AR	493
IA	434
MN	474
MO	1,068
NE	297
ND	58
SD	151

9th Circuit Filings

State	Filings
AK	168
AZ	1,245
CA	**11,050**
HI	290
ID	171
MT	323
NV	782
OR	649
WA	1,227

10th Circuit Filings

State	Filings
CO	507
KS	412
NM	354
OK	674
UT	322
WY	120

If the Ninth Circuit were to be divided in the manner suggested by S. 1845, the new Ninth Circuit would continue to have the largest caseload in the nation and the new Twelfth Circuit would have a caseload larger than five other circuits (D.C., First, Seventh, Eighth, and Tenth Circuits).

Case Filings—Before Split

Circuit	Filings
D.C.	1,354
1st	1,927
2nd	7,338
3rd	4,677
4th	5,556
5th	8,965
6th	5,354
7th	3,801
8th	3,426
9th	**15,317**
10th	2,818
11th	7,786

Case Filings—After Split

Circuit	Filings
D.C.	1,354
1st	1,927
2nd	7,338
3rd	4,677
4th	5,556
5th	8,965
6th	5,354
7th	3,801
8th	3,426
9th	**10,887**
10th	2,818
11th	7,786
12th	**4,430**

A split such as suggested in S. 1845, in addition to dividing the highest caseload in the country between two circuits, would also reduce the caseload per judge by adding seven judges to the new Ninth Circuit. The Ninth Circuit currently has the third highest number of cases per active judge (547 cases) and, with the addition of seven new judgeships, would drop to the fourth highest (494 cases). The caseload per judge of the new Twelfth Circuit would be seventh of the thirteen circuits.

Case Filings per Active Circuit Judge—Before Split

Circuit	Filings Per Judge
D.C.	113
1st	321
2nd	564
3rd	334
4th	370
5th	527
6th	334
7th	346
8th	311
9th	**547**
10th	234
11th	648

Case Filings per Active Circuit Judge—After Split

Circuit	Filings Per Judge
D.C.	113
1st	321
2nd	564
3rd	334
4th	370
5th	527
6th	334
7th	346
8th	311
9th	**494**
10th	234
11th	648
12th	**340**

The new Ninth Circuit would also benefit from the assistance of thirteen senior circuit judges.

B. Disproportionate Population

In 1891, when the Ninth Circuit Court of Appeals was created by the Evarts Act,[105] fewer than three million people inhabited the area that now comprises the Ninth Circuit.[106] Today, nearly sixty million people reside within the boundaries

[105] Circuit Court of Appeals Act, ch. 517, 26 Stat. 826 (1891).
[106] 1910 CENSUS, *supra* note 16, at 30.

of the Ninth Circuit[107]—twenty-seven million more than the next largest circuit.[108] Not counting the Ninth Circuit, the average federal geographical circuit has a population of just over twenty-two million people.[109] A new Twelfth Circuit, such as proposed in S. 1845, would have a population of 21.3 million people.[110]

Circuit Population—Before Split

Circuit	Population
DC	546,944
1st	14,223,876
2nd	23,460,010
3rd	22,220,386
4th	28,240,059
5th	30,628,590
6th	31,958,785
7th	24,616,453
8th	19,960,650
9th	**59,363,495**
10th	15,841,602
11th	31,445,636

Circuit Population—After Split

Circuit	Population
DC	546,944
1st	14,223,876
2nd	23,460,010
3rd	22,220,386
4th	28,240,059
5th	30,628,590
6th	31,958,785
7th	24,616,453
8th	19,960,650
9th	**37,993,842**
10th	15,841,602
11th	31,445,636
12th	**21,369,653**

Because very few cases receive any en banc review, three-judge panels end up deciding the law for nearly sixty million people. In 1998, Justice Kennedy wrote that any circuit claiming the right "to bind nearly one fifth of the people of the United States by decisions of its three-judge panels . . . must meet a heavy burden of persuasion."[111]

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[107] U.S. CENSUS BUREAU, U.S. DEP'T OF COMM., TABLE 1: ANNUAL ESTIMATES OF THE POPULATION FOR THE U.S. AND PUERTO RICO: APRIL 1, 2000 TO JULY 1, 2005, http://www.census.gov/popest/states/NST-ann-est.html [hereinafter 2005 STATE POPULATION ESTIMATES] (2005 population estimates for all fifty states); CENTRAL INTELLIGENCE AGENCY, THE WORLD FACT BOOK, http://www.cia.gov/cia/publications/factbook/index.html (2006 population estimates for Guam and the Northern Mariana Islands); *see also* Population Projections, *supra* note 3 (2006 population projections for all fifty states).

[108] 2005 STATE POPULATION ESTIMATES, *supra* note 107.

[109] *Id.*

[110] *Id.*; Population Projections, *supra* note 3.

[111] Justice Kennedy Letter, *supra* note 4, at 2.

C. Disproportionate Number of States

The current Ninth Circuit contains nine states, a commonwealth, and a territory.[112] Excluding the Ninth Circuit, the average circuit has fewer than four states. The nine states of the Ninth Circuit include the most populous state in the country[113] and the two fastest growing states.[114]

The new Twelfth Circuit, consisting of seven states, would be tied with the Eighth Circuit for the most states within a circuit.

Of course, since California has thirty-six million people—thirteen million more than the next largest state (Texas)—the new Ninth Circuit would have the largest population of any circuit, even after being reduced by twenty-one million people.

D. Disproportionate Number of Judges

The Ninth Circuit has twenty-eight authorized active circuit judgeships and twenty-three senior circuit judges.[115] It has requested and is clearly in need of seven more active circuit judgeships,[116] which would result in the Ninth Circuit having a staggering total of thirty-five active circuit judges. The other circuits

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[112] Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington, Guam, and the Northern Mariana Islands.

[113] California. *See* Press Release, *supra* note 1.

[114] Nevada and Arizona. *Id.* Ninth Circuit Judge Tashima recently observed "The Ninth Circuit is going to have to be split" because the western states are growing too fast. Ofgang, *supra* note 104.

[115] *U.S. Courts of Appeals Additional Authorized Judgeships: 2005*, U.S. COURTS JUDGESHIP STATISTICS, http://jnet.ao.dcn/img/assets/5151/authorized_appeals_05.pdf [hereinafter *2005 Judgeship Statistics*]; United States Court of Appeals for the Ninth Circuit: The Judges of This Court in Order of Seniority (July 9, 2006), http://www.ca9.uscourts.gov/ca9/Documents.nsf/174376a6245fda7888256ce5007d5470/0dbdee40d48f66408825683c0058477e/$FILE/judgeWeb.pdf [hereinafter Ninth Circuit Judge List].

[116] Justice Byron R. White, Chair of the White Commission, in a 1999 statement to a subcommittee of the House Judiciary Committee, noted that the Ninth Circuit "has 28 authorized judgeships and has requested more; it will undoubtedly need still more judges in the years ahead." *Final Report of the Commission on Structural Alternatives for the Federal Courts of Appeals Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*. 106th Cong. 220 (July 22, 1999) (prepared statement of Hon. Byron R. White, Chair, White Commission). The U.S. Judicial Conference has since requested seven additional judgeships. *See* Press Release, U.S. Judicial Conference, Federal Courts Seek Congressional Action on 68 New Judgeships (Nov. 17, 2005), *available at* http://www.uscourts.gov/Press_Releases/newjudgeshipsprint.html; U.S. Judicial Conference, Additional Judgeships or Conversion of Existing Judgeships Recommended by the

average fewer than fourteen active circuit judges.[117] The next largest circuit has seventeen authorized active circuit judgeships.[118]

In 1999, Judge Rymer observed that "[t]wo-thirds of the circuit judges throughout the country (including one-third of my colleagues on the Court of Appeals for the Ninth Circuit) believe that the maximum number of judges for an appellate court to function well lies somewhere between eleven and seventeen. Beyond this range there are too many judges . . . ."[119] Judge O'Scannlain has estimated that a court of fifty circuit judges, active and senior, results in 19,600 possible three-judge panel combinations.[120]

Both the Hruska and White Commissions discussed complaints by practitioners and judges that inconsistent decisions result from such a large pool of judges.[121] The White Report stated that more than lawyers elsewhere, Ninth Circuit practitioners reported that appellate results were unpredictable until the identity of the panel was known.[122] In 1999, Judge Kleinfeld told a Senate subcommittee that "[n]o district judge and no lawyer can, by reading even a few hundred of our decisions, predict what our court will do in the next case . . . . When a circuit grows to a size such that its judges cannot read and correct other panels' decisions, district judges and lawyers trying to figure out what the law is are compelled to say that it depends on who is on the panel."[123] Ninth Circuit Judge Stephen R. Reinhardt has written in two specific cases that panel composition determined the result.[124] With the addition of seven new circuit judges such as provided for

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Judicial Conference 2005, *available at* http://www.uscourts.gov/SummaryJudicialConferenceRecommendations.pdf. *See also* Judge Royal Furgeson, *Statement Before the Subcomm. on Administrative Oversight and the Courts of the S. Comm on the Judiciary*, 109th Cong. (2005), *available at* http://www.uscourts.gov/Press_Releases/newjudgeshipsprint.html.

[117] *Id.*

[118] *2005 Judgeship Statistics*, *supra* note 115.

[119] Rymer, *supra* note 54, at 384.

[120] Howard Bashman, How Appealing's 20 Questions Site: Interview with Hon. Diarmuid F. O'Scannlain, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit, (Mar. 3, 2003) at Question 7, http://20q-appellateblog.blogspot.com/2003_03_01_20q-appellateblog_archive.html.

[121] HRUSKA REPORT, *supra* note 29, at 234-35; WHITE REPORT, *supra* note 25, at 40.

[122] WHITE REPORT, *supra* note 25, at 40.

[123] 1999 Sen. Subcomm. Hearing, *supra* note 22, at 85 (prepared statement of Hon. Andrew J. Kleinfeld, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit). In his written submission to the Senate Committee on the Judiciary, Chief Judge Roll provided an "incomplete" list of twenty-six recent Ninth Circuit decisions which are unclear or in conflict with precedent. 2006 Sen. Hearing, *supra* note 35 (follow up questions for the Hon. John M. Roll, Chief District Judge, U.S. District Court for the District of Arizona).

[124] U.S. v. Barona, 56 F.3d 1087, 1105 (9th Cir. 1995) (Reinhardt, J., dissenting); Garcia v. Spun Steak Co., 13 F.3d 296, 301 (9th Cir. 1993) (Reinhardt, J., dissenting from denial of rehearing en banc).

in S. 1845, the new Ninth Circuit would have twenty-two active circuit judges, in addition to thirteen senior circuit judges. The new Twelfth Circuit would have thirteen active circuit judges, which is average for the other circuit courts.

The new Ninth Circuit would have a caseload reduced by 4,500 cases and would be the beneficiary of seven new circuit judgeships. The new Twelfth Circuit would look like the prototypical federal circuit court.

A circuit split such as proposed in S. 1845 would serve well all nine states of the current Ninth Circuit.

III. ADVERSE CONSEQUENCES OF THE NINTH CIRCUIT'S DISPROPORTIONATE SIZE

In his written statement in support of 1999 legislation, which would have enacted the recommendations of the White Report, Justice White pointed out that although "the Commission found no administrative malfunctions in the Ninth Circuit sufficient to call for a division or realignment of the circuit . . . , the *court of appeals* in the Ninth Circuit presents a different picture."[125] Justice White said that as an adjudicative body, the Ninth Circuit "encounters special difficulties" due to size, "that will worsen with continued growth."[126] He said that "[u]nder the circumstances, doing nothing would be irresponsible."[127]

White Commission member Judge Rymer testified that "the Court of Appeals for the Ninth Circuit is broke and should be fixed, but cannot be fixed without structural change."[128] She said that Justice White had a "strong conviction" that the Commission's recommendations should be enacted.[129] Judge Rymer pointed out that the Ninth Circuit has too many judges to function as a court, stating that "[t]he problem with the Ninth Circuit's Court of Appeals has nothing to do with good will or good administration."[130] Judge Rymer added that the court's output was too voluminous to read.[131] She testified that "a majority of the justices of the U.S. Supreme Court unequivocally say that it is time for change."[132]

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[125] 1999 Sen. Subcomm. Hearing, *supra* note 22, at 4 (prepared statement of Hon. Byron R. White, Chair, White Commission) (emphasis added).
[126] *Id.*
[127] *Id.*
[128] *Id.* at 60 (statement of Hon. Pamela Ann Rymer, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit, and Member, White Commission).
[129] *Id.*
[130] *Id.*
[131] 1999 Sen. Subcomm. Hearing, *supra* note 22, at 60 (statement of Hon. Pamela Ann Rymer, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit, and Member, White Commission).
[132] *Id.*

To be sure, a majority of the Supreme Court raised multiple concerns regarding the shortcomings of the Ninth Circuit. In 1998, Chief Justice William H. Rehnquist[133] and four other justices all informed the White Commission—in individual letters—that the Ninth Circuit was too big.[134]

Chief Justice Rehnquist wrote that "some change in structure" is needed and that the Ninth Circuit's limited en banc is problematic.[135] Justice Sandra Day O'Connor added that the Ninth Circuit "is simply too large," and "some division or restructuring of the Ninth Circuit seems appropriate and desirable."[136] Justice John Paul Stevens wrote that the arguments for dividing the Ninth Circuit into two or three circuits far outweigh arguments against a split.[137] Justice Antonin Scalia wrote to the Commission twice, first emphasizing the "incomplete and random nature of its en banc panel" as well as its untoward reversal rate,[138] then citing statistical evidence of the Ninth Circuit's high reversal rate.[139] Justice Scalia concluded with the observation that the Ninth Circuit has a "singularly (and I had thought notoriously) poor record on appeal."[140] Justice Kennedy said that the experiment of having an extremely large court had failed.[141]

In 1999, Professor Meador, who served as Executive Director of the White Commission, provided a prescient written statement to a House subcommittee, in support of legislation to enact the White Commission's recommendations. He

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[133] Letter from Chief Justice William H. Rehnquist to Hon. Byron R. White, Chair, White Commission (Oct. 22, 1998), *available at* http://www.library.unt.edu/gpo/csafca/report/comments/chiefj.pdf [hereinafter Chief Justice Rehnquist Letter].

[134] 1999 Sen. Subcomm. Hearing, *supra* note 22, at 60 (statement of Hon. Pamela Ann Rymer, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit, and Member, White Commission). *See also* Chief Justice Rehnquist Letter, *supra* note 133, at 1; Justice O'Connor Letter, *infra* note 136, at 1-2; Justice Stevens Letter, *infra* note 137, at 1-2; Justice Scalia Letter 1, *infra* note 142, at 1; Justice Scalia Letter 2, *infra* note 143, at 2; Justice Kennedy Letter, *supra* note 4, at 2-5.

[135] Chief Justice Rehnquist Letter, *supra* note 133, at 1.

[136] Letter from Justice Sandra Day O'Connor to Hon. Byron R. White, Chair, White Commission 2 (June 23, 1998), *available at* http://www.library.unt.edu/gpo/csafca/hearings/submitted/pdf/oconnor.pdf [hereinafter Justice O'Connor Letter].

[137] Letter from Justice John Paul Stevens to Hon. Byron R. White, Chair, White Commission 1 (Aug. 24, 1998), *available at* http://www.library.unt.edu/gpo/csafca/hearings/submitted/pdf/stevens.pdf [hereinafter Justice Stevens Letter].

[138] Letter from Justice Antonin Scalia to Hon. Byron R. White, Chair, White Commission 1 (Aug. 21, 1998), *available at* http://www.library.unt.edu/gpo/csafca/hearings/submitted/pdf/Scalia1.pdf [hereinafter Justice Scalia Letter 1].

[139] The Ninth Circuit's reversal rate was 81% while the other circuits' reversal rate was 57%. Letter from Justice Antonin Scalia to Hon. Byron R. White, Chair, White Commission 2 (Sep. 9, 1998), *available at* http://www.library.unt.edu/gpo/csafca/hearings/submitted/pdf/Scalia2.pdf [hereinafter Justice Scalia Letter 2].

[140] *Id.* at 2.

[141] Justice Kennedy Letter, *supra* note 4, at 1, 5.

reasoned that unless Congress acts, the "controversy over the Ninth Circuit will continue to fester, with . . . debilitating consequences . . . ."[142]

The Ninth Circuit's enormously disproportionate dimensions have resulted in several serious and adverse consequences. A non-exhaustive summary of these consequences is set forth below.

A. A Structurally Flawed Limited En Banc Procedure

Because it has so many judges, since 1980 the Ninth Circuit has (with congressional authorization[143]) heard cases en banc with fewer than all active circuit judges.[144] It is the only circuit court of appeals to do so. Until very recently, limited en banc panels in the Ninth Circuit consisted of eleven active judges;[145] as of January 2006, fifteen active circuit judges now sit on limited en banc panels.[146] Since adopting the limited en banc procedure, the Ninth Circuit has never conducted a full en banc hearing with all active circuit judges participating.[147]

A Widely Criticized Procedure

The Ninth Circuit's utilization of the limited en banc has been widely criticized by members of the federal judiciary. White Commission member Judge Rymer has said that a "'limited' en banc is an oxymoron, because 'en banc' means 'full bench.'"[148] In her 1998 letter to the White Commission, Justice O'Connor said that the Ninth Circuit's limited en banc hearings "cannot serve the purposes of en banc hearings as effectively as do the en banc panels consisting of all active judges that are used in the other circuits."[149] Justices Kennedy and Scalia, in their letters, also referred to the Ninth Circuit's limited en banc process.[150] Former Seventh Circuit Chief Judge Richard A. Posner has criticized what he refers to as the Ninth Circuit's "bob-tailed en banc procedure."[151]

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[142] 1999 Sen. Subcomm. Hearing, *supra* note 22, at 184 (prepared statement of Prof. Daniel J. Meador, Executive Director, White Commission).
[143] This act authorizes circuits with more than fifteen active circuit judges to hear cases en banc with fewer than all active circuit judges. Act of Oct. 20, 1978, Pub. L. No. 95-486, section 6, 92 Stat. 1629 (1978).
[144] U.S. CT. OF APPEALS, 9TH CIR. R. 35-3 (1979) (amended 2006).
[145] *Id.*
[146] *Id.*
[147] WHITE REPORT, *supra* note 25, at 32.
[148] Hon. Pamela Ann Rymer, *The 'Limited' En banc: Half Full, or Half Empty?*, 48 ARIZ. L. REV. 317, 317 (2006).
[149] Justice O'Connor Letter, *supra* note 136, at 2.
[150] Justice Kennedy Letter, *supra* note 4; Justice Scalia Letter 1, *supra* note 138.
[151] Hon. Richard A. Posner, *Is the Ninth Circuit Too Large? A Statistical Study of Judicial Quality*, 29 J. LEGAL STUD. 711, 712 (2000).

Although in 2006 the Ninth Circuit increased the number of active circuit judges participating in its limited en banc hearings from eleven to fifteen,[152] the addition of four judges is cosmetic only. When the Ninth Circuit is at full strength, this will still result in only fifteen of twenty-eight active judges of the court participating in limited en banc hearings. Judge Rymer has pointed out that "the limited en banc means that the views of off-panel judges are not necessarily known or taken into account in the collaborative effort to craft an opinion."[153]

Fifteen Votes Required for Limited En Banc Rehearing

In order for a case to be reheard en banc, a majority of the active circuit judges must vote in favor of rehearing.[154] In the Ninth Circuit, when the Court is at full strength, at least fifteen judges must vote for rehearing en banc. This is more judges than sit on most of the other circuit courts.[155] Since the White Report was issued in 1998, six or more Ninth Circuit judges have unsuccessfully voted for rehearing en banc thirty-four times.[156] The Supreme Court granted review in nine of these thirty-four cases; eight were reversed and one is still pending.[157]

In one recent case in which a three-judge panel reached a conclusion contrary to that arrived at by five other circuits, nine Ninth Circuit judges unsuccessfully voted for rehearing en banc.[158] In another recent case, on two occasions en banc review was denied and both times the Supreme Court granted review.[159]

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[152] Press Release, U.S. Courts for the Ninth Circuit, Ninth Circuit to Increase Size of *En Banc* Courts (Oct. 1, 2005), *available at* http://www.ca9.uscourts.gov/ca9/Documents.nsf/54dbe3fb372dcb6c88256ce50065fcb8/2c6819f99f6bc7038825708f006aa2d7/$FILE/9thCircuitEnBanc.pdf; *see also* U.S. CT. OF APPEALS, 9TH CIR. R. 35-3 (1979) (amended 2006).

[153] Rymer, *supra* note 148, at 323.

[154] FED. R. APP. P. 35.

[155] *2005 Judgeship Statistics*, *supra* note 115.

[156] 2006 Sen. Hearing, *supra* note 35 (prepared statement of Hon. John M. Roll, Chief Judge, U.S. District Court for the District of Arizona, Attachment I: Ninth Circuit, Recent Unsuccessful Votes for Rehearing En Banc, 1998-2006).

[157] *Id.* (prepared statement of Hon. John M. Roll, Chief Judge, U.S. District Court for the District of Arizona, Attachment I: Ninth Circuit—Recent Unsuccessful Votes for Rehearing En Banc: 1998-2006). Chief Judge Roll's testimony cites two cases still pending before the Supreme Court. However, the Supreme Court has since ruled on one of the cases, reversing the Ninth Circuit. Ayers v. Belmontes, 127 S. Ct. 469, 2006 WL 3257143 (Nov. 13, 2006).

[158] Bockting v. Bayer, 418 F.3d 1055 (9th Cir. 2005).

[159] Belmontes v. Woodford, 359 F.3d 1079 (9th Cir. 2004) (denying en banc review), *vacated sub nom.* Brown v. Belmontes, 544 U.S. 945 (2005), *en banc reh'g denied*, 427 F.3d 663 (9th Cir. 2005), *cert. granted sub nom.* Ornaski v. Belmontes, 126 S. Ct. 1909 (2006).

Finally, as Judge Rymer has pointed out, even if a majority of active circuit judges vote to rehear a case "limited en banc," since not all active circuit judges will be drawn to hear the case en banc, there is no assurance that all of the active circuit judges who vote for en banc review will be selected to hear the case.[160]

Close Votes Are Now Common in Limited En Banc Rehearings

In its December 1998 report, the White Commission stated that the Ninth Circuit's limited en banc procedure was not problematic because the limited en banc votes were seldom close.[161] This is no longer true. Since 1998, thirty-three percent (42 of 127) of the Ninth Circuit's limited en banc rulings have been by 6-5 or 7-4 votes.[162]

Although fifteen active circuit judges now participate in limited en banc hearings,[163] this does nothing to change the fact that far fewer than all active circuit judges will continue to participate in the Ninth Circuit's unique en banc procedure. The only likely change will be close votes of 8-7 or 9-6, with eight or nine judges speaking for a court of twenty-eight.[164] It is demonstrably incorrect to argue that in all forty-two cases with close votes, participation by the other active circuit judges would have made no difference.[165]

Three-judge panel members frequently are not picked for limited en banc hearings

Since the limited en banc panels do not include all active circuit judges, there have been occasions when none of the three-judge panel members who decided a case was picked to hear the case en banc.[166] In one highly publicized case, a unanimous three-judge panel was unanimously reversed 11-0 by a limited en

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[160] Rymer, *supra* note 148, at 321.
[161] WHITE REPORT, *supra* note 25, at 35.
[162] 2006 Sen. Hearing, *supra* note 35 (prepared statement of Hon. John M. Roll, Chief Judge, U.S. District Court for the District of Arizona, Attachment J: Ninth Circuit En Banc Votes, 1999-2006).
[163] U.S. CT. OF APPEALS, 9TH CIR. R. 35-3 (1979) (amended 2006).
[164] *See, e.g.*, Perez-Enriquez v. Gonzales, 463 F.3d 1007 (9th Cir. 2006) (8-7 vote, with three concurring in part, dissenting in part; four dissenting).
[165] For example, in *Payton v. Woodford*, 346 F.3d 1204 (9th Cir. 2003) (en banc), six of the eleven judges on the en banc panel granted habeas relief to a death row inmate. At least seven active judges on the Ninth Circuit would have denied relief—the five judges on the en banc panel, and two of the judges on the original panel. *See* Payton v. Woodford, 258 F.3d 905, 910 (9th Cir. 2001). For a more in-depth discussion of this phenomenon, see 2006 Sen. Hearing, *supra* note 35 (follow up questions for the Hon. Richard C. Tallman, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit).
[166] *See* Rymer, *supra* note 148, 322. *See also* Payton v. Woodford, 346 F.3d 1204 (9th Cir. 2003) (en banc); Cooper v. Woodford, 358 F.3d 1117 (9th Cir. 2004) (en banc).

banc court.[167] None of the three judges who participated in the panel decision was selected to rehear the case en banc.[168]

Judge Rymer has pointed out that when no panel member is drawn to hear the case on "limited en banc" (something that occurred in twenty-two of ninety-five limited en banc cases between 1999-2005),[169] the limited en banc panel "lacks the benefit of input from colleagues who are well-versed in the record and law applicable to the case, and whose work would bring a different perspective to en banc deliberations."[170]

Solutions

Enactment of legislation producing a circuit split such as that provided for in S. 1845 would enable the seven states of the new Twelfth Circuit—with its thirteen active circuit judges—to experience the benefits of full en banc review of cases now enjoyed by all other circuits except the current Ninth Circuit. The new Ninth Circuit might choose to continue conducting limited en banc hearings, particularly with the addition of seven new judges. However, even with the addition of seven judges such as provided for in S. 1845, these limited en banc panels would consist of fifteen of the court's twenty-two active judges—more than two thirds of the court.[171] If the Ninth Circuit remains structurally unchanged and the seven requested judgeships are authorized, only fifteen of thirty-five active circuit judges will participate in limited en banc hearings.

Alternatively, Congress could revoke authorization for the largest courts to conduct the structurally-flawed limited en banc hearings.[172]

B. Most Reversed Circuit

The Ninth Circuit is the most reversed circuit. Even more extraordinary, however, is the fact that since the White Report was issued in 1998, the Ninth Circuit has been reversed at least sixty-two times *unanimously*, i.e., with no dissent.[173]

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[167] Southwest Voter Registration Educ. Project v. Shelley, 344 F.3d 882 (9th Cir.), *reh'g en banc*, 344 F.3d 914 (9th Cir. 2003) (addressing the California gubernatorial recall procedure).
[168] *Id.*
[169] Rymer, *supra* note 148, at 322.
[170] *Id.* at 323.
[171] S. 1845, 109th Cong. (2005).
[172] This has recently been proposed by Rep. Mike Simpson (R-ID). H.R. 1064, 109th Cong. (2005).
[173] 2006 Sen. Hearing, *supra* note 35 (prepared statement of Hon. John M. Roll, Chief Judge, U.S. District Court for the District of Arizona, Attachment K: List of Ninth Circuit Cases Unanimously Reversed by the Supreme Court, 1998-1999 Term Through 2005-2006 Term).

No other circuit is close to having so many unanimous reversals. In only two of these sixty-two cases had the Ninth Circuit heard the matter en banc; the other sixty unanimous reversals were of three-judge panel decisions.[174] In the Supreme Court term recently completed, eighteen Ninth Circuit cases were reviewed and fifteen were reversed, most of them unanimously.[175] In effect, the Supreme Court is performing review of Ninth Circuit panel decisions that should be addressed by the Ninth Circuit in full en banc hearings. Since the Supreme Court only hears a limited number of cases per year, the Ninth Circuit, with its extraordinary reversal rate, is placing disproportionate demands on the Supreme Court's limited time.

C. Slowest Circuit in Decisional Time

The Ninth Circuit is the slowest circuit in decisional time when measured from the time of filing of notice of appeal to disposition.[176] Recent statistics indicate that the Ninth Circuit takes 15.9 months per case.[177] The Ninth Circuit is more than two months slower than the next slowest circuit and almost four months slower than the average circuit.[178] The Ninth Circuit now takes two months longer per case than it did when the White Report was issued in 1998.[179]

D. Under-representation in Judicial Conference

Every circuit is entitled to two representatives to the U.S. Judicial Conference, the policy-making body for the federal courts.[180] Nine states with a combined population of nearly sixty million people and accounting for thirty percent of all pending federal appeals should have two to three times the Judicial Conference representation received by the current Ninth Circuit. Splitting the Ninth Circuit would give better representation to all nine states.

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[174] Thomas v. Gonzales, 409 F.3d 1177 (9th Cir. 2005) (en banc), *vacated by* 126 S.Ct. 1613 (2006); Rucker v. Davis, 237 F.3d 1113 (9th Cir. 2001) (en banc), *rev'd sub nom.* Department of Housing and Urban Development v. Rucker, 535 U.S. 125 (2002) (Justice Breyer took no part in the decision.).

[175] 2006 Sen. Hearing, *supra* note 35 (prepared statement of Hon. John M. Roll, Chief Judge, U.S. District Court for the District of Arizona, Attachment K: Summary of the Ninth Circuit's Reversal Rate by the Supreme Court & List of Ninth Circuit Cases Unanimously Reversed by the Supreme Court, 1998-1999 Term Through 2005-2006 Term).

[176] *Table B4: U.S. Courts of Appeals, Median Time Intervals in Months for Cases Terminated After Hearing or Submission, By Circuit, During the Twelve Month Periods Ending Sept. 30, 2005 and 2006*, U.S. COURTS CASELOAD STATISTICS 21 (2006), http://jnet.ao.dcn/img/assets/4647/AppealsSept2006.pdf [hereinafter *2006 Decisional Time Statistics*].

[177] *Id.*

[178] *Id.*

[179] WHITE REPORT, *supra* note 25, at 32.

[180] 28 U.S.C. § 331 (2006).

IV. SPLIT OPPONENTS FAIL TO CARRY THE "HEAVY BURDEN"[181] THEY BEAR, AS THE OBJECTIONS TO A SPLIT CANNOT WITHSTAND SCRUTINY

In 1998, Justice Kennedy wrote that split opponents bear a "heavy burden of persuasion . . . ."[182] Split opponents woefully fail to meet this burden.

A. "It Would Cost Too Much to Split the Ninth Circuit."

Split opponents incorrectly claim that a circuit split would break the bank.[183] Existing facilities requiring modest modifications with relatively small price tags would meet the immediate needs for a new Twelfth Circuit headquarters in Phoenix, Arizona.[184]

It has been suggested that the immediate cost of a split of the Ninth Circuit is $100 to $125 million for a new circuit headquarters in Phoenix.[185] However, either of two existing Phoenix locations—the Sandra Day O'Connor U.S. Courthouse at 401 W. Washington ("401") or the 230 N. 1st Ave U.S. Courthouse ("230")—has adequate space to fully serve as a circuit headquarters for the midterm.[186] Executive summaries, courthouse floor plans and conceptual estimates developed by HBJL Collaborative, LLC ("HBJL"), and a letter from former Chief District Judge Robert C. Broomfield of the District of Arizona—submitted to a Senate subcommittee in 2005—show that either of the two existing courthouses in Phoenix can initially house a new Twelfth Circuit headquarters at a cost of approximately $5,821,282.76 or $9,683,697.29, respectively.[187] Judge Broomfield concurs with

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[181] *See supra* note 111 and accompanying text.

[182] Justice Kennedy Letter, *supra* note 4, at 2.

[183] 2006 Sen. Hearing, *supra* note 35 (prepared testimony of Hon. Mary M. Schroeder, Chief Judge, U.S. Court of Appeals for the Ninth Circuit). *See also id.* (statement of the American Bar Association); Letter from William N. LaForge, President, Federal Bar Association, to Sen. Arlen Specter, Chair, Senate Committee on the Judiciary (Sept. 18, 2006), at 2 [hereinafter FBA Letter].

[184] 2005 Sen. Subcomm. Hearing, *supra* note 85, at 126-27 (prepared statement of Hon. John M. Roll, District Judge, U.S. District Court for the District of Arizona).

[185] *The Breakup of the 9th U.S. Circuit Court Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 107th Cong. (July 23, 2002) [hereinafter 2002 House Subcomm. Hearing] (statement of Hon. Mary M. Schroeder, Chief Judge, U.S. Court of Appeals for the Ninth Circuit).

[186] Letter from Hon. Robert C. Broomfield, Senior District Judge, U.S. District Court for the District of Arizona, to Sen. Jeff Sessions, Chairman, Subcomm. on Administrative Oversight of the S. Comm. on the Judiciary (Oct. 19, 2005) [hereinafter Judge Broomfield Letter]

[187] HBJL Collaborative LLC, *Initial Housing Plan Alternatives for the Proposed New 12th Circuit Headquarters to Be Located in Phoenix, AZ Consisting of 14 Judges* (Oct. 14, 2005); Judge Broomfield Letter, *supra* note 186.

HBJL's conclusion that adequate space exists at both 401 and 230.[188] As the HBJL study and Judge Broomfield's letter reflect, a Twelfth Circuit headquarters can be attained in Phoenix now without a new circuit headquarters building.

In the past, the cost of additional circuit judgeships was sometimes included as a significant part of the cost of a circuit split. However, the reality is that seven new judgeships are needed, with or without a circuit split.[189]

B. "The Ninth Circuit Doesn't Want a Split."

Split opponents emphasize that most Ninth Circuit judges do not want a split.[190] Initially, it should be noted that a significant number of Ninth Circuit judges support a split of the circuit. Ninth Circuit Judges O'Scannlain, Tallman, and Kleinfeld have testified in support of a split of the Ninth Circuit.[191]

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[188] Judge Broomfield Letter, *supra* note 186. Judge Broomfield's evaluation of the HBJL analysis is deserving of great weight because of his extraordinary credentials. He served as a judge for thirty-six years, including fourteen years (eleven as presiding judge) on the Superior Court of Arizona in Maricopa County—then one of the nation's largest general jurisdiction trial courts—and twenty-one years (five as chief judge) on the U.S. District Court in Arizona. He has also been involved in the planning, design, and oversight of the construction of several state and federal courthouses, serving on the Space and Facilities Committee of the U.S. Judicial Conference from 1987-95 and serving as chair from 1989-95. In addition, in 1997, Judge Broomfield was appointed to the Judiciary's Budget Committee and chaired its Economy Subcommittee for several years. 2006 Sen. Hearing, *supra* note 35 (prepared statement of Hon. John M. Roll, Chief Judge, U.S. District Court for the District of Arizona). Judge Broomfield continues to serve on the Committee on the Budget.

[189] *See* Press Release, U.S. Judicial Conference, Federal Courts Seek Congressional Action on 68 New Judgeships (Nov. 17, 2005), *available at* http://www.uscourts.gov/Press_Releases/newjudgeshipsprint.html; U.S. Judicial Conference, Additional Judgeships or Conversion of Existing Judgeships Recommended by the Judicial Conference 2005, *available at* http://www.uscourts.gov/SummaryJudicialConferenceRecommendations.pdf. *See also* Judge Royal Furgeson, *Statement Before the Subcomm. on Administrative Oversight and the Courts of the S. Comm on the Judiciary*, 109th Cong. (2005), *available at* http://www.uscourts.gov/Press_Releases/newjudgeshipsprint.html.

[190] 2006 Sen. Hearing, *supra* note 35 (prepared statement of Hon. Mary M. Schroeder, Chief Judge, U.S. Court of Appeals for the Ninth Circuit); *id.* (statement of American Bar Association).

[191] 2005 Sen. Subcomm. Hearing, *supra* note 85, at 13, 89 (oral and prepared statements of Hon. Diarmuid F. O'Scannlain, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit); *id.* at 15, 149 (oral and prepared statements of Hon. Richard C. Tallman, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit); *id.* at 36, 57 (oral and prepared statements of Hon. Andrew J. Kleinfeld, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit).

The fact that a strong majority of Ninth Circuit judges opposes a split of the circuit—as evidenced by thirty-three of forty-seven Ninth Circuit judges recently "co-authoring" a Federalist Society magazine piece in opposition of a split[192]—should not be given undue weight. In its final report, the White Commission did not "regard the preferences of judges as dispositive."[193]

In expressing her support of a circuit split to the White Commission in 1998, Justice O'Connor said that "[i]t is human nature that no circuit is readily amenable to changes in boundary or personnel" and observed that "it is unrealistic to expect much sentiment for change from within any circuit."[194] Despite this institutional bias against change referred to by Justice O'Connor, twenty-four federal judges who sit in the Ninth Circuit recently signed a letter sent to the Senate Committee on the Judiciary in support of S. 1845.[195]

Although hundreds of law professors and many judges of the Ninth Circuit recently wrote to the Senate Committee on the Judiciary in opposition to a circuit split, far more significant are the 1998 opinions of a majority of the Supreme Court—the ultimate evaluators of the handiwork of all circuits—that the Ninth Circuit is too big. Judge Rymer, shortly after the White Commission issued its report, wrote that "many circuit judges, lawyers who practice within the [Ninth

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[192] Schroeder, et al., *supra* note 90. Even among those who oppose a split, some recognize that a split is inevitable. Ofgang, *supra* note 104 (quoting Ninth Circuit Judge A. Wallace Tashima). In addition, two opposition letters were submitted to the Senate Committee on the Judiciary by federal judges in the Ninth Circuit—one letter signed by forty-nine bankruptcy judges in the Ninth Circuit (thirty-one from California), and one signed by sixty-eight district judges in the Ninth Circuit (forty-three from California). Letter from Hon. Gregg W. Zive, Chief Nevada Bankruptcy Judge, to Hon. Arlen Specter, Chairman, Senate Committee on the Judiciary (July 27, 2006); Letter from Hon. Robert S. Lasnik, Chief Judge, U.S. District Court for the Western District of Washington, to Hon. Arlen Specter, Chairman, Senate Committee on the Judiciary (Sep. 19, 2006).

[193] WHITE REPORT, *supra* note 25, at 5.

[194] Justice O'Connor Letter, *supra* note 136, at 2.

[195] Letter from Hon. Richard C. Tallman, et al., to Sen. Arlen Specter, Chairman, Senate Committee on the Judiciary (June 29, 2006), *available at* http://ensign.senate.gov/static_media/062906_9thcircuit_letter.pdf. The other twenty-three judges who signed the letter were Ninth Circuit Judges Andrew J. Kleinfeld and Diarmuid F. O'Scannlain; Senior Ninth Circuit Judges Robert R Beezer, Ferdinand F. Fernandez, Cynthia Holcomb Hall, Thomas G. Nelson, Joseph T. Sneed, and Steven S. Trott; Chief District Judge John M. Roll and District Judges David C. Bury, Frederick J. Martone, and James A Teilborg, and Senior District Judge Robert C. Broomfield of the District of Arizona; Senior District Judge Howard B. Turrentine of the Southern District of California; District Judges Richard F. Cebull and Sam E. Haddon, and Senior District Judge Jack D. Shanstrom of the District of Montana; District Judge Robert C. Jones and Senior District Judge Lloyd D. George of the District of Nevada; Senior District Judges Malcolm F. Marsh and Owen M. Panner of the District of Oregon; District Judge Fred Van Sickle and Senior District Judge Wm. Fremming Nielson of the Eastern District of Washington. *Id.*

Circuit], and a majority of justices on the United States Supreme Court question how well the court of appeals performs its adjudicative functions."[196]

C. "There Is a Need for a Unified Law of the West."

Although split opponents have argued that the law of the west should be decided by a single circuit,[197] no other circuit spans an entire border or coast.[198] The eastern seaboard, for example, is subdivided into five circuits.[199] Justice Kennedy has pointed out the value to federalism of circuit courts being regional courts.[200]

D. "California Can't Be Separated from the Other Eight States of the Ninth Circuit."

Split opponents argue that because of close historic and economic ties, the other eight states must remain with California.[201] However, on the east coast, New Jersey and New York are in different circuits, as are Massachusetts and Connecticut, Delaware and Maryland, and South Carolina and Georgia.[202] Without any apparent difficulty, intellectual property cases as well as maritime law cases are distributed among multiple circuits on the eastern seaboard.[203]

E. "California and Arizona are Border Courts and Should Remain in the Same Circuit."

Split opponents argue that the Ninth Circuit should not be split because two of the five southwest border districts are in the Ninth Circuit.[204] However, the

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[196] Rymer, *supra* note 54, at 386.
[197] *See, e.g.*, 2006 Sen. Subcomm. Hearing, *supra* note 35 (prepared statement of Hon. Mary M. Schroeder, Chief Justice, U.S. Court of Appeals for the Ninth Circuit); 2005 Sen. Subcomm. Hearing, *supra* note 85 (Nov. 1, 2005 supplemental statement of Hon. Mary M. Schroeder, Chief Judge, U.S. Court of Appeals for the Ninth Circuit).
[198] Judge O'Scannlain notes: "There is no corresponding 'Law of the South' or 'Law of the East.'" 2005 Sen. Subcomm. Hearing, *supra* note 85, at 100 (statement of Hon. Diarmuid F. O'Scannlain, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit).
[199] 28 U.S.C. § 41 (2006).
[200] Justice Kennedy Letter, *supra* note 4, at 4.
[201] 2005 Sen. Subcomm. Hearing, *supra* note 85 (statement of Hon. Mary M. Schroeder, Chief Judge, U.S. Court of Appeals for the Ninth Circuit); *id.* (statement of Hon. Marilyn L. Huff, former Chief Judge, U.S. District Court for the Southern District of California); 2002 House Subcomm. Hearing, *supra* note 189 (statement of Hon. Sidney R. Thomas, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit).
[202] 28 U.S.C. § 41 (2006).
[203] 2005 Sen. Subcomm. Hearing, *supra* note 85, at 100 (prepared statement of Hon. Diarmuid F. O'Scannlain, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit).
[204] *See, e.g.*, *id.* at 55-56 (statement of Hon. Marilyn L. Huff, former Chief Judge, U.S. District Court for the Southern District of California).

five southwest border districts are already separated into three circuits: the Ninth (S.D. Cal. and D. Ariz.), Fifth (S.D. Tex. and W.D. Tex.) and Tenth (D. N.M) Circuits.[205]

F. "As a Result of Technological Advances and Creative Case Processing, the Ninth Circuit Is Able to Cope with its Large Number of Judges and Vast Caseload."

Split opponents argue that as a result of technological advances (e.g., e-mail, teleconferences, blackberries), and creative case processing techniques (e.g., the widespread use of screening panels, commissioners, and staff attorneys), the Ninth Circuit is able to cope with its vast caseload and disproportionate number of judges.[206]

It is not clear, however, that the Ninth Circuit is, in fact, able to cope with its staggering caseload. Ninth Circuit Judge Stephen R. Reinhardt, a split opponent, recently observed, "We work more [than we used to] but there just isn't time to give cases the attention they deserve . . . . [The judges will] all be dead long before we make any progress on [the hundreds of death penalty cases]."[207] Even where the Ninth Circuit is "coping," the case processing techniques employed pose additional problems. For example, according to Ninth Circuit Judge Arthur L. Alarcon, a Ninth Circuit screening panel recently disposed of 500 cases—most involving disabled persons, immigrants, or criminal defendants—in three days.[208] While this is a laudable accomplishment from an administrative standpoint, it is no wonder that Judge Alarcon said that others may find it "troubling."[209] Ninth Circuit Judge O'Scannlain, recently questioned whether shortcuts used by the Ninth Circuit may ultimately deprive litigants of Article III review of their cases.[210]

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[205] 28 U.S.C. § 41 (2006).

[206] 2006 Sen. Hearing, *supra* note 85, at 18 (statement of Hon. Mary M. Schroeder, Chief Judge, U.S. Court of Appeals for the Ninth Circuit); 2006 Sen. Hearing, *supra* note 35 (statement of the American Bar Association). *See also* Ofgang, *supra* note 104. The Ninth Circuit publishes only fifteen percent of its opinions, and usually does not grant oral argument. *Id.* (quoting Ninth Circuit Judge Stephen R. Reinhardt).

[207] Ofgang, *supra* note 104. Judge Reinhardt co-authored the 2006 *Engage* article discussed above. *See* Hon. Mary M. Schroeder et al., *supra* note 90.

[208] Ofgang, *supra* note 104.

[209] *Id.* (quoting Ninth Circuit Judge Arthur Alarcon).

[210] Hon. Diarmuid F. O'Scannlain, *supra* note 89, at 61-62.

G. "Rather than Reduce the Size of the Ninth Circuit, Other Circuits Should Be Bigger."

Some Ninth Circuit judges have argued that other federal circuits should be consolidated and have larger caseloads so as to follow the lead of the Ninth Circuit.[211] However, no other circuit has expressed an interest in becoming more like the Ninth Circuit.

Seventh Circuit Judge Richard A. Posner has said: "The Ninth Circuit is performing badly, a case reinforced by the impressions that almost everyone has who appears before the Ninth Circuit or reads its opinions."[212]

When the White Commission was conducting its study, Commission member and Judge William D. Browning repeatedly asked those who opposed a split, "How big is too big?" He never received a response.[213] Judge Browning noted that "those who support the current Ninth Circuit" do not believe "that there is such a thing as it being too big."[214] In 2004, he submitted a letter to a Senate subcommittee urging that if more judges are added to the Ninth Circuit, it should be divided.[215]

How big *is* too big? When the White Report was issued, the Ninth Circuit's caseload was about 8,500 cases[216] (of a national total of 52,271)[217] and it had a population of 51,450,000 people[218] (of a national total of over 271 million).[219]

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[211] 2005 Sen. Subcomm. Hearing, *supra* note 85 (Nov. 1, 2005 supplemental statement of Hon. Mary M. Schroeder, Chief Judge, U.S. Court of Appeals for the Ninth Circuit); 2004 Sen. Subcomm. Hearing, *supra* note 78 (statement of Hon. J. Clifford Wallace, Senior Judge, U.S. Court of Appeals for the Ninth Circuit).

[212] Howard Bashman, How Appealing's 20 Question Site: Interview with Hon. Richard A. Posner, Circuit Judge, U.S. Court of Appeals for the Seventh Circuit (Dec. 1, 2003) at Question 9, http://20q-appellateblog.blogspot.com/2003_12_01_20q-appellate-blog_archive.html.

[213] 1999 Senate Subcomm. Hearing, *supra* note 22, at 127 (statement of Hon. William D. Browning, Senior District Judge, U.S. District Court for the District of Arizona, and Member, White Commission).

[214] *Id.* Judge Tashima has acknowledged that the caseload of the Ninth Circuit may someday require an astronomical 100 judges. Ofgang, *supra* note 104.

[215] Letter from Hon. William D. Browning, Senior District Judge, U.S. District Court for the District of Arizona, and Member, White Commission, to Sen. Jeff Sessions, Chair, Subcommittee on Administrative Oversight and the Courts of the Senate Committee on the Judiciary (Apr. 29, 2004). The letter was also signed by Judge Broomfield and then-District Judge John M. Roll.

[216] WHITE REPORT, *supra* note 25, at 32.

[217] *Id.* at 16.

[218] *Id.* at 27.

[219] *Id.*

In the interim, the Ninth Circuit's caseload has doubled (17,229 pending cases as of September 30, 2006)[220] and the population has increased by eight million people.[221]

H. "The Ninth Circuit Is a National Beacon and Cutting-edge Innovator."

Although the Ninth Circuit sometimes depicts itself as a national beacon for the other federal courts and a cutting edge innovator,[222] it is actually just one of twelve regional circuit courts. It is not entitled to a position of preeminence over all other circuits.

I. "Before the Ninth Circuit Is Divided, More Studies Are Needed."

Some split opponents have urged that more hearings and studies are required.[223] Whether to divide the Ninth Circuit has been the subject of countless hearings, the most recent having been held on September 20, 2006, before the Senate Committee on the Judiciary.[224]

In a little more than three decades, two national commissions, the Hruska Commission (1973)[225] and the White Commission (1998),[226] studied the Ninth Circuit and made recommendations. The Hruska Commission recommended that both the Fifth and Ninth Circuits be divided.[227] The White Commission recommended what has been described as a "de facto split"[228] of the Ninth Circuit Court of Appeals, proposing that the Ninth Circuit be subdivided into three semi-autonomous divisions.[229] Prior to issuance of the White Report, the White Commission held several hearings in the Ninth Circuit.[230] This issue has been

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[220] *2006 Caseload Statistics*, *supra* note 58, at 1.
[221] 2005 STATE POPULATION ESTIMATES, *supra* note 107; CENTRAL INTELLIGENCE AGENCY, THE WORLD FACT BOOK http://www.cia.gov/cia/publications/factbook/index.html (2006 population estimates for Guam and the Northern Mariana Islands); Population Projections, *supra* note 3.
[222] 2006 Sen. Hearing, *supra* note 35 (statement of Hon. Mary M. Schroeder, Chief Judge, U.S. Court of Appeals for the Ninth Circuit).
[223] Carl Tobias, *A Divisional Arrangement for the Federal Appeals Courts*, 43 ARIZ. L. REV. 633, 661-64 (2001). *See also* 2006 Sen. Hearing, *supra* note 35 (statement of Sen. Dianne Feinstein (D-CA)).
[224] 2006 Sen. Hearing, *supra* note 35.
[225] HRUSKA REPORT, *supra* note 29.
[226] WHITE REPORT, *supra* note 25.
[227] HRUSKA REPORT, *supra* note 29, at 228-29.
[228] Hon. Procter Hug, Jr., *supra* note 61, at 330.
[229] WHITE REPORT, *supra* note 25, at 40-41.
[230] *Id.* at 2-3. *See also* White Commission, Public Hearings and Testimony, *available at* http://www.library.unt.edu/gpo/csafca/schedule.htm.

studied to distraction. No further studies or hearings are warranted; they would only delay the necessary and the inevitable.

J. "The White Commission's Recommendations Are an Attractive Alternative to a Split of the Ninth Circuit."

When the White Report's recommendations were announced, the Ninth Circuit Court of Appeals' opposition to them was vociferous.[231] The White Commission's recommendations represent a valiant, extraordinary and unprecedented effort to prevent the division of a circuit that has simply grown to unworkable dimensions from an adjudicative standpoint. Since the White Report was issued, the population in the nine states of the Ninth Circuit has increased by eight million people and the caseload has doubled.[232] Even assuming that today's split opponents have reversed themselves and now believe the White Report's key recommendations are appropriate (i.e., three semi-autonomous divisions with full divisional en banc review, nonbinding interdivisional caselaw, and circuit-wide limited en banc restricted to "substantial and square conflicts"), an actual split of the circuit is the best solution.

K. "Disparity in Caseload Between a New Circuit with California and a New Circuit of the Remaining States Is Unfair."

Opponents of a split have suggested that the various splits proposed would create unfair disparity in caseload between the new Ninth Circuit and the new Twelfth Circuit.[233] The Ninth Circuit currently ranks third in caseload, with 547 cases per active circuit judge.[234]

Under legislation such as S. 1845, with its addition of seven new judgeships, the new Ninth Circuit's caseload would be significantly reduced—dropping from 547 cases per active circuit judge to 494 cases per active circuit judge.[235] The new

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[231] *See supra* notes 60-68 and accompanying text.
[232] *See supra* notes 216-21 and accompanying text.
[233] 2006 Sen. Hearing, *supra* note 35 (statement of Hon. Mary M. Schroeder, Chief Judge, U.S. Court of Appeals for the Ninth Circuit); FBA Letter, *supra* note 187, at 2; Ofgang, *supra* note 104 (quoting Ninth Circuit Judge A. Wallace Tashima). However, as Judge Tashima noted, the bulk of Ninth Circuit cases originate in California—more than fifty percent come from the Central District of California alone. *Id.* Absent a division of California—which is adamantly opposed by that state, *see supra* notes 35, 68—it is not possible to divide the Ninth Circuit into two circuits with equal caseloads.
[234] *2006 Caseload Statistics*, *supra* note 58; *2005 Judgeship Statistics*, *supra* note 115. Only the Eleventh and Second Circuits have a higher caseload per judge. *Id.*
[235] *2006 Caseload Statistics, supra* note 58; *2005 Judgeship Statistics, supra* note 115; AIMS, *supra* note 103.

Ninth Circuit would also have thirteen senior circuit judges to assist with this caseload.[236] Overall, the caseload of the new Ninth Circuit judges would be less than three other circuits.[237] In addition, although the new Twelfth Circuit would have a caseload of 340 cases per active circuit judge, a number significantly smaller than the caseload of the new Ninth Circuit, its caseload would be larger than that of six other circuits.[238] Split opponents continue to invoke the mantra that any split must be even, but California cannot be divided between two circuits. Therefore, since any circuit split that does not divide California would not be "even," no circuit split is possible. This reasoning cannot continue to prevail.

L. "A New Twelfth Circuit Would Have No Bankruptcy Appellate Panel."

Some split opponents have said that the new Twelfth Circuit would not have a Bankruptcy Appellate Panel.[239] However, the much smaller Tenth Circuit has a bankruptcy appellate panel. Former Chief District Judge Lloyd D. George of the District of Nevada, an organizer of the Ninth Circuit Bankruptcy Appellate Panel and a former chief bankruptcy judge, sees no impediment to a bankruptcy appellate panel in the new Twelfth Circuit.[240]

M. "The Problems Associated with the Ninth Circuit Will Be Alleviated Once Current Vacancies Are Filled."

Split opponents suggest that filling vacant judgeships is the solution to the Ninth Circuit Court of Appeals' problems.[241] More judges, however, will not solve the insurmountable difficulties caused by the massive caseload, population, and number of judges. Judge Rymer, in testifying before a Senate subcommittee nine

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[236] Ninth Circuit Judge List, *supra* note 116; S. 1845, 109th Cong. (2005).

[237] The Eleventh, Second, and Fifth Circuits would have higher caseloads. *2006 Caseload Statistics*, *supra* note 58; *2005 Judgeship Statistics*, *supra* note 115.

[238] The new Twelfth Circuit would have a caseload higher than the D.C., First, Third, Sixth, Eighth, and Tenth Circuits. *2006 Caseload Statistics*, *supra* note 58; *2005 Judgeship Statistics*, *supra* note 115.

[239] 2005 Sen. Subcomm. Hearing, *supra* note 85, at 174 (statement of Hon. Sidney R. Thomas, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit).

[240] 2006 Sen. Hearing, *supra* note 35 (statement of Hon. John M. Roll, Chief Judge, U.S. District Court for the District of Arizona). Judge George has extensive expertise in the area of bankruptcy courts. He has served as both a bankruptcy and district court judge, has published several articles dealing with bankruptcy practice, and served as chair of the Bankruptcy Rules Committee of the U.S. Judicial Conference. Valerie Stewart, *Hon. Lloyd D. George and Hon. Edward C. Reed, Jr., Senior U.S. District Judges for the District of Nevada*, 53 FED. LAW. 33, 33-34 (Aug. 2006).

[241] *See* 2006 Sen. Hearing, *supra* note 35 (statement of Hon. Mary M. Schroeder, Chief Judge, U.S. Court of Appeals for the Ninth Circuit); *id.* (statement of the American Bar Association).

years ago, said that "no amount of [good will or good administration] can make it possible for 30, 40, or 50 or more judges to decide cases together. It simply cannot be done, and that is the problem."[242]

N. "The Composition of the Judges on the New Twelfth Circuit Would Lack Ethnic Diversity."

Opponents have even suggested that no split can occur because the new Twelfth Circuit would have no Hispanic circuit judges.[243] The composition of circuit judges on any circuit is a transitory feature. Little wonder that the White Commission stated in its final report: "There is one principle that we regard as undebatable: it is wrong to realign circuits (or not realign them) and to restructure courts (or leave them alone) because of particular judicial decisions or particular judges."[244]

The new Twelfth Circuit would have a relatively small number (thirteen) of active circuit judges, of which one would be African-American. The ethnic composition of a court—or a proposed court—at a particular point in time is not a compelling reason to fail to split the Ninth Circuit.[245]

O. "Attempts to Split the Ninth Circuit Are Politically Motivated."

Despite the overwhelming and compelling evidence in support of a circuit split, some split opponents continue to rely upon the unfounded claim that attempts to split the Ninth Circuit are simply politically motivated.[246] However, judges who support a split have consistently focused on the impracticality of having a single circuit court of such enormous proportions. Circuit-splitting bills have been sponsored by Democrats, Republicans, and independents alike.[247] While there is little or no evidence of pro-split judges and lawyers articulating

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[242] 1999 Senate Subcomm. Hearing, *supra* note 22, at 60 (statement of Hon. Pamela Ann Rymer, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit, and Member, White Commission).

[243] Pamela A. MacLean, *New Circuit with No Hispanics Draws Fire: A 9th Circuit Judge Protests Current Proposal for a New 12th Circuit*, NAT'L L.J. 4 (Oct. 2, 2006).

[244] WHITE REPORT, *supra* note 25, at 6.

[245] Ninth Circuit Judge Stephen R. Reinhardt, who opposes a split of the Ninth Circuit, recently stated, "I don't think [race or gender] is what counts," as it does not seem to affect rulings. Ofgang, *supra* note 104.

[246] Glater, *supra* note 82, at 116; Ofgang, *supra* note 104.

[247] *See supra* notes 23-91 and accompanying text. Moreover, the political effects of a split are unclear, as the current members of the court would continue to serve, the Ninth Circuit precedent to date would remain intact, and the proportion of Republican and Democratic nominees in both new circuits would be roughly comparable.

political reasons for a division of the circuit, this has not been true of all split opponents.[248] The reasons a split is necessary far transcend politics. No one can seriously maintain that the Ninth Circuit is proportionate to the other geographic circuit courts or that it adjudicates well despite its enormous caseload and number of judges.

V. CONCLUSION

The administration of justice is not well-served by having one of twelve federal circuit courts entertain thirty percent of the nation's federal appeals, house one-fifth of the nation's population, and contain nearly one-fifth of the nation's states (including the most populous state). The consequences of having a single circuit encompass so many states and hear so many cases resonate in many ways, including too many judges, lengthy dispositional time, utilization of a structurally flawed limited en banc process, an extraordinary unanimous reversal rate, and gross under-representation in the U.S. Judicial Conference.

For 115 years there has been no diminution in the boundaries of the Ninth Circuit despite a more than twenty-fold increase in population. The need for a split has been discussed in earnest for over three decades, including studies by two national commissions. The situation has become exacerbated and, without a division of the Ninth Circuit, will continue to deteriorate. This issue will not go away.

For Congress to divide the Ninth Circuit is not an attack upon judicial independence; it is the wise exercise of authority expressly entrusted to Congress by the Constitution.

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[248] *See* Justin Scheck, *Circuit Breakers Attack Overload*, RECORDER (San Francisco), July 14, 2006, at 1; Lawrence Hurley, *Environmentalists Ask Senate to Leave the 9th Circuit Alone*, THE DAILY JOURNAL, Aug. 4, 2006. Ofgang, *supra* note 104 (quoting Ninth Circuit Judge Stephen R. Reinhardt: "[T]he issue of a circuit split [will] be dead for at least two years if the Democrats win control of either house.").

WYOMING LAW REVIEW

VOLUME 7 *2007* NUMBER 1

IS *LARA* THE ANSWER TO IMPLICIT DIVESTITURE? A CRITICAL ANALYSIS OF THE CONGRESSIONAL DELEGATION EXCEPTION

*Anna Sappington**

I. INTRODUCTION 150
II. 1823-1977: THE DOCTRINES OF DISCOVERY AND PLENARY POWER 151
  A. Johnson v. M'Intosh*: The Doctrine of Discovery and the United States as Successor in Interest* 151
  B. Lone Wolf v. Hitchcock*: The Advent of Congressional Plenary Power* 155
  C. *Analysis of Early Doctrines Regarding Tribal Sovereignty* 157
III. 1978-PRESENT: THE RISE OF JUDICIAL CONSTRAINTS ON TRIBAL SOVREIGNTY 158
  A. Oliphant *and Its Progeny: Implied Divestiture of Tribal Sovereignty* 159
  B. *Reining in Implicit Divestiture:* Duro, Lara, *and the Congressional Delegation Exception* 165
IV. POST-*LARA*: IS THE CONGRESSIONAL DELEGATION EXCEPTION "THE" ANSWER TO IMPLICIT DIVESTITURE? 168
  A. *An Overview of Literature Treating the Congressional Delegation Exception: Of Promise and Problems* 168
  B. *The Lurking Issue: Implicit Divestiture as an Unmoored Doctrine* 170
  C. *Constitutional Limits on the Congressional Delegation Exception? An Illustration of the Problems of an Unmoored Doctrine* 175
V. CONCLUSION 180

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I. INTRODUCTION

When the colonies attained their political independence from Europe, they also acquired a problematic relationship with the indigenous peoples who already inhabited the "new" continent. Due to Britain's practice of seeking tribal consent to settle lands, underlying questions about the tribes' and tribal members' rights vis-à-vis settlers lay dormant during the period of Britain's rule.[1] Since the United States' formation, however, tribal and Anglo-American interests often have conflicted.[2] As a result, the Supreme Court repeatedly has adjudicated the tribes' and the United States' respective rights as sovereigns.[3]

The Court's jurisprudence in deciding these disputes is best understood as two separate periods: 1823-1977, and 1978 to present. In both, the Court developed doctrines to vindicate the United States' interests at the expense of tribal sovereignty, but there are important distinctions between them. During the first period, the doctrines the Court developed constrained sovereignty when its exercise *expressly* conflicted with the interests of the United States.[4] In the second period, the Court extended its inquiry and began to divest tribes of sovereignty when it considered that sovereignty *implicitly* incongruent with the United States' interests—even when allowing tribal sovereignty would not create an express conflict between the two sovereigns.[5]

This Article explores the limits that the Court historically has imposed upon tribal sovereignty and the questions raised by the Court's most recent doctrine: the doctrine of implicit divestiture. Part II reviews the two doctrines the Court developed during the first period of its Indian law jurisprudence: the doctrine of

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[1] *See* DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 55 (5th ed. 2005).

[2] *See generally* GETCHES ET AL., *supra* note 1. Getches' casebook gives concise synopses of the United States' Indian Law jurisprudence and current conflicts within federal Indian Law.

[3] *See*, *e.g.*, Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) (concerning effects of discovery upon tribal sovereign rights); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903) (holding that Congress has plenary power over Indian tribes); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (stating that Indian tribes are impliedly divested of sovereign authority where exercise of power is inconsistent with the tribes' status).

[4] *See Lone Wolf*, 187 U.S. at 565-66 (holding that Congress has plenary power over "tribal relations," and explaining that this legislative power allows Congress to pass laws in conflict with treaty provisions); *Johnson*, 21 U.S. at 573 (holding that discovery necessarily diminished tribes' rights to alienate land).

[5] *Oliphant*, 435 U.S. at 208-09 ("[T]he tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments. . . . Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty.").

discovery and the doctrine of plenary power. Part III introduces the second period's doctrine of implicit divestiture, and discusses a potential limit on that doctrine: the "congressional delegation exception," the use of which the Court recently held removed a constraint on tribal jurisdiction that the Court had imposed under the implicit divestiture doctrine. Part IV reviews commentators' thoughts about how the exception might be used to fortify tribal sovereignty, and considers potential problems in applying the exception. It argues that, at present, the implicit divestiture doctrine lacks a coherent rationale; that this makes the doctrine unmoored and malleable; and that its malleability potentially poses enormous threats to exercises of tribal sovereignty—even those expressly sanctioned by Congress.

II. 1823-1977: THE DOCTRINES OF DISCOVERY AND PLENARY POWER

The Supreme Court considered the nature of tribal authority beginning in the nineteenth century, as interactions between non-Indians and tribes generated litigation.[6] To resolve these disputes, the Court developed two doctrines: the doctrine of discovery and the doctrine of plenary power. The effect of these doctrines was to vindicate the United States' interests at the expense of tribal sovereignty.

A. Johnson v. M'Intosh*: The Doctrine of Discovery and the United States as Successor in Interest*

In *Johnson v. M'Intosh*,[7] the Court considered the effect of Europe's discovery of the New World upon tribal sovereignty. The case involved competing claims to land originally inhabited by the Illinois and Piankeshaw Indians which had been under Britain's control. Prior to the American Revolution, the Tribes' chiefs sold the lands to various non-Indian individuals.[8] Virginia assumed control of the territory during the Revolution and later ceded its rights to the United States; the United States, in turn, eventually sold the tracts to McIntosh.[9] After McIntosh took possession of the land, the parties that had purchased it from the Tribes sued McIntosh, arguing they had superior title. [10]

The Court reviewed the history of North America's colonization[11] and concluded that the European "discovery" of the continent necessarily divested Indian nations of complete sovereignty.[12] The Court based its holding on the "doctrine of

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[6] *See*, *e.g.*, *Johnson*, 21 U.S. 543.
[7] *Id*.
[8] *Id*. at 550-54 (Illinois Indians); *see also id.* at 555-58 (Piankeshaw Indians).
[9] *Id*. at 558-60.
[10] *See id.* at 560-62. Plaintiffs also included successors in interest to the parties that had purchased the lands. *Id*. at 560-61.
[11] Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 574-87 (1823).
[12] *Id*. at 574.

discovery" developed by colonizing European governments.[13] This doctrine, the Court explained, grew out of a mutual need:

> On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. . . . [A]s they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves.[14]

Thus, as the various European nations rushed to stake claims on the "new" continent, it became to the advantage of each to establish rules by which its claims would be respected by the others. These interests converged to establish the doctrine of discovery by which each European nation vindicated its claims in exchange for recognizing the claims of its colonial competitors.

According to the Court, the doctrine's "original fundamental principle" was that discovery gave the discoverer the sole right to title over the discovered land.[15] This title, the Court found, was "consummated" by possessing the land.[16] Until possession, discovery prevented other European governments from establishing any claim to the land, including claims based on negotiations with the tribes that occupied it.[17]

The Court next considered the effect of the doctrine upon the rights of North America's indigenous inhabitants:

> The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.

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[13] *See id.* 572-74 (discussing discoverers' rights as recognized by European colonizing governments); *see also id.* at 587 (stating that the United States has "unequivocally acceded" to doctrine that discovery granted discoverer rights). For a comprehensive discussion of the doctrine of discovery, see generally ROBERT J. MILLER, NATIVE AMERICA, DISCOVERED AND CONQUERED: THOMAS JEFFERSON, LEWIS & CLARK, AND MANIFEST DESTINY (2006).
[14] *Johnson*, 21 U.S. at 572-73.
[15] *Id.* at 574 ("original fundamental principle"); *see also id.* at 573 ("[D]iscovery gave title to the government by whose subjects, or by whose authority, it was made, as against all other European governments, which title might be consummated by possession.").
[16] *Id.* at 573.
[17] *See id.*

> Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.
>
> In the establishment of these relations, the rights of the original inhabitants were . . . necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it . . . but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.[18]

Here, the Court held the event of discovery divested tribes of the sovereign power to convey their lands freely.[19] Although tribes might (and often did) remain in possession of the land, the doctrine of discovery granted the discoverer the right to obtain land from a tribe.[20] In addition, it divested the tribes of their "rights to complete sovereignty, as independent nations," and granted the discoverer power, with the tribes, to "regulate" the relations which were to exist between them. The rights and powers granted by discovery were exclusive: no one but that land's discoverer held them.

Finally, the Court concluded that Britain's treaty with the United States at the close of the American Revolution, in which Britain ceded its territorial rights, conveyed Britain's rights and powers of discovery upon the American States.[21] The States subsequently ceded their rights to the United States.[22] Thus, the rights and powers of discovery eventually vested in the federal government.[23]

As applied to McIntosh, the finding that discovery divested tribes of the power to convey their land to anyone except their discoverer meant that the Tribes lacked the ability to sell legal title to the plaintiffs, and that McIntosh's title was

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[18] *Id.* at 573-74.
[19] Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 573-74 (1823).
[20] Indeed, the Court went on to say that the doctrine gave the discoverer not only the exclusive right to acquire land occupied by Indians, but also the power to grant title to others while the tribes were in possession of the land. *Id.* at 574.
[21] *See id.* at 584-85.
[22] *Id.* at 586.
[23] *See also id.* at 587 (stating United States "unequivocally acceded" to doctrine of discovery).

superior.[24] More broadly speaking, *Johnson* stands for the principle that discovery divested tribes of their authority as sovereigns to have government-to-government relations with anyone but their discoverer (or its successor in interest).[25] External government-to-government relations between occupying tribes and another European country, the Court said, "would have been considered and treated as an invasion of the [discoverer's or its successor's] territories."[26]

The constraints upon tribal sovereignty imposed by discovery did not mean that tribes no longer functioned as governments. Interestingly, the Court in *Johnson* recognized that tribes had authority to govern the sale of the rights they retained:

> If an individual might . . . purchase [Indian title], still he could acquire . . . that title. Admitting [the tribes'] power to change their laws or usages, so far as to allow an individual to separate a portion of their lands from the common stock, and hold it in severalty, still it is a part of their territory, and is held under them, by a title dependent on their laws. The grant derives its efficacy from [that tribe's] will; and, if [that tribe] choose[s] to resume it, and make a different disposition of the land, the Courts of the United States cannot interpose for the protection of the title. The person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the

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[24] *See id.* at 595 ("If . . . discovery be made . . . under the authority of an existing government . . . the country becomes a part of the [discovering] nation, and . . . the vacant soil is . . . disposed of [according to the discoverer's laws].").

[25] *See* Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 573-74 (1823) (holding that discovery gave the discovering nation "exclusive" right, along with the land's tribal occupants, to regulate the relations between them, and finding that, upon discovery, the tribes' rights to "complete sovereignty, as independent nations, were necessarily diminished"). Traditionally, the Court cites Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), for this proposition. *E.g.*, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209 (1978) (citing *Cherokee*, 30 U.S. at 17-18). However, the statements in *Cherokee* that are cited for this principle merely echo those that appeared previously in *Johnson*. *Compare Cherokee*, 30 U.S. at 17-18 ("[Indian tribes] and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States, that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility."), *with Johnson,* 21 U.S. at 573-74, 583-84 (stating that after Britain ceded territory west of the Mississippi to France "any [later] attempt to purchase it from the Indians, would have been considered and treated as an invasion of the territories of France"); *Id.* at 587 (stating that after the United States purchased Louisiana from France, "any attempt of others to intrude into that country . . . would be considered as an aggression which would justify war").

[26] *Johnson*, 21 U.S. at 583-84.

> property purchased; holds their title under their protection, and subject to their laws.[27]

Here, the Court's comments indicate that those powers retained by tribes after discovery remain subject to tribal authority.[28] Post-discovery, tribes retained the right of occupancy and were able to convey it to another party, even a non-Indian; these conveyed rights, however, depended upon that tribe (rather than upon the United States) for recognition and enforcement.[29] Thus, the *Johnson* plaintiffs' remedies, if available, were only available under tribal law.

B. Lone Wolf v. Hitchcock*: The Advent of Congressional Plenary Power*

In *Lone Wolf v. Hitchcock*,[30] one of the most sweeping decisions in its history, the Court addressed the question of the bounds of tribal authority vis-à-vis the United States. *Lone Wolf* and its premise—that Congress had "plenary" power over Indian tribes—became the basis and justification for subsequent incursions upon tribal authority.[31]

Lone Wolf contested Congress' authority to unilaterally change agreements made by tribes and officers of the federal government.[32] The Kiowa and Comanche Tribes' 1867 treaty with the United States provided specifically that cessions of reservation lands required the consent of three-fourths of the adult male Indians on the reservation.[33] In 1892, the Tribes signed an agreement to cede lands held in common by them to the United States; the United States was to allot lands to individual tribal members and purchase "surplus" lands for later sale to non-Indians.[34] Subsequently, Congress acted to effectuate the agreement

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[27] *Id.* at 593.
[28] *Id.*
[29] In the instant case, the Court determined that, since the plaintiffs' beneficial title depended on the Tribes' recognition, Johnson et. al lost the right of occupancy they had purchased from the Tribes when the Tribes ceded their lands to the United States without recognizing plaintiffs' titles within the terms of the cession: "[The Tribes'] cession of the country, without a reservation of this land, affords a fair presumption, that they considered [the conveyance to plaintiffs] as of no validity. They ceded to the United States this very property, after having used it in common with other lands, as their own, from the date of their deeds to the time of cession[.]" *Id.* at 594.
[30] 187 U.S. 553 (1903).
[31] *See* CONFERENCE OF W. ATTORNEYS GEN., AMERICAN INDIAN LAW DESKBOOK 107-08 (Joseph P. Mazurek et al. eds., 2d ed. 1998) (listing various statutes enacted under Congress' plenary power to govern Indian country).
[32] Lone Wolf v. Hitchcock, 187 U.S. 555, 564 (1903).
[33] *Id.* at 554.
[34] *Id.* at 554-55.

by congressional acts.[35] These acts, however, modified the agreement in various particulars.[36]

The Tribes sued, arguing that the acts violated their property rights without due process and were unconstitutional.[37] The Tribes had three arguments against the law, two of which touched upon the federal government's authority to take unilateral action affecting the Tribes. First, the Tribes argued that the agreement they had signed (and the acts implementing it) was invalid because it had not been consented to by three-fourths of the Tribes' adult male population, as required by treaty.[38] Second, the Tribes argued the acts were invalid because they unilaterally changed the terms of the signed agreement "without submitting such changes to the Indians for their consideration."[39]

In a short opinion, the Court affirmed lower court decisions that sustained the United States' motion to dismiss.[40] The Court explained that Congress had complete power over tribes:

> Indians who [are not] fully emancipated from the control and protection of the United States are subject, at least so far as the tribal lands [are] concerned, to be controlled by direct legislation of Congress . . . . Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.

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[35] *Id*. at 559-60 (Senate bill, amended and passed by House of Representatives and subsequently enacted as amended); *see also id.* at 560 (subsequent acts passed to implement non-Indian settlement).

[36] As finally passed, the adopted bill: changed the time frame for making allotments; amended requirements regarding the composition of Indian allotments (between agricultural and grazing land); set aside an amount of grazing land to be used in common by the Tribes; eliminated provisions which treated the Indian agent and army officer who negotiated the agreement for the U.S. as members of the Tribes (thus entitling them to benefits under the agreement); exempted monies from the surplus land sale from Indian depredation claims; and provided that surplus land proceeds would be subject to further congressional action in the event that a claim then pending against the Tribes (by other tribes) was successful. *See id.* at 556-60.

[37] *Id.* at 561.

[38] Lone Wolf v. Hitchcock, 187 U.S. 553, 556 (1903). This contention was confirmed by the Secretary of the Interior. The Secretary lacked census records for the year the agreement was made, and so based his calculation upon member rolls used to make payments to tribal members. *Id.* at 557.

[39] *Id.* at 561. The Tribes also argued that the agreement was invalid because the interpreters had misrepresented its terms to the Tribes. *Id.*

[40] *Id.* at 568.

> . . . [A]s with treaties made with foreign nations, the legislative power might pass laws in conflict with treaties made with the Indians.[41]

In *Johnson*, the Court found that discovery granted the discoverer the exclusive right to "regulate" its relationship to the tribes within its territory.[42] *Lone Wolf* further elucidated the United States/tribal relationship, characterizing it as one in which Congress had absolute, unilateral power over tribes.[43]

By characterizing Congress' power as plenary, the Court implied that, while the United States' relationship with tribes developed through mutual negotiation, these negotiations were merely an exercise of Congress' absolute power over tribes.[44] Essentially, the Court's rationale was that the greater power (plenary power) included the lesser (the power to negotiate).[45] Thus, under *Lone Wolf*, the United States would have been within its rights had it chosen never to negotiate with the tribes but unilaterally to impose its will upon them from the start.[46]

C. Analysis of Early Doctrines Regarding Tribal Sovereignty

The doctrines of discovery and plenary power can be criticized easily on the grounds that they legitimize colonialism at the expense of indigenous rights. In both *Johnson* and *Lone Wolf*, the Court sidestepped the inherent inequities caused by the United States' actions and avoided discussion of the self-interest that motivated them. Though the Court's opinion in *Johnson* contains expressions of regret,[47] these comments are unpersuasive in the face of the Court's vindication of the doctrine of discovery.[48] The *Lone Wolf* Court's assertion that it "must presume

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[41] *Id.* at 567, 565-66 (citation omitted).
[42] Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 573 (1823).
[43] *See Lone Wolf*, 187 U.S. at 567.
[44] *See id.* at 564 ("The contention [that the agreement was void because it violated the terms of the Tribes' treaty with the United States] in effect ignores the status of the contracting Indians and the relation of dependency they bore and continue to bear towards the United States. To uphold the claim would be to adjudge that the indirect operation of the treaty was to materially limit and qualify the controlling authority of Congress in respect to the care and protection of the Indians, and to deprive Congress, in a possible emergency, when the necessity might be urgent . . . of all power to act, if the assent of the Indians could not be obtained.").
[45] *See id.*
[46] *See id.*
[47] *Johnson*, 21 U.S. at 588 ("Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.").
[48] *Id.* at 588, 591 ("However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the

that Congress acted in perfect good faith" in exercising its plenary power, and its suggestion that the Tribes instead petition Congress for relief, are of little comfort given its conclusion that any congressional act regarding Indians is nonjusticiable.[49] Moreover, *Lone Wolf*'s premise that the United States held more power than it exercised[50] also figures as an unwelcome harbinger of—and invitation for—later impositions upon the tribes.

Nonetheless, unjust though they may be, these early doctrines at least have the virtue of restraint. The consequences of discovery appear to be limited to the loss of legal title and the right to have a government-to-government relationship with any nation other than the United States; limitations on tribal sovereignty under the plenary power doctrine require express congressional action adverse to tribal sovereignty.[51] Ultimately, many tribes weathered discovery and various congressional acts (some intended to destroy them) and survived as political entities.[52]

III. 1978-PRESENT: THE RISE OF JUDICIAL CONSTRAINTS ON TRIBAL SOVREIGNTY

By contrast, the future of tribal sovereignty during the second, current period of jurisprudence is far from certain. In this period, the Court created and continues to develop the doctrine of implicit divestiture. Under this doctrine, the Court invalidates exercises of tribal sovereignty that it finds to be "inconsistent" with the tribes' dependent status.[53] Unlike the doctrine of plenary power, implicit divestiture does not require express congressional action inimical to tribal sovereignty.[54]

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property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.").

[49] Lone Wolf v. Hitchcock, 187 U.S. 553, 567-68 (1903).

[50] *See supra* text accompanying notes 41-42.

[51] *See Lone Wolf*, 187 U.S. at 567 (characterizing Congress' plenary power as "legislative") (quoting *Choctaw Nation v. United States*, 119 U.S. 1 (1886), for the proposition that "Indians who [are] not . . . fully emancipated from the control and protection of the United States are subject . . . to be controlled by direct legislation of Congress.").

[52] For an excellent overview of the history of congressional Indian policy, see generally GETCHES ET AL., *supra* note 1, at 140-256. The United States has pursued various measures to destroy tribalism. *Id.* Generally, early approaches attempted to achieve this goal by making traditional tribal lifestyles impossible; the Anglo-American lifestyle, meanwhile, was promoted aggressively. *Id.* at 141-47, 165-84. From 1945-1961, the United States even attempted to assimilate tribal members by "terminating" tribes—ending their legal existences. *Id.* at 199-207.

[53] *See, e.g.,* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978).

[54] *Id.* ("[T]he tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments. . . . Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers "*inconsistent with their status*." (citation omitted)).

Under implicit divestiture, the Court scrutinizes the contested tribal act, and then *itself* decides whether the act was "inconsistent" with the tribe's status.[55] If the Court finds the tribe's act to be "inconsistent," it holds the act invalid.[56]

Thus, through its implicit divestiture doctrine, the Court has interjected itself alongside Congress as a power able to curtail tribal sovereignty. Invalidations under implicit divestiture do not merely enforce limits expressly imposed upon the tribes by Congress; rather, the Court creates limits independently based upon determinations of the act's "consistency" with the tribes' status.[57] The standard for the doctrine's application is vague, with the result that it is difficult to determine the doctrine's reach. Moreover, judicially-imposed constraints may prove intractable: at present, it is unclear whether Congress can use its plenary power to check all constraints on tribal sovereignty imposed under the doctrine.[58]

A. Oliphant *and Its Progeny: Implied Divestiture of Tribal Sovereignty*

Beginning in 1978 with *Oliphant v. Suquamish Indian Tribe*,[59] the Supreme Court decided a series of cases which dramatically curtailed the sovereignty tribes retained under previous jurisprudence.[60] Specifically, the Court in *Oliphant* created a new doctrine by which to evaluate the validity of assertions of tribal authority: the doctrine of implicit divestiture.[61]

At issue in *Oliphant* was whether a tribe retained inherent, sovereign power to assert criminal jurisdiction over non-Indians for their acts on the tribe's reservation.[62] Petitioners Mark David Oliphant and Daniel B. Belgarde were non-Indian residents of the Suquamish Indian Tribe's Port Madison Reservation.[63] The Tribe

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[55] *See*, *e.g., Oliphant*, 435 U.S. 191 (1978).
[56] *See*, *e.g., id.*
[57] *See*, *e.g., id.*
[58] *See* United States v. Lara, 541 U.S. 193 (2004) (holding that Congress could use its plenary power to permit tribes, as an exercise of their inherent sovereign authority, to criminally prosecute nonmember Indians, but intimating that Congress' implementing statute may be subject to constitutional challenge).
[59] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).
[60] *See*, *e.g.*, Montana v. United States, 450 U.S. 544 (1981) (ruling that tribes generally divested of legislative jurisdiction over "nonmembers of the tribe," with exceptions); Strate v. A-1 Contractors, 520 U.S. 438 (1997) (ruling that tribal courts' adjudicative jurisdictions are coextensive with tribes' legislative jurisdictions; assertions of tribal adjudicative jurisdiction are judged under *Montana*); *see*, *e.g.*, Montana v. United States, 450 U.S. 544 (1981) (holding that tribes generally divested of legislative jurisdiction over "nonmembers of the tribe," with exceptions).
[61] *Oliphant*, 435 U.S. 191.
[62] *Id.*
[63] *Id.* at 194.

had adopted a Law and Order Code addressing a variety of offenses that purported to extend the Tribe's jurisdiction over both Indians and non-Indians.[64] Oliphant and Belgarde were charged by the Tribe under the Code. In habeas corpus petitions to the United States District Court, each argued that the Tribe's purported criminal jurisdiction was invalid as applied to non-Indians.[65] The Tribe argued that it had criminal jurisdiction over non-Indians as a result of its "retained inherent powers of government over the Port Madison Indian Reservation."[66]

In assessing the Tribe's claim of retained authority, the Court boldly pronounced that tribes' sovereign powers could be reduced even when the federal government had not acted expressly to delimit them: "[T]he tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments."[67] Instead, the Court announced a new rule for determining when a tribe had been divested of sovereign power, which applied even absent express federal action limiting tribal authority: "Indian tribes are prohibited from exercising both those powers of autonomous states that are expressly terminated by Congress *and* those powers '*inconsistent with their status*.'"[68] This holding is the central pillar of the doctrine of implicit divestiture. The doctrine is one of divestiture because, through its application, Indian tribes are held to have been divested of specific sovereign powers; it is implicit because the divestiture is not the result of an express executive or legislative action. Under the doctrine, tribal exercises of authority found to be inconsistent with the tribes' status are null and void. The doctrine of implicit divestiture thus has become a powerful vehicle for challenging tribal actions.[69]

In applying this new doctrine, the *Oliphant* Court ultimately determined that tribal assertions of criminal jurisdiction over non-Indians were inconsistent with their status and thus void.[70] To reach this decision, the Court considered

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[64] *Id.* at 193. The Tribe also had gone to great lengths to publicize its jurisdiction over all entrants to the Reservation: "[n]otices were placed in prominent places at the entrance to the Port Madison Reservation informing the public that entry onto the Reservation would be deemed implied consent to the criminal jurisdiction of the Suquamish tribal court." *Id.* at 193 n.2.

[65] *Id.* at 194-95.

[66] *Id.* at 195-96.

[67] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978).

[68] *Id.* (citing and quoting Oliphant v. Schlie, 544 F.2d 1007, 1009 (9th Cir. 1976)).

[69] *See* Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) (holding that the tribe is divested of power to impose zoning regulations on reservation lands within open area of reservation and owned by nonmembers); *see*, *e.g.*, Montana v. United States, 450 U.S. 544 (1981) (holding that the tribe is divested of power to regulate hunting and fishing by non-Indians on reservation lands held in fee by nonmembers of the tribe); Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) (tribe divested of power to impose zoning regulations on reservation lands within open area of reservation and owned by nonmembers).

[70] *Oliphant*, 435 U.S. at 210.

both the history of tribal criminal jurisdiction over non-Indians and the federal government's interest in protecting United States citizens from tribal prosecution. After reviewing the history of tribal jurisdiction over non-Indians, the Court concluded that Congress, the Executive Branch, and lower federal courts each held a "commonly shared presumption" that tribes lacked criminal jurisdiction over non-Indians.[71] In addition, the Court was concerned that allowing tribal jurisdiction would infringe upon important rights incident to United States citizenship.[72] The Court noted that "from the formation of the Union and the adoption of the Bill of Rights, the United States has manifested [a] . . . solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty."[73] It reviewed a prior case[74] in which it had held the United States lacked federal criminal jurisdiction over tribal members on the basis that allowing federal jurisdiction would subject tribal members to trial under an "external and unknown code . . . by a standard made for others and not for them . . . according to the law of a social state of which they have an imperfect conception."[75] Allowing tribal jurisdiction over non-Indians, the Court continued, would cause the same problem in reverse: United States citizens would be subjected to a similarly "external code."[76] The federal interests in protecting United States citizens

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[71] *Id.* at 206. The Court's historical review acknowledged that the United States Reports did not specifically discuss the question of tribal jurisdiction over non-Indians, but concluded that this omission was because historically the issue was moot: most tribes did not have a formal court system and so did not assert jurisdiction over non-Indians. *Id.* at 197. The Court then reviewed treaties between the United States and various tribes, and decided that the treaties showed that both the federal government and the tribes presumed that tribes would lack jurisdiction over non-Indians absent a "congressional statute or treaty provision to that effect." *Id.*; treaty provisions reviewed *id.* The Court also considered opinions by the Attorneys General, written in the 1800's, that argued tribal jurisdiction over non-Indians was inconsistent with treaty provisions that recognized the United States' sovereignty over Indian Country and the Indians' dependence upon the United States. *Id.* at 199. The Court noted that one federal court decision considering the issue had concluded that tribal courts lacked jurisdiction to try non-Indians. *Id.* The Court also reviewed legislative history regarding the issues of tribal criminal jurisdiction over non-Indians in a proposed Indian Territory, federal criminal jurisdiction over Indians, and federal legislation preventing trespass on Indian lands, and concluded that Congress' discussions and acts evinced its understanding that tribes did not retain jurisdiction over non-Indians. *Id.* at 201-03, 204-05. Finally, the Court noted that one of its 1891 opinions recognized that congressional acts "demonstrated an intent to reserve jurisdiction over non-Indians for the federal courts." *Id.* at 204.

[72] *See id.* at 210.

[73] *Id.*

[74] *Ex parte* Crow Dog, 109 U.S. 556 (1883).

[75] *Oliphant*, 435 U.S. at 210-11 (quoting *Ex parte* Crow Dog, 109 U.S. at 571).

[76] *Id.* at 211.

from unwarranted intrusions upon their personal liberties and from exposure to alien tribal court systems, said the Court, also led it to conclude that tribes lacked inherent jurisdiction to try non-Indians.[77]

Subsequent decisions have built upon *Oliphant* and developed further guidelines for assessing whether the Court will find that a tribe's authority was "inconsistent with [its] status" and therefore implicitly divested.[78] Generally, the Court has found the tribes to be divested of jurisdiction over anyone except their respective members.[79] This principle applies to both criminal and civil jurisdiction.[80]

The Court has carved out certain exceptions to this "members-only" limitation in the context of civil jurisdiction; these were set out in *Montana v. United States*,[81] the current lodestar regarding tribal civil jurisdiction. First, a tribe may regulate "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[82] Second, as to fee lands within a tribe's reservation boundaries, the tribe may regulate the "conduct of non-Indians [only] when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe."[83]

A later case, *Strate v. A-1 Contractors*,[84] demonstrated that the Court construes *Montana*'s exceptions very narrowly. The *Strate* Court rejected tribal jurisdiction in a civil suit between two non-Indians arising from an auto accident that occurred on land held in trust for the tribes and maintained as a highway by North Dakota.[85] *Strate*'s discussion of the first *Montana* exception clarified that

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[77] *See id.* at 212.
[78] *See*, *e.g.*, Montana v. United States, 450 U.S. 544, 546 (1981) (tribes generally divested of legislative jurisdiction over "nonmembers of the tribe," with exceptions); Strate v. A-1 Contractors, 520 U.S. 438 (1997) (stating that the tribal courts' adjudicative jurisdictions are coextensive with tribes' legislative jurisdictions; assertions of tribal adjudicative jurisdiction are judged under *Montana*).
[79] *See* United States v. Wheeler, 435 U.S. 313, 326 (1978) ("The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe.") (holding that an Indian tribe has criminal jurisdiction over tribal member for crime committed on tribe's reservation on basis that it was an exercise of tribe's retained right to internal self-government).
[80] *See Montana*, 450 U.S. at 565. *Montana* rejected the Crow Tribe's authority to regulate non-Indian fishing and hunting on reservation lands held in fee by nonmembers. *Id.* at 544.
[81] *Id.*
[82] *Id.* at 565.
[83] *Id.* at 566.
[84] Strate v. A-1 Contractors, 520 U.S. 438 (1997).
[85] *Id.*

the *mere existence* of a "consensual relationship" between a party and the tribe was insufficient to sustain that tribe's claim of jurisdiction.[86] The *Strate* Court construed *Montana*'s second exception equally narrowly: while it conceded that careless driving "endanger[s] all in the vicinity, and surely jeopardize[s] the safety of tribal members[,]"the Court declined to find that this activity rose to the level required for the tribe to have jurisdiction under *Montana*'s second exception.[87] In rejecting the argument in favor of tribal jurisdiction, the Court commented, "if *Montana*'s second exception requires no more, the exception would severely shrink the rule."[88] Instead, the Court framed its discussion of the exception as focusing on whether allowing state jurisdiction would "trench unduly on tribal self-government,"[89] and characterized the tribes' rights to self-government as limited to "'the right of reservation Indians to make their own laws and be ruled by them.'"[90] Thus, after *Strate*, *Montana*'s exceptions seem out of reach for all but the most dramatic scenarios under which a tribe would attempt to assert jurisdiction.

As apparent by this attempt to sketch the contours of law regarding implicit divestiture of tribal authority over nonmembers,[91] *Oliphant*'s implicit divestiture doctrine has resulted in a judicially-devised system for assessing assertions of tribal authority that is tangled and unpredictable. As jurisprudence now stands, various factors may influence whether a tribe can assert jurisdiction: what jurisdiction the tribe is asserting (i.e., criminal or civil);[92] over whom the tribe asserts jurisdiction

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[86] *Id.* at 456-57. *Strate*'s defendants were working on the reservation under subcontract with a tribal corporation (i.e., one wholly owned by the Tribe). *Id.* at 443. One source summarizes *Montana*'s first exception after *Strate* as "typically . . . aris[ing] in connection with business dealings on reservations with tribes or their members where the right to engage in the particular activity may be conditioned on compliance with tribal law." CONFERENCE OF W. ATTORNEYS GEN., *supra* note 31, at 120.

[87] *See Strate*, 520 U.S. at 457-58.

[88] *Id.*

[89] *Id.*

[90] *Id.* at 458 (quoting Williams v. Lee, 358 US 217, 220 (1959)).

[91] This brief summary of the most salient decisions regarding implicit divestiture of tribal authority over nonmembers presents a far-from-complete picture of the Court's jurisprudence in the general area of tribal authority. For a comprehensive overview of tribal authority generally, see CONFERENCE OF W. ATTORNEYS GEN., *supra* note 31, at 109-21 (tribal civil jurisdiction); CONFERENCE OF W. ATTORNEYS GEN., AMERICAN INDIAN LAW DESKBOOK 45-53 (Joseph P. Mazurek et al. eds., 2d ed. Supp. 2002) (tribal civil jurisdiction); GETCHES ET AL., *supra* note 1, at 488-92 (criminal jurisdiction in Indian Country).

[92] Tribes have criminal jurisdiction over members for crimes committed on the tribe's reservation. *See* United States v. Wheeler, 435 U.S. 313 (1978). Tribes also have criminal jurisdiction over nonmember Indians. *See* United States v. Lara, 541 U.S. 193 (2004). Tribes have civil jurisdiction over members. *See* Montana v. United States, 450 U.S. 544, 565 (1981). Tribes also have civil jurisdiction over nonmembers under limited circumstances. *See Montana*, 450 U.S. at 565-67.

(a tribal member, a nonmember Indian, or a nonmember non-Indian);[93] how reservation lands are held (by the tribe, by the United States in trust for the tribe, or in fee);[94] the character of a nonmember's relationship to the tribe (consensual or not);[95] and finally, the effect of a nonmember's activities upon the tribe (whether or not they threaten or directly affect the tribe's political integrity, economic security, health, or welfare).[96] The delineated factors help the Court to determine whether a tribe's particular assertion of jurisdiction is "inconsistent with its status" and thus implicitly divested. But the principles articulated in current case law are not exhaustive: the Court could consider other factors, which then would serve as springboards for further iterations of limits under implicit divestiture.

Speculating about applying implicit divestiture to possible assertions of tribal authority illustrates the problems caused by the doctrine's vagaries. Significantly, under *Oliphant*, the Court alone determines whether a tribe's authority to act was implicitly divested.[97] Thus, *Oliphant* casts doubt upon all exercises of tribal sovereignty, because any exercise which seems legitimate at its outset later may be invalidated under implicit divestiture. Professor Philip Frickey rightly describes this development as "a model of ad hoc common law-making" that "supplement[s] the plenary power of Congress with [the Court's] own plenary common law authority."[98] After *Oliphant* and its progeny, tribes cannot be certain any assertion of tribal jurisdiction will be upheld.

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[93] *E.g.*, *Wheeler*, 435 U.S. 313 (criminal jurisdiction over tribal members); *Montana*, 450 U.S. 544 (civil jurisdiction over nonmember non-Indians); *Lara*, 541 U.S. 193 (criminal jurisdiction over nonmember Indians).

[94] A tribe's civil jurisdiction over non-Indians on reservation lands held in fee is extremely limited. *See Montana*, 450 U.S. at 565. But tribal jurisdiction over lands held in trust for the tribe is not assured. *See* Strate v. A-1 Contractors, 520 U.S. 438, 456 (1997) (tribe lacks jurisdiction over suit between nonmembers arising from accident on trust land within reservation).

[95] A tribe may regulate "the activities of nonmembers who enter consensual relationships with the tribe or its members." *Montana*, 450 U.S. at 565. But the mere existence of *some* consensual relationship to the tribe does not confer jurisdiction. *See Strate*, 520 U.S. at 456-57.

[96] A tribe may regulate the activities of non-Indians on fee land within the reservation when the non-Indian's conduct "threatens or has some . . . effect on the [tribe's] political integrity, the economic security, or [its] health and welfare." *Montana*, 450 U.S. at 566. But the Court construes this exception narrowly. *See Strate*, 520 U.S. at 457-59.

[97] *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208-09 (1978) and discussion *infra* Part IV.B.

[98] Philip P. Frickey, *(Native) American Exceptionalism in Federal Indian Law*, 119 HARV. L. REV. 431, 459 (2005). Frickey postulates that this approach grew out of the Court's attempts to normalize law in Indian Country with Anglo-American jurisprudence. *Id.* He argues that, rather than using implicit divestiture to standardize law in Indian country, we should "hav[e] the courage to admit our larger confusions about the place of federal Indian law in public law." *Id.* at 437.

B. *Reining in Implicit Divestiture:* Duro*,* Lara*, and the Congressional Delegation Exception*

As the Court developed the doctrine of implicit divestiture, it recognized one exception to its general rule that divested tribes of authority the Court held to be "inconsistent with their status."[99] This exception was most clearly expressed in *Montana v. United States*: "Exercise of tribal power . . . inconsistent with the dependent status of the tribes . . . cannot survive *without express congressional delegation.*"[100] Express congressional delegation, then, potentially could allow a tribe to exercise authority the Court otherwise would have found was divested.[101]

For many years, this exception was purely theoretical: no congressional act intervened to curtail implicit divestiture's continuing erosion of tribal authority. In 1990, however, Congress amended the Indian Civil Rights Act of 1968[102] so as to conflict with the Court's holding in *Duro v. Reina*,[103] decided earlier that same year. Following a challenge involving the effect of the amended statute, the Court was forced to consider the effects of the congressional delegation exception upon its implicit divestiture doctrine.[104]

In *Duro*, a member of the Torres-Martinez Band of Cahuilla Mission Indians was arrested for a crime committed on the Pima-Maricopa Tribe's reservation and was prosecuted by the Tribe.[105] The defendant contested the Tribe's assertion of criminal jurisdiction over him.[106] The Court ruled for the defendant on the basis that Indian tribes had been implicitly divested of criminal jurisdiction over "nonmember Indians"—Indians not members of the specific tribe asserting jurisdiction over them—for crimes committed on their reservations.[107] The Court

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[99] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978) (quoting Oliphant v. Schlie, 544 F.2d. 1007, 1009 (9th Cir. 1976)), *superseded by statute*, Indian Civil Rights Act, 25 U.S.C. § 1301 (1979), *as recognized in* Dairyland Greyhound Park, Inc. v. Doyle, 719 N.W.2d 408 (Wis. 2006).

[100] Montana v. United States, 450 U.S. 544, 545-46 (1981) (emphasis added); *see also Oliphant*, 435 U.S. at 208 (stating that tribes are implicitly divested of criminal jurisdiction over non-Indians "absent affirmative delegation of such power by Congress").

[101] *See*, *e.g.*, *Montana*, 450 U.S. at 564.

[102] Act of Nov. 5, 1990, Pub. L. No. 101-511, 104 Stat 1856 § 8077 (codified as amended at 25 U.S.C. § 1301(2) (2006)).

[103] Duro v. Reina, 495 U.S. 676 (1990) (holding that tribes were implicitly divested of criminal jurisdiction over nonmember Indians), *superseded by statute,* Act of Nov. 5, 1990, Pub. L. No. 101-511, 104 Stat 1856 § 8077, *as recognized in* Mousseaux v. U.S. Comm'r of Indian Affairs, 806 F. Supp. 1433, 1439-1440 (D.S.D. 1992).

[104] United States v. Lara, 541 U.S. 193 (2004).

[105] *Duro*, 495 U.S. at 679-80.

[106] *Id.* at 681-82.

[107] *Id.* at 688.

found that Congress had not considered tribal authority over nonmembers, and concluded that tribes' retaining this authority would be inconsistent with their dependent status.[108]

The *Duro* decision created an enormous problem respecting nonmember Indians who committed crimes within Indian Country: after *Duro*, no government had complete jurisdiction over these nonmembers.[109] To address the problems created by *Duro*, Congress enacted the "*Duro* fix."[110] This legislation amended the relevant statute to statutorily recognize Indian tribes' "powers of self-government" to include "exercis[ing] criminal jurisdiction over *all* Indians."[111] Congress also amended the statute specifically to recognize the tribes' power as an "*inherent power* of Indian tribes, hereby recognized and affirmed."[112] The amendments' express allocation arguably put tribal jurisdiction over nonmember Indians within the implicit divestiture doctrine's "express congressional delegation" exception.[113] Moreover, by casting the tribes' criminal jurisdiction over nonmembers to be an exercise of *inherent tribal* power, Congress clarified that it considered tribal criminal jurisdiction over nonmembers to stem from retained tribal sovereignty rather than from Congress delegating federal power to the tribes.[114]

In *United States v. Lara*,[115] the Court considered the effect of the "*Duro* fix" legislation upon tribal criminal jurisdiction. *Lara* involved a nonmember Indian criminal defendant prosecuted for a crime committed on a tribe's reservation under both tribal authority (under the *Duro* fix legislation) and federal author-

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[108] *See id.* at 690 ("[Congressional] statutes reflect at most the tendency of past Indian policy to treat Indians as an undifferentiated class."); *see also id.* at 684-85 ("We think the [implicit divestiture] rationale . . . compels the conclusion that Indian tribes lack jurisdiction over persons who are not tribe members.").

[109] Discussing the reason for this "prosecutorial void" is not necessary for the purposes of this Article. Prior to *Duro*, it was clear that federal courts' jurisdiction over Indians was sharply curtailed to jurisdiction for a small list of enumerated crimes. States usually did not have jurisdiction over Indians for crimes committed on the reservation. *Duro* held that tribes' criminal jurisdiction was limited to tribal members. Thus, after *Duro*, no authority had jurisdiction over many crimes committed by non-tribal-member Indians. This is because both States and tribes lacked criminal jurisdiction altogether, and federal jurisdiction was limited to the enumerated crimes. For a good discussion of criminal jurisdiction in Indian Country (written prior to the Court's *Duro* decision), see Chriss Wetherington, *Criminal Jurisdiction of Tribal Courts Over Nonmember Indians: The Circuit Split*, 1989 DUKE L.J.1053 (1989) (arguing that tribal courts have jurisdiction over nonmembers).

[110] Civl Rights Act Amendments of 1990, Pub. L. No. 101-511, § 8077, 104 Stat. 1856 (1990) (codified as amended at 25 U.S.C. § 1301(2)); *see also* Pub. L. No. 102-137, 105 Stat. 646 (1991) (making change permanent).

[111] Pub. L. No. 101-511, § 8077, 104 Stat. 1856.

[112] *Id.*

[113] *See id.*

[114] *See id.*

[115] United States v. Lara, 541 U.S. 193 (2004).

ity.[116] Billy Jo Lara, an Indian, married a member of the Spirit Lake Tribe and lived on its reservation, but was not a member of the Tribe.[117] After "several instances of serious misconduct," the Spirit Lake Tribe excluded him from its reservation.[118] Lara disobeyed the order, and, when federal officials stopped him, Lara struck one of them.[119] Based on Congress' statutory amendments granting tribes criminal jurisdiction over all Indians (including nonmember Indians) for crimes committed on the reservation, the Tribe asserted jurisdiction over Lara and charged him with "violence to a policeman."[120] Lara pleaded guilty in Tribal Court and served 90 days in jail.[121] Subsequently, the United States government prosecuted Lara for the federal crime of assaulting a federal officer.[122]

The validity of the Tribe's prosecution under the "*Duro* fix" legislation was not at issue in *Lara*; rather, the dispute was over its effect upon the United States' efforts to prosecute under federal jurisdiction.[123] Lara claimed that tribal prosecutions under the "*Duro* fix" were made under federal authority that Congress had delegated to the tribes.[124] He moved to dismiss the federal prosecution, arguing that because it also was made under federal authority, it violated the Fifth Amendment's Double Jeopardy clause.[125] The Government argued that the "*Duro* fix" did not delegate *federal* power to tribes but instead enlarged *tribes'* powers of self-government.[126] The Government concluded by arguing that because the Tribe's prosecution was made under its own sovereign authority, the "two prosecutions" were made by separate sovereigns, and subsequent federal prosecution did not "violate the Double Jeopardy Clause."[127]

The Court first decided that Congress had intended tribal sovereign power (and not federal power) to underlie tribal prosecutions.[128] It reviewed the amendments' plain language and legislative history, and found these showed that

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[116] *Id.*
[117] *Id.* at 196.
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] United States v. Lara, 541 U.S. 193, 196 (2004).
[122] *Id.* at 197.
[123] *See id.* However, Lara also made arguments based on the Due Process and Equal Protection clauses, which tended to attack the legality of the Tribe's prosecution. *See id.* at 208-09. The Court did not describe these arguments in detail but mentioned that, if valid, they would show that Lara's tribal prosecution was constitutionally defective. *Id.* The Court dismissed these arguments as "beside the point," noting that they would not affect the Double Jeopardy claim at issue, and refused to address them. *Id.*
[124] United States v. Lara, 294 F.3d 1004, 1006 (8th Cir. 2002).
[125] *See Lara*, 541 U.S. at 197.
[126] *Id.* at 198.
[127] *Id.*
[128] *Id.* at 199.

Congress had not intended merely to delegate federal authority to the tribes: rather, Congress had intended that tribal prosecutions under the statute be made under tribal sovereign authority.[129]

Next, the Court determined that Congress' plenary power over Indian tribes under the Constitution allowed it to expand the tribes' sovereignty:

> [T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as "plenary and exclusive." . . . Congress, with this court's approval, has interpreted the Constitution's "plenary" grants of power as authorizing it to enact legislation that both restricts and, in turn, relaxes those restrictions on tribal sovereign authority. From the Nation's beginning Congress' need for such legislative power would have seemed obvious. After all, the Government's Indian policies, applicable to numerous tribes with diverse cultures, affecting billions of acres of land, of necessity would fluctuate dramatically as the needs of the Nation and those of the tribes changed over time. . . . Such major policy changes inevitably involve major changes in the metes and bounds of tribal sovereignty.[130]

The Court's reasoning ratified Congress' authority to restore sovereignty to the tribes under the plenary power doctrine.[131] Just as Congress can use plenary power to restrict tribal sovereignty, it may use plenary power to expand it—as it meant to do by enacting the "*Duro* fix."[132] Seen in this light, the "congressional delegation" exception is really a way of saying that Congress, by exercising its plenary power, can legislatively overrule the Court's finding of implicit divestiture.

IV. POST-*LARA*: IS THE CONGRESSIONAL DELEGATION EXCEPTION "THE" ANSWER TO IMPLICIT DIVESTITURE?

A. An Overview of Literature Treating the Congressional Delegation Exception: Of Promise and Problems

Though no new cases have reached the Court since *Lara*, commentators generally have accepted that *Lara* vindicates the congressional delegation exception as an avenue to enlarge tribal authority, and they have cited express congressional delegation as a means of resolving various problems that confront Indian Country.

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[129] *Id.* (citing the statute's language, committee reports, and statements made by various members of Congress while Congress considered the amendments).
[130] *Id.* at 200-02 (citations omitted).
[131] United States v. Lara, 541 U.S. 193, 200-02 (2004).
[132] *Id.*

For example, authors have suggested express congressional delegation could expand tribal authority to tax,[133] could allow tribes criminal jurisdiction over non-Indians who committed crimes on the reservation,[134] and could provide for inter-tribal enforcement of each tribe's court orders.[135] One commentator reads *Lara* in conjunction with Maine's Indian Claims Settlement Act and Congress' Indian Claims Settlement Act to propose that Maine tribes could force state courts to recognize same-sex marriages acknowledged under tribal law.[136] While articles usually treat the subject of tribal jurisdiction in the context of a specific issue, some authors posit that Congress could use *Lara* to annul the Court's broadest incursions into tribal authority: its holdings in *Oliphant* and *Montana*.[137]

Notwithstanding the congressional delegation exception's availability in theory, commentators have identified practical obstacles that may prevent using *Lara* to further expand tribal jurisdiction.[138] Of these, the most commonly cited

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[133] *See* Anna-Marie Tabor, *Sovereignty In the Balance: Taxation by Tribal Governments*, 15 U. FLA. J.L. & PUB. POLICY 349, 399 (2004) (citing *Lara* for proposition that "congressional action could . . . expand the reach of tribal [tax] jurisdiction"); *see also* Matthew L. M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. REV. 759, 800-03 (2004) (noting that Congress could extend tribal authority to tax non-Indians).

[134] *See* Amy Radon, Note, *Tribal Jurisdiction and Domestic Violence: The Need for Non-Indian Accountability on the Reservation*, 37 U. MICH. J.L. REFORM 1275, 1295, 1301-02 (2004) (noting that Congress should affirm tribal jurisdiction over non-Indian men accused of committing domestic violence against Indian women).

[135] Steven J. Gunn, *Compacts, Confederacies, and Comity: Intertribal Enforcement of Tribal Court Orders*, 34 N.M. L. REV. 297, 322 (2004).

[136] L. Scott Gould, *December Song: The Waiting Game for Tribal Sovereignty in Maine*, 20 ME. B.J. 18, 21-23 (2005). Maine's Indian Claims Settlement Act expressly stated that Maine could not regulate "internal tribal matters," which the Act defined to include "membership" and marriage between tribal members who reside on the reservation; the federal Maine Indian Claims Settlement Act provided that the tribes and Maine would give full faith and credit to each's respective judicial proceedings. *Id.* at 22-23. Gould suggests the tribes could use their powers to define marriage to allow same-sex marriages prohibited under Maine's laws; Maine would have to honor these marriages under the federal Act's full faith and credit provisions. *Id.* at 23. He also posits that the tribes might have jurisdiction over non-Indian same-sex couples who wished to marry under tribal law. *Id.*

[137] *Id.* at 21; Gunn, *supra* note 135, at 322.

[138] Literature treating *Lara* discusses two potential limits on the congressional delegation exception. First, many commentators speculate that political processes will prevent tribes from making use of the exception. This paragraph discusses this first, most common argument. Second, some writers note that comments made by the Court indicate that the Court may think the exception has external limits. For discussion of this argument, see discussion *infra* Part IV.C. (Court's dicta implies that Constitution may limit use of congressional delegation exception).

is the political process itself.[139] Many commentators suggest that Congress lacks the "political will" to enlarge jurisdiction, except under limited circumstances like those that led to the "*Duro* fix."[140] One author opines that Congress actually would be hostile to the idea: "there remains a core of ill will toward Indian nations and sovereignty in both congressional houses."[141] Another practical problem is that tribes, who have suffered under the plenary power doctrine, may not be willing to use it to their advantage.[142]

B. The Lurking Issue: Implicit Divestiture as an Unmoored Doctrine

As summarized above, most of the commentary regarding *Lara* focuses on discussing the "*Duro* fix" as an application of the congressional delegation exception and postulating further applications this exception may have in Indian Country.[143] Commentators see congressional delegation as a means by which Congress can reverse the Court's implicit divestiture holdings[144] and as a way it can enlarge the tribes' authority while proactively preventing legal challenges.[145] Under this reading, the major obstacle to using the congressional delegation exception to vindicate tribal sovereignty is the practical problem of convincing Congress and the tribes to do so.[146]

However promising *Lara*'s acceptance of the congressional delegation exception may be, the most important aspect of the *Lara* decision is what it revealed about implicit divestiture: currently, the doctrine lacks a consistent rationale. In fact, the rationale the *Lara* Court offers for implicit divesture differs significantly from that which it set out in *Oliphant*. The *Lara* Court does not acknowledge this discrepancy, but it could prove problematic. Theoretical inconsistency may indicate that implicit divestiture doctrine is a moving target. *Lara* may not, after all,

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[139] *See*, *e.g.*, Gould, *supra* note 136, at 21; Gunn, *supra* note 135, at 322-324; Tabor, *supra* note 133, at 401; Fletcher, *supra* note 133, at 802; Christopher J. Schneider, *Hornell Brewing Co. v. Rosebud Sioux Tribal Court: Denigrating the Spirit of Crazyhorse to Restrain the Scope of Tribal Court Jurisdiction*, 43 S.D. L. REV. 486, 525 (1998) (written prior to *Lara*).

[140] *See* Gould, *supra* note 136, at 21; Gunn, *supra* note 135, at 322-323; Tabor, *supra* note 133, at 401; Fletcher, *supra* note 133, at 802.

[141] *See* Schneider, *supra* note 139, at 525.

[142] Gunn, *supra* note 135, at 324.

[143] *Supra* Part IV.A.

[144] *See supra* note 136.

[145] *See* Gould, *supra* note 136, at 21 ("*Lara* makes clear that the Court must step aside when Congress legislates respecting [tribal jurisdiction]"). *See also* Tabor, *supra* note 133, at 399; Fletcher, *supra* note 133, at 800-03; Radon, *supra* note 134, at 1301-02. Discussion in these authorities implies that congressional legislation is a solution immune from subsequent legal challenge.

[146] *See*, *e.g.*, Gould, *supra* note 136, at 21; Tabor, *supra* note 133, at 401; Fletcher, *supra* note 133 at 802.

provide the definitive statement of implicit divestiture's scope and consequences. If it does not, *Lara*'s usefulness for Indian Country may be more limited than current literature suggests.

The *Lara* opinion appears to set out a rationale for implicit divestiture:

> [The "*Duro* fix"] relaxes the restrictions, recognized in *Duro*, that the political branches had imposed on the tribes' exercise of inherent prosecutorial power. . . . [Holdings finding implicit divestiture] reflect the Court's view of the tribes' retained sovereign status *as of the time* the Court made them.[147]

Although, practically speaking, the limits imposed on tribal jurisdiction under *Duro* stemmed from the Court's *Duro* decision, the *Lara* Court implied that these limits instead originated from legislative and executive acts.[148] According to the Court's explanation, *Duro* merely effectuated limits that the *other* federal branches had imposed on tribal authority.[149] This analysis informs the Court's broader comment about its implicit divestiture holdings: that each holding reflected its view of the tribes' authority as of the time the Court made it.[150] According to *Lara*, the Court's divestiture rulings result from its reasoning that *another* federal branch *previously* had curtailed tribal authority.[151]

Essentially, then, *Lara* situates implicit divestiture doctrine as a gap-filler. In cases where a law's application in Indian Country is at issue but the law's text leaves that issue unresolved, the Court presumes that Congress enacted the law without considering it.[152] To settle the dispute, the Court tries to infer how Congress would have wanted the law to work, and uses implicit divestiture to effectuate what it considers Congress would have intended.[153] Thus, the *Lara* Court's comments recast implicit divestiture doctrine as a means by which the Court effectuates Congress' un- or imperfectly-expressed intent to limit tribal jurisdiction.

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[147] United States v. Lara, 541 U.S. 193, 200, 205 (2004).
[148] *See id.* at 200.
[149] *See id.*
[150] *Id.* at 205.
[151] *See id.*
[152] *See id.*
[153] *See* United States v. Lara, 541 U.S. 193, 205 (2004). *Cf.* Frickey, *supra* note 98, at 458. Writing post-*Lara*, Frickey summarizes *Oliphant*'s result using *Lara*'s rationale: "the Court in *Oliphant* stepped into what it must have perceived as a legal void and 'fixed' the problem." *Id.* Frickey rightly criticizes implicit divestiture doctrine on the basis that, "under foundational Indian law, things Congress has not done to diminish tribal authority are not voids—they are areas of retained tribal authority." *Id.*

In *Oliphant*, however, the Court offered a different rationale.[154] After announcing implicit divestiture's rule that "Indian tribes are prohibited from exercising both those [sovereign] powers . . . that are expressly terminated by Congress *and* those powers '*inconsistent with their status*[,]'"[155] the Court went on to explain:

> We have already described some of the inherent limitations on tribal powers that stem from [tribes'] incorporation into the United States. In *Johnson v. M'Intosh* . . . we noted that the Indian tribes' "power to dispose of the soil at their own will, to whomsoever they pleased," was inherently lost to the overriding sovereignty of the United States. And in *Cherokee Nation v. Georgia* . . . the Chief Justice observed that since Indian tribes are "completely under the sovereignty and dominion of the United States, . . . any attempt [by foreign nations] to acquire their lands, or to form a political connexion with them, would be considered by all as an invasion of our territory, and an act of hostility."
>
> Nor are the intrinsic limitations on Indian tribal authority restricted to limitations on the tribes' power to transfer lands or exercise external political sovereignty.[156]

Here, the Court said that the tribes' "incorporation into the United States" limited their powers.[157] The Court also held that limitations on tribal sovereignty "stem" from this incorporation.[158] Finally, the Court added that the limitations on tribal sovereignty that it had mentioned—presumably, those that "stem" from "incorporation"—are not exclusive.[159]

Since *Oliphant* situates "incorporation" at the heart of implicit divestiture doctrine,[160] it becomes vital to understand it. The Court's examples of "inherent limitations" on tribal powers resulting from incorporation[161]—that tribes are unable to alienate land and to exercise external political sovereignty—indicate that the Court is using "incorporation" to describe the limitations imposed upon tribes under the doctrine of discovery. As discussed in Part II, *Johnson* stands for the propositions that discovery stripped tribes of the ability to convey their land freely, and also of the authority to have government-to-government relations with

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[154] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208-09 (1978).
[155] *Id.* at 208.
[156] *Id.* at 209 (citations omitted) (deciding that Indian tribes' "dependent status" implicitly divested them of criminal jurisdiction over non-Indians).
[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209 (1978).
[161] *Id.*

anyone but their discoverer. In *Oliphant*, the Court cited these dispossessions as examples of limitations that resulted from the tribes' incorporation.[162] The limitations that, in *Johnson*, the Court held to result from discovery,[163] it described in *Oliphant* as resulting from "incorporation."[164]

By equating the consequences of discovery with those of incorporation, it seems the *Oliphant* Court is saying that *discovery* is the event which divested the tribes of authority "inconsistent with their status."[165] Under *Oliphant*'s reasoning, the Court's implicit divestiture holdings are consequences of discovery: just as discovery divested the tribes of the right to alienate land (*Johnson*), it also divested tribes of the rights to criminally prosecute non-Indians (*Oliphant*), to criminally prosecute nonmember Indians (*Duro*), and so on. The Court's conflation thus has the effect of broadening *Johnson*'s doctrine of discovery.[166] Discovery's effects are not limited to *Johnson*'s prior holdings; rather, discovery carries additional consequences enumerated in the Court's implicit divestiture jurisprudence.

Comparing the *Lara* and *Oliphant* implicit divestiture rationales side by side highlights the points at which the two paradigms diverge. These theoretical differences reflect models of implicit divestiture that are significantly different and potentially incompatible. Because the rationale the Court ultimately chooses will have dramatic repercussions upon the scope of authority it allows tribes to exercise, it is important to examine the differences between the two rationales and the consequences of each.

The first point of difference between the two rationales is what each identifies as the source of limits on tribal sovereignty. *Lara* identified Congress as the source of these limits: Congress' plenary power over tribes allows it unilaterally to restrict tribal authority.[167] Under this model, Congress divests tribes of specific sovereign powers piecemeal, by various congressional acts that either deal directly with or that indirectly affect Indian Country.[168] By contrast, *Oliphant*'s reason-

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[162] *Oliphant*, 435 U.S. at 209.
[163] Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 573 (1823).
[164] *Oliphant*, 435 U.S. at 209.
[165] *Id.* at 208.
[166] *See id.* (stating that intrinsic limitations on tribal authority imposed by incorporation are not "restricted to limitations on the tribes' power to transfer lands or exercise external political sovereignty").
[167] United States v. Lara, 541 U.S. 193, 202 (2004) ("Congress, with this Court's approval, has interpreted this Constitution's 'plenary' grants of power as authorizing it to enact legislation that . . . restricts . . . tribal sovereign authority.").
[168] *See id.* The Court gave examples of legislative acts representing Congress' changing policy towards the tribes, and concludes that such policy changes "inevitably involve major changes in the metes and bounds of tribal sovereignty." *Id.* The Court then described its *Oliphant* and *Duro* implicit divestiture holdings as resting upon historical sources,

ing implies that discovery is the sole source of limits upon tribal sovereignty.[169] Under *Oliphant*, divestiture occurred in one fell swoop at the point of the tribes' discovery, and independently of any congressional exercise of plenary power.[170]

In addition, the two decisions cast the Court's role differently. In *Lara*, implicit divestiture is the means by which the Court attempts to consummate congressional intent.[171] Congress' acts impose limits on tribes' authority; the Court discerns and enforces these limits, using the doctrine of implicit divestiture to invalidate exercises of tribal authority that exceed them.[172] Thus, under *Lara*, congressional intent circumscribes the Court's role.[173] Since implicit divestiture is merely a means of effectuating congressional intent, any ruling refuted by Congress would override the decision by showing that the Court had failed correctly to discern and implement Congress' intent.[174]

In *Oliphant*, however, divestiture automatically resulted from the tribes' discovery, and the implicit divestiture doctrine is the Court's way of enforcing the limits it considers to result from discovery.[175] Because the Court alone determines what limits discovery imposes upon tribal sovereignty,[176] this model gives the Court unlimited latitude itself to determine the bounds of tribal authority.

The *Lara* Court's opinion does not acknowledge that its rationale for implicit divestiture differs from *Oliphant*'s.[177] The fact that *Lara*'s majority disregarded this disparity should give pause to those who see *Lara* as a way of overruling implicit

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including congressional legislation, and concludes that "*Wheeler*, *Oliphant*, and *Duro* . . . are not determinative because Congress has enacted a new statute, relaxing restrictions on the bounds of . . . inherent tribal authority . . . . And that fact makes all the difference." *Id.* at 205-07.

[169] *See Oliphant*, 435 U.S. at 208-09.

[170] *See id.* at 209. The Court says that "incorporation into the territory of the United States" constrains the tribes' exercise of separate powers "so as not to conflict with" the interests of the United States' "overriding sovereignty." *Id.* The examples the Court gives of "inherent limitations" that "stem from" incorporation include the tribes' inability unilaterally to alienate the lands they occupy and the inability to have external relationships with other nations. *Id.*

[171] *See Lara*, 541 U.S. at 205-07 (describing *Wheeler*, *Oliphant*, and *Duro* as "reflect[ing] the Court's view of the tribes' retained sovereign status *as of the time* the Court made [the decisions]" and describing limitations on tribal authority as "restrictions imposed by the political branches") (emphasis added).

[172] *See id.*

[173] *See id.*

[174] *See id.*

[175] *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208-09 (1978).

[176] *See id.* at 209.

[177] *See* United States v. Lara, 541 U.S. 193 (2004).

divestiture.[178] The asymmetries are troubling because they cause different results regarding the Court's authority to invalidate tribal actions via implicit divestiture doctrine and also Congress' role in setting the bounds of tribal authority.[179] A skeptic might say that having two concurrent implicit divestiture rationales gives the Court latitude to cite to whichever one allows it to reach its desired result. At the very least, it leaves open the possibility that the Court might find that discovery divested the tribes of the sovereignty necessary for some assertions of jurisdiction.

C. Constitutional Limits on the Congressional Delegation Exception? An Illustration of the Problems of an Unmoored Doctrine

A few commentators[180] have discussed a conundrum contained in the *Lara* decision that may illustrate the problems caused by vagaries in implicit divestiture's rationale. The Court's comments in *Lara* and other cases indicate that it may consider tribal authority somehow to be circumscribed by the United States Constitution. Steven J. Gunn draws upon various Court opinions to offer a succinct overview of the Court's concerns:

> The *Lara* Court mentioned, but did not "consider," the question of "whether the Constitution's Due Process or Equal Protection Clauses prohibit tribes from prosecuting a nonmember citizen of the United States." Thus, while the Court held that Congress possesses the "constitutional power to enact a statute that modi-

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[178] *But cf.* Alex Tallchief Skibine, *Redefining the Status of Indian Tribes Within "Our Federalism": Beyond the Dependency Paradigm*, 38 CONN. L. REV. 667, 679 (2006). Skibine argues that *Lara* narrows the scope of implicit divestiture doctrine and premises this argument upon his belief that *Lara*'s majority opinion repeals parts of *Oliphant*'s implicit divestiture rationale. *Id.* Skibine later posits, however, that the congressional delegation exception nonetheless may be limited. He suggests that the Court's recent decisions "could be construed" as defining Congress' plenary power over "Indian affairs" narrowly, to exclude any matter that implicates state interests. *Id.* at 683 ("While the Court repeatedly insists that Congress has plenary authority over Indian affairs, recent cases could be construed as indicating that the Court might consider regulation of non-Indians on Indian reservations as not always involving such 'Indian affairs' over which Congress has plenary power."). If so, the congressional delegation exception would be available *only* in matters that involved Indian interests exclusively.

[179] Under *Oliphant*'s rationale, the Court retains ultimate authority to hold that discovery/incorporation divested the tribes of authority by finding that the asserted authority is inconsistent with the interests of the United States. *See Oliphant*, 435 U.S. at 209. Under *Lara*, implicit divestiture is merely a means of effectuating Congress' changing policy towards the tribes. *See Lara*, 541 U.S. at 205. Thus, *Lara* allows Congress to set the bounds of tribal authority, while *Oliphant* does not.

[180] Gunn, *supra* note 135, at 318-19; *cf.* Radon, *supra* note 134, at 1306-09 (stating that a "dominant society" is concerned that tribal courts will not protect individual's

> fies tribal power," it did not decide whether the *Duro* fix itself ran afoul of the Constitution by permitting tribes to prosecute nonmember Indian citizens without affording them "certain constitutional safeguards." . . .
>
> [T]he Court has stated that it would be "inconsistent with the overriding interests of the National Government" to permit Indian tribes to prosecute non-tribal members in "tribal courts which do not accord the full protections of the Bill of Rights." The Court has long held that the Bill of Rights does not apply to Indian tribal governments, and while the Indian Civil Rights Act . . . imposes on tribal governments "some guarantees of fair procedure," it does not incorporate all of the protections under the Bill of Rights. For example, . . . ICRA contains no guarantee of court appointed counsel for indigent criminal defendants. In light of this and other limitations, the Court has suggested that there may be "constitutional limitations" on the ability of Congress, "through recognition of inherent tribal authority" or otherwise, to "subject American citizens to criminal proceedings before a tribunal that does not provide constitutional protections as a matter of right."
>
> . . . .
>
> As for the Equal Protection Clause, the Court has suggested that congressional authorization of tribal power over nonmember Indians, but not over non-Indians, may raise equal protection concerns.[181]

As Gunn's synopsis makes clear, the Court consistently has hinted that tribal criminal jurisdiction over nonmembers may be subject to constitutional limits. Specifically, the Court speculates that, depending on how Congress structured its delegation, tribal jurisdiction could run afoul of the Due Process and Equal Protection clauses.

Though Gunn's analysis[182] focuses on possible constitutional limits regarding tribal *criminal* jurisdiction over nonmembers, it seems likely the Court also might find the Constitution imposes limits on other kinds of jurisdiction—including

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rights and liberties); Gould, *supra* note 136, at 21 (saying that the Court "sidestepp[ed]" constitutional concerns and characterizing this circumvention as "a major downside" of the decision).

[181] Gunn, *supra* note 135, at 318-19 (citations omitted). In addition to *Lara*, 541 U.S. 193, Gunn quotes and cites Wash. v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980), and Duro v. Reina, 495 U.S. 676 (1990).

[182] *Id.*

civil adjudicative jurisdiction and legislative jurisdiction. Constitutional concerns would seem to apply equally to these areas: any exercise of tribal jurisdiction potentially could subject American citizens to action that would be unconstitutional if taken by the federal, state, or municipal governments.

The Court's comments nonetheless are difficult to explain doctrinally, because the Court's jurisprudence expressly holds that tribal authority does not arise from the Constitution and thus is not limited by the constraints the Constitution imposes upon the federal powers it created.[183] Philip P. Frickey addresses the problems inherent in the Court's constitutional arguments through a critique of Justice Kennedy's *Lara* concurrence, which was based upon constitutional concerns:

> For Justice Kennedy, the Constitution "is based on a theory of original, and continuing, consent of the governed." The people condition this consent, he reasoned, upon a federal structure that limits the powers of both the national and state governments. Justice Kennedy suggested that Congress' authorization of tribal prosecutions violates the constitutional structure, for it allows an American citizen to be tried within the United States by a government to which that person has not granted the consent of the governed. . . .
>
> "The original, and continuing, consent of the governed" is a strange idea [to apply to tribal governments]. Just when and how did all the Indian tribes become part of the constitutional system? The answer from constitutional text is never . . . . Justice Kennedy's argument reduces to this remarkable contention: tribes may be judicially subjugated based on the mystical implications of a document by which they have never consented to be bound and to which they have never even been coercively tied . . . because the document is manifestly good. The argument is driven by an almost irresistible impulse of coherence flowing from the canonical place of the Constitution in our legal culture and the related instinct that all exercises of governmental power must somehow be subject to it.[184]

As seen in Gunn's synopsis,[185] the Court consistently has indicated that tribal governments might be subject to constitutional limits. Although the Court has not recently confronted a direct challenge to tribal action based on constitutional

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[183] Talton v. Mayes, 163 U.S. 376, 383 (1896).

[184] Frickey, *supra* note 98, at 465, 468. Frickey uses Kennedy's concurrence to address the Court's constitutional concerns because *Lara*'s majority found that Lara's Double Jeopardy claim did not raise the constitutional issues squarely, and thus eschewed discussing them. *See Lara*, 541 U.S. at 209.

[185] *See supra* text accompanying note 181.

concerns, Frickey[186] correctly notes the problem with a constitutional argument: doctrinally, tribes are not subject to the Constitution.[187] In order to contend otherwise, the Court seemingly would have to identify a point at which tribal action became subject to the Constitution.[188]

Frickey suggests that the Court cannot identify this point because it does not exist.[189] Instead, says Frickey, Justice Kennedy resorts to a legal fiction: the "consent of the governed" argument.[190] Under this argument, the citizenry's consent to be governed by the United States is based upon its understanding that the government action to which it is subject is limited by the Constitution.[191] Therefore, any federal action subjecting a citizen to a tribal government would be invalid, because it subjects the citizenry to a government *not* limited by the Constitution. [192] The federal action granting the tribe jurisdiction would exceed the reign the citizenry allowed the federal government.[193]

Frickey argues that the "consent of the governed" argument is a "seduction" which "requires resisting."[194] Certainly it bodes ill for tribes. Assuming the argument is merely a "seduction,"[195] however, the rationale for applying constitutional

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[186] Frickey, s*upra* note 98, at 467-68.
[187] *See Talton*, 163 U.S. at 376.
[188] Frickey also comes to this conclusion. *See supra* note 98, at 466-67.
[189] Frickey, *supra* note 98, at 466-67. Frickey assumes that Kennedy's argument is that the Constitution's text renders tribes subject to it and criticizes Kennedy's opinion on the basis that it "applie[s] the doctrine of 'it-must-be-somewhere[.]'" *Id.* Frickey's analysis is problematic if Kennedy's rationale does not in fact rest on constitutional text, but instead upon the doctrine of discovery (as argued in this Article).
[190] Frickey, *supra* note 98, at 465-66.
[191] *See id.* at 465 ("The people condition [their consent to be governed, Kennedy] reasoned, upon a federal structure that limits the powers of both the national and state governments.").
[192] *See id.* at 466 ("Justice Kennedy suggested that [the *Duro* fix's] authorization of tribal prosecution violates the constitutional structure, for it allows the American citizen to be tried within the United States by a government to which that person has not granted the consent of the governed."). This statement assumes that the federal grant of jurisdiction was not conditioned upon the tribe's being bound by constitutional mandates. Presumably, if a grant of jurisdiction to the tribe met constitutional muster, the grant would be within the scope of the citizenry's consent to the federal government and therefore would be valid.
[193] *See id.*
[194] *Id.* at 468.
[195] *Id.* This assertion is arguable. The "consent of the governed" rationale may have a basis in the Tenth Amendment, which reserves powers not delegated to the United States "to the States respectively, or to the people." U.S. CONST. amend X. One could argue that the people had not delegated the United States the power to subject them to governments that did not comport with the Constitution; under the Tenth Amendment, then, the United States would lack the power to compel U.S. citizens to be subject to tribal jurisdiction.

principles to the tribes would be a legal fiction, susceptible to attack as sleight of hand. However, Kennedy's "consent of the governed" rationale may not be the only rationale supporting the argument that the Constitution limits exercises of tribal authority. The Court's implicit divestiture jurisprudence may provide another, intractable rationale: the doctrine of discovery.

Specifically, the Court could cite *Oliphant*'s implicit divestiture rationale[196] to find that discovery divested the tribes of the ability to exercise sovereignty in a way inconsistent with the Constitution.[197] This reasoning would establish the Constitution as a constraint on tribal assertions of jurisdiction and would explain the Court's cryptic warnings[198] that tribes may be subject to constitutional limitations.

If the Court follows this course, its decisions ultimately will clarify that *Oliphant*'s implicit divestiture rationale[199] remains viable post-*Lara*, and that discovery still functions as a source of power, independent of and concurrent with that described in *Lara*,[200] by which the Court can divest tribes of authority. If *Oliphant*'s rationale[201] remains valid, the Court retains authority to define what types of tribal authority are "inconsistent" with the tribes' status, as well as to strip tribes of power under the implicit divestiture doctrine.[202] Moreover, if the Court

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[196] Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208-09 (1978) (noting that the tribes' "incorporation" into the United States "constrained" tribal sovereignty as not to conflict with the interests of the United States). The *Oliphant* Court characterizes assertions of sovereignty that are inconsistent with United States' interests as "inconsistent" with the tribes' statuses. *Id.* at 208. Under *Oliphant*'s implicit divestiture doctrine, the Court invalidates assertions of tribal authority it finds to conflict with the United States' interests. *See id. See also* discussion *supra* Part IV.B.

[197] The Court could find that congressional acts are not the *only* measure of the United States' interests, and could hold that the United States has an interest in constitutional principles which overrides congressional ratifications of tribal authority that would allow tribes to act in a manner inconsistent with the Constitution.

[198] *E.g.*, Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, at 153-154 (1980) (it would be "inconsistent with the overriding interests of the National Government" to permit tribal courts to prosecute nonmembers without the full protections of the Bill of Rights); Duro v. Reina, 495 U.S. 676, 693 (1990) (Court "hesitate[s]" to adopt a view of tribal sovereignty that allows nonmembers to be tried by tribal governments "that do not include them").

[199] *See supra* note 176 and accompanying text.

[200] *Lara* identifies congressional acts as a source by which tribes can be divested of power and describes implicit divestiture as a means by which the Court effectuates limitations on tribal power which Congress intended but did not expressly enact. *See* discussion *supra* Part IV.B.

[201] *See supra* note 174 and accompanying text.

[202] *See* discussion *supra* Part IV.B.

holds that discovery can accomplish divestiture absent congressional action, the congressional delegation exception might not be an available means for Congress to override a Court decision that relies upon it. If *Oliphant* and *Lara* represent concurrent sources of authority for implicit divestiture, the Court has latitude to limit the congressional delegation exception's availability to *Lara*'s congressionally-driven, plenary power rationale.

The confusion surrounding implicit divestiture's rationale—or rationales—makes the doctrine unmoored and malleable. Ultimately, it may call *Lara*'s utility into question, because the implicit divestiture rationale the Court adopts may delineate the bounds of authority that Congress can restore to the tribes. Unless the Court clarifies that the doctrine of discovery does not underpin implicit divestiture, the Court nonetheless may invalidate exercises of tribal sovereignty expressly sanctioned by Congress. This result would remove much of the power of the congressional delegation exception by situating the Court as the final arbiter of tribal sovereignty.

V. CONCLUSION

From the beginning of its jurisprudence, the Supreme Court's holdings have ratified the federal government's encroachment upon Indian lands and sovereignty.[203] The doctrines of discovery and plenary power provide dramatic examples of the way the Court has developed doctrines that vindicate the United States' interests at the tribes' expense.[204]

Implicit divestiture undoubtedly is another such doctrine, but its characteristics distinguish it from its predecessors. Unlike the doctrine of plenary power, implicit divestiture is judicially-driven.[205] Moreover, unlike either discovery or plenary power, implicit divestiture's reach as yet is undefined.[206] Under the doctrine, the Court potentially wields significant power to invalidate exercises of tribal authority.[207]

At first blush, *Lara* appears to provide a welcome means for Congress to overrule the Court's implicit divestiture holdings, and even act preemptively on the tribes' behalf, using the legislative process to ensure that tribes can effectively govern and manage Indian Country.[208] On closer inspection, however, the

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[203] *See*, *e.g.*, Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823) (holding that discovery necessarily diminished tribes' rights to complete sovereignty and their rights to alienate land), discussed *supra* Part II.A.
[204] *See* discussion *supra* Part II.
[205] *See* discussion *supra* Part III.A.
[206] *Id.*
[207] *Id.*
[208] *See* discussion *supra* Parts III.B, IV.A.

congressional delegation exception may be less promising than it appears. The Court continues to speculate that congressional delegation might be subject to external limits,[209] and, in *Lara*, practically invites parties to challenge the *Duro* fix on constitutional grounds.[210] Meanwhile, its *Oliphant* rationale—the doctrine of discovery in disguise—continues to lurk in the background.[211]

Given these factors, the congressional delegation exception likely is not the panacea for implicit divestiture. Indeed, although constitutional concerns may provide a starting point for the Court to re-examine the validity of exercises of tribal sovereignty, they are not necessarily its terminus. The Court might go beyond the constitutional concerns already raised to find that discovery implicitly divested the tribes of the ability to exercise sovereignty in any way inconsistent with the Constitution.[212] Ironically, *Lara*—a decision hailed by many as a triumph for tribal sovereignty[213]—may serve as the starting point for limits upon sovereignty that are more stringent, not less.

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[209] Duro v. Reina, 495 U.S. 676, 693 (1990); *see* United States v. Lara, 541 U.S. 193, 207-10 (2004).

[210] 541 U.S. at 209 ("Other defendants in tribal proceedings remain free to raise [a constitutional claim] should they wish to do so. *See* 25 U.S.C. §1303 (vesting district courts with jurisdiction over habeas writs from tribal courts).").

[211] *See* discussion *supra* Part IV.B.

[212] Until now, the Court's comments regarding non-congressional limits on tribal sovereignty have focused around its concerns about the constitutionality of allowing tribes to criminally prosecute nonmembers and non-Indians. *See* cases cited *supra* note 189. However, if *Oliphant*'s criteria for implicit divestiture is viable post-*Lara*, then tribes may not be able to exercise inherent tribal authority—whether or not congressionally ratified—that the Court considers "to conflict with the interests of [the United States'] overriding sovereignty." Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209 (1978). Under *Oliphant*, the test is not constitutionality, but the United States' interests. *Id.* Congressional delegations of tribal authority that would not be unconstitutional might still run afoul of *Oliphant*'s broad national interests standard.

[213] *E.g.*, Bethany R. Berger, *United States v. Lara as a Story of Native Agency*, 40 TULSA L. REV. 5 (2004).

COMMENT

Who Decides: Institutional Choice in Determining a Performance Enhancing Drug Policy for the NFL

*Scott B. Shapiro**

I. Introduction 183
II. Institutional Choice Framework 188
  A. *Background* 188
  B. *The Framework* 190
III. Ephedrine Case Study 196
  A. *Introduction* 197
  B. *NFL Analysis* 198
  C. *Market Analysis* 202
  D. *Political Process Analysis* 203
  E. *Judiciary Analysis* 206
  F. *Conclusions of Study* 209
IV. Institutional Analysis for Performance Enhancing Drug Policy 209
  A. *History of the NFL's Performance Enhancing Drug Testing Program* 210
  B. *NFL Analysis* 212
  C. *Market Analysis* 213
  D. *Political Process Analysis—The Drug Free Sports Act* 215
  E. *Judiciary Analysis* 218
    1. *Relevant Case Law* 219
    2. *Institutional Choice Analysis* 220
V. Conclusion 222

I. Introduction

In this, the era of the juiced athlete, asterisks, fallen heroes, and tell all books, it seems all too familiar that the lead news story in the sporting section always seems to be a new athlete involved in a new steroid scandal.[1] So here's to you Justin Gatlin, Floyd Landis, Jose Canseco, Barry Bonds, Bill Romanowski, Shawne Merriman, and of course, the greatest funk-bass-player-turned-alleged-steroid-

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[1] *See* Rob Sinclair, *Barry Bonds Lacks Star Power*, CBC Sports, April 1, 2005, at http://www.cbc.ca/sports/columns/analysis/sinclair; Micheal Wilbon, *Tarnished Records Deserve an Asterisk*, Washington Post, Dec. 4, 2004, at D10. *See also* Lance Williams, Mark Fainaru-Wada, *What Bonds Told the Grand Jury*, San Francisco Chronicle, Dec. 3, 2004,

mogul of all time, Victor Conte, Jr.[2] He and his San Francisco-area BALCO (Bay Area Laboratory Co-operative) laboratories not only diagnosed what was missing from the nutritional end of athletic training, but would also allegedly supply professional athletes that extra edge in the form of undetectable steroids opening up the proverbial "can of worms" that Congress has tried to reseal. The arrest of Conte signaled the end of America's blind eye.

In the summer of 2003, a then unnamed source delivered a syringe filled with a substance, that was described as a designer steroid, to the United States Anti-Doping Agency (USADA).[3] This designer steroid was tetrahydrogestrinone (THG).[4] THG was undetectable by current testing methods.[5] This same source, later named as Trevor Graham, also said that many top athletes were using the substance.[6] Now that the USADA had the syringe, the THG could be analyzed and a test developed to detect it.[7] Dr. Don Catlin, of the Olympic Analytical Laboratory at the University of California-Los Angeles (UCLA), developed a test for the previously undetectable substance.[8] THG was eventually tracked back to BALCO, a company based in Burlingame, California. According to its website, the company provides "Scientific analysis of essential and toxic elements impacting the quality of life."[9] Victor Conte, Jr. is the President and CEO of BALCO. SNAC System, Inc., a nutritional supplement company operated out of BALCO's office space.[10] After the link to BALCO was made, the Internal Revenue Service

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at A1; JOSE CANSECO, JUICED : WILD TIMES, RAMPANT 'ROIDS, SMASH HITS, AND HOW BASEBALL GOT BIG (2005); MARK FAINARU-WADA, LANCE WILLIAMS, GAME OF SHADOWS: BARRY BONDS, BALCO AND THE STEROID SCANDAL THAT ROCKED PROFESSIONAL SPORTS (2005).

[2] U.S. v. Conte, No. CR04-004 SI, 2004 U.S. Dist. LEXIS 25896 (N.D.Cal. 2004). All of these athletes have been linked to steroids. *Id.* Conte was a central figure in the production and distribution of the designer steroid THG. *Id.* He was also the bass player for the 1970's funk band, Tower of Power. *Id.*

[3] *See infra* note 8. *See also* Beau Dure, *BALCO Investigation Timeline*, USATODAY.com (June 22, 2006), *available at* http://www.usatoday.com/sports/balco-timeline.htm.

[4] MedicineNet.com (2006) *available at* http://www.medterms.com/script/main/art.asp?articlekey=24863 (defining THG: Tetrahydrogestrinone. A "designer steroid." THG first surfaced in October 2003 with reports of its illicit use by athletes due to the fact that it was undetectable at the time).

[5] Reuters, *I Was THG Whistleblower, Admits Gatlin Coach*, ABC NEWS ONLINE (Aug. 23, 2004), *available at* http://www.abc.net.au/sport/content/200408/s1182730.htm.

[6] *Id.*

[7] U.S. ANTI-DOPING AGENCY, *Mission Statement* (2006), *available at* http://www.usantidoping.org/who/mission.html. The USADA is dedicated to preserving the well being of Olympic Sport, the integrity of competition, and ensuring the health of athletes by focusing on research, education testing and results management. *Id.*

[8] John T. Wendt, *The Year of the Steroid: Are New Testing Regimens Enough?*, ENTERTAINMENT AND SPORTS LAWYER, 8 (Winter 2005).

[9] *Id.* at 8.

[10] *Id.*

criminal investigation unit and the San Mateo County Narcotics Task Force raided the Burlingame lab.[11] Conte, James Valente, Vice President of BALCO, Greg Anderson, a well known personal trainer, and Remi Kochemny, a track and field coach, were all charged with (1) conspiracy to distribute and possess with intent to distribute anabolic steroids, (2) conspiracy to defraud the United States through the introduction and delivery of misbranded drugs, and (3) possession with intent to distribute human growth hormone; and conspiracy to launder monetary instruments.[12] In September 2004, the NFL fined only three players with respect to the BALCO/THG scandal.[13] Chris Cooper, Barret Robbins, and Dana Stubblefield were fined three game checks each after the three current and former Oakland Raiders tested positive for THG.[14] A fourth player, Bill Romanowski, was reported to have tested positive but retired.[15] The four are the only positive tests in the league for THG. The three active players were also warned that any subsequent positive test would result in an eight-game suspension.[16]

Until 2004, the NFL and all professional sports leagues were responsible for policing their own players.[17] These policies were bargained for as part of the league's collective bargaining agreements with their player's unions.[18] With the proverbial cat out of the bag and the seemingly endless litany of allegations of steroid abuse, Congress decided to conduct hearings as to the prevalence of steroid use in sports. Being that Major League Baseball (MLB) and Barry Bonds were at the center of the BALCO allegations, Commissioner Bud Selig and Bonds took center stage at hearings. Because of Selig's unwillingness to work with Congress to uncover the truth, or to create any kind of performance enhancing drug testing program, Congress began to threaten the autonomy of the leagues to police themselves.[19]

In 2005, in the wake of the MLB hearings and allegations of rampant steroid use in professional sports, the U.S. government decided that governmental action was appropriate. Congressman Tom Davis of Virginia linked a Centers for Disease Control and Prevention study to the steroid problem in professional sports.[20] The study stated that more than 500,000 high school students have tried

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[11] *Id.*
[12] U.S. v. Conte, No. CR04-004 SI, 2004 U.S. Dist. LEXIS 25896 (N.D. Cal. 2004).
[13] Wendt, *supra* note 8, at 10.
[14] *See* Dure, *supra* note 3.
[15] *Id.*
[16] *Id.*
[17] NATIONAL FOOTBALL LEAGUE, *Collective Bargaining Agreement* (2006), *available at* http://nflpa.org/CBA/CBA_Complete.aspx. The NFL as well as all other non-Olympic professional team sports have policed themselves from performance enhancing drugs. *Id.*
[18] *Id.*
[19] Associated Press, *McCain: Law for All Sports Should be Considered*, ESPN.com (March 20, 2005), *available at* http://sports.espn.go.com/espn.
[20] *Steroid Use in Sports: Hearing on H.R. 1862 Before the H.R. Gov't. Reform Comm.*, 109th Cong. (2005) (statement of Rep. Tom Davis).

steroids, nearly triple the number from ten years prior.[21] He also quoted a second study, conducted by the National Institute on Drug Abuse and the University of Michigan in 2004, that "found over 40% of twelfth graders describe steroids as 'fairly easy' or 'very easy' to get, and the perception among high school students that steroids are harmful has dropped from 71% in 1992 to 56% in 2004."[22]

In an effort to take action, Congress summoned all professional sports league representatives to Washington for congressional hearings on the subject of steroid use in sport.[23] After the confrontational stance taken by MLB commissioner Bud Selig, Senator John McCain said, "it seems to me that we ought to seriously consider . . . a law that says all professional sports have a minimum level of performance enhancing drug testing."[24] On April 26, 2005, the Drug Free Sports Act was introduced in Congress.[25] Essentially, this act takes the testing program

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[21] *Id.*

[22] *Id.*

[23] Dave Sheinin, *Pro Sports Leagues Pitch Steroid Proposal on Hill,* WASHINGTON POST, May 19, 2005, at D01.

[24] Associated Press, *supra* note 19.

[25] 109 H.R. 1862 (2005).

> [T]he Secretary [of State] shall issue regulations requiring professional sports associations operating in interstate commerce adopt and enforce policies and procedures for testing athletes who participate in their respective associations for the use of performance-enhancing substances. Such policies and procedures shall, at minimum, include the following:
>
> (1) Timing and frequency of random testing. Each athlete shall be tested a minimum of once each year that such athlete is participating in the activities organized by the professional sport association. Tests shall be conducted at random throughout the entire year and the athlete shall not be notified in advance of the test.
> (2) Applicable substances. The Secretary shall, by rule, issue a list of substances for which each athlete shall be tested. Such substances shall be those that are—
> (A) determined by the World Anti-Doping Agency to be prohibited substances; and
> (B) determined by the Secretary to be performance-enhancing substances for which testing is reasonable and practicable.
> (A) Suspension.
> (i) An athlete who tests positive shall be suspended from participation in the professional sports association for a minimum of 2 years.
> (ii) An athlete who tests positive, having once previously tested positive shall be permanently suspended from participation in the professional sports association.
> (B) Disclosure. The name of any athlete having a positive test result shall be disclosed to the public.

Id.

out of league hands and places it into the hands of the Secretary of Commerce and the World Anti-Doping Agency.[26] The policy stance taken by Congress is that the youth of America look to athletes like Bonds, McGuire, and even Romanowski as heroes and will act in a similar manner as these athletes.[27] In allowing steroids to be used by the best athletes in the world, American youth only see the advantages of having a long career in professional sports and do not acknowledge the harmful physical and emotional effects of these powerful drugs.[28]

In trying to resolve the problem of performance enhancing drugs in sports, consideration must given to what institution is in the best position to create policy. The NFL has been dealing with drug testing issues for close to twenty years. Congress has been addressing the issue for approximately two years. So who should decide how to address this issue? This article will focus on the NFL's drug testing policy because of the NFL's effort to eliminate performance enhancing drugs over a prolonged period of time, and also because the NFL policy is the is widely acclaimed to be the most complete program for team sports in the United States.[29] By using the NFL as the benchmark to compare policy, it will become clear that a professional sports league can create a policy that works.[30]

This article will apply the institutional choice analysis developed by Neil Komesar in his book *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy*, in order to determine which institution, Congress, the National Football League, the market, or the courts, can best address the issue of performance enhancing drug testing programs for the NFL. The labor and employment ramifications of this determination will affect employee and employer rights in relation to performance enhancing drug testing programs that were bargained for under the current Collective Bargaining Agreement. This article will analyze the different institutions that could affect these rights and how to best resolve the issue of which institution can best decide policy in the workplace of professional athletics. Institutional choice is paramount in determining how institutions will enact public policy.

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[26] *Id. See also* Shaun Assael, *Dick Pound's Fight Against Drugs Has Claimed a Surprising Victim: Himself*, ESPN MAGAZINE, 10 (July 31, 2006). The World Anti-Doping Agency has been publicly scrutinized for its handling of the Lance Armstrong doping allegations, and its chairman Dick Pound was likened to Captain Ahab "with his bearings lost, chasing his great white whale." *Id.*

[27] *Steroid Use in Sports: Hearing on H.R. 1862 Before the H.R. Gov't. Reform Comm.*, 109th Cong. (2005).

[28] *Id.*

[29] *See* U.S. ANTI-DOPING AGENCY, *supra* note 7. The USADA oversees international sports doping policy and works in concert with WADA policy. *Id.*

[30] Wendt, *supra* note 8, at 8. Due to the fact the other leagues have only recently implemented policy, there would be little doubt that any policy created outside the vacuum of the league, would likely be better than the untested policy recently created. *Id.*

This article contains five sections that will outline and then apply Komesar's institutional choice framework. Part II of this article will examine the evolution of institutional choice as an evaluation tool. Then it will demonstrate what to look for in an institutional choice analysis. In order to understand how this theory applies to a real world situation, Part III will apply the institutional choice framework to a similar factual situation, the banning of ephedrine, in order to illustrate how the framework applies to the relevant institutions. The ephedrine case study is particularly relevant because each of the possible institutions, the NFL, Congress, and the courts made a decision in that case regarding the banning of a performance enhancing drug.[31] In Part IV, the article will use the information gathered in the ephedrine case study to apply Komesar's institutional choice framework, to the NFL's performance enhancing drug testing policy. Through this examination it becomes clear that the NFL is the best institution to decide performance enhancing drug testing policy for its players/employees.

II. INSTITUTIONAL CHOICE FRAMEWORK

A. Background

Institutional choice or comparative institutional analysis refers to a mode of public policy analysis that examines institutional choice as a central and necessary component of public policy decision making.[32] This type of economic analysis is useful because the majority of economic analyses rely on economic efficiency to guide the analyst to the best institutional choice for addressing a particular issue.[33]

Komesar's theory of institutional choice is rather groundbreaking, and has called attention to defects in the market based efficiency analysis of other studied economists.[34] Komesar attacks well-known legal scholars as suffering

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[31] The lawmaking body involved in the ephedrine case study is actually the FDA, but since regulatory agencies have the same effect as the legislative body, the results would mirror each other.

[32] NEIL KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994).

[33] *Id.*

[34] *Id.* at 34-44 (discussing JOHN RAWLES, A THEORY OF JUSTICE (1971)). *See also id.* at 17-22, 157-61 (discussing RICHARD POSNER, ECONOMIC ANALYSIS OF LAW (4th ed. 1992)); *Id.* at 198-215 (discussing JOHN HART ELY, DEMOCRACY AND DISTRUST (1980); *Id.* at 235-44 (discussing RICHARD EPSTEIN, TAKINGS (1985)); *Id.* at 217-21 (discussing Cass Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985)); *Id.* at 221-30 (discussing Bruce Ackerman, *Beyond Carolene Products*, 989 HARV. L. REV. 713 (1985)); *Id.* at 22 n.17 (discussing Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1098 (1972)); *Id.* at 137 n.13 (discussing GUIDO CALABRISI, A COMMON LAW FOR THE AGE OF STATUTES (1982)); *Id.* At 215 N.37 (Discussing Laurence Tribe, *The Puzzling Persistence Of Process-based*

from the defect he calls "single institutionalism."[35] As he explains, most institutional choice frameworks up to this point have only concentrated on single institutions, ignoring other institutions that may or may not be more effective in policy implementation.[36] For example, Richard Posner, a renowned law and economics scholar, opined that "where the market works, the courts allocate the . . . balancing of costs and benefits[] to the market; where the market does not work, the courts make the efficiency determination themselves."[37] According to Komesar, this analysis is incomplete.[38] If the issue involves two institutions, the market and the courts, then why does Posner only ask about variations in the ability of the market? The question is not whether market performance improves or deteriorates with larger numbers of parties, but rather whether the market works better or worse than the courts.[39] Komesar observes that the same factors that cause market performance to deteriorate may also impede the functioning of courts, making our choice between the two institutions much more difficult than Posner recognizes.[40] These gaps in Posner's framework are filled in by Komesar through identifying the actions of the significant players within each institution, and then comparing those actions across all relevant institutions.[41] This is the crux of Komesar's participation-centered approach to institutional choice.

In developing his theory, Komesar based his participation-centered research on the work of two well known economists, Mancur Olson and Ronald Coase.[42] He stated,

> Nothing is new or startling about the participation-centered approach. Ronald Coase's transaction cost approach . . . emphasized the cost of information in understanding institutional activity . . . . The emphasis on the distribution of stakes can be traced to Mancur Olson's work on collective action. That this

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Constitutional Theories, 89 YALE L.J. 1063 (1980)); *Id.* at 179-80 (discussing Patricia Danzon, *Tort Reform and the Role of Government in Private Markets*, 13 J. LEGAL STUD. 517 (1984)); *Id.* at 180-81 (discussing Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353, 371-84 (1988)); *Id.* at 80 n.49 (discussing W. KIP VISCUSI, REFORMING PRODUCTS LIABILITY 128 (1991)).

[35] *Id.* at 6.

[36] KOMESAR, *supra* note 32, at 3.

[37] *Id.* at 22.

[38] *Id.*

[39] David A. Luigs, *Administrative Law and Regulation: Imperfect Alternatives: Choosing Institutiuons in Law, Economics, and Public Policy*, 93 MICH. L. REV. 1559, 1566 (1995) (reviewing NEIL KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY, (1994)).

[40] *Id.* (citing KOMESAR, *supra* note 32, at 21-28).

[41] KOMESAR, *supra* note 32, at 4.

[42] *Id.* at 8.

> analysis is simple and its components well known are major advantages . . . for my purposes. An analytical framework meant to serve so vast a range of possible investigations . . . must be as simple, accessible, and intuitively sensible as possible.[43]

Olson's work on collective action describes the importance of the distribution of stakes as the average per capita benefit derived from institutional participation and the variance of this benefit across the population of beneficiaries.[44] Coase's work on the other hand, describes the costs of institutional participation, including transaction costs, litigation costs, and political participation costs, as the costs of information and organization.[45] Both of these ideas are central to Komesar's framework and are virtually ignored in Posner's work.[46]

Komesar's research sheds light on the gaps that can form when economic efficiency is the only factor being considered.[47] Economic efficiency analysis assists in determining the best policy making institution by weighing the costs against the benefits that affect each individual actor within each institution.[48] It also helps flush out the potential problems that each institution faces in trying to determine the efficiency, reach, and effectiveness of the final policy as implemented by each of the potential participating institutions.[49]

As this synopsis shows, Komesar accounts for more variables when analyzing institutions than many of his predecessors. Because the central issue regarding the NFL performance enhancing drug policy regards institutional choice in policy implementation, Komesar's framework is beneficial because it can be used across institutions. For that reason his framework will be the lens that this article will use to determine the best institution for deciding drug testing policy for the NFL.

B. The Framework

Institutional choice analysis starts with the premise that one must decide who decides. In 1960, Ronald Coase stated:

> There is no reason to suppose that government regulation is called for simply because the problem is not well handled by [the politics] of the market or the firm. Satisfactory views on

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[43] *Id.*
[44] *Id.* (citing MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965)).
[45] *Id.* (citing Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937); Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960)).
[46] *Id. See also* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW (4th ed. 1992).
[47] Luigs, *supra* note 39, at 1562.
[48] KOMESAR, *supra* note 32, at 10-11.
[49] *Id.* at 16.

> policy can only come from a patient study of how, in practice, the market, firms and governments handle the problem of harmful effects.[50]

In *Imperfect Alternatives*, Neil Komesar focuses on assessing the relative capacities of three alternative institutions available to address social needs: the market, the political process, and the courts.[51] It should be noted that this analysis does not have to apply to only these three institutions, but in fact can be applied to any institution that is in the position to set policy.[52] Institutional choice analysis begins with an assumption prevalent in law and economics.[53] Specifically, both individuals and institutions are assumed to be rational actors making choices that maximize their self-interest.[54] However, comparative institutional analysis also provides both a positive and a normative structural approach to considerations of legal change.[55] As a positive matter, the analysis predicts the different outcomes that will arise in various institutional settings based on the actors' incentives in each setting.[56] As a normative matter, comparative institutional analysis chooses the best institution by determining the outcome that best furthers a particular social policy goal.[57]

Komesar's analysis consists of five steps. First, a policy goal must be chosen.[58] Since the value of the Komesar framework is to analyze institutions' ability to implement a policy, it is not important where the policy comes from so long as it is not altered when comparing across institutions. Thus, virtually any policy goal

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[50] Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

[51] *See* KOMESAR, *supra* note 32, at 3.

[52] *See* David Arsen & Courtney Bell, *David Plank, Who Will Turn Around "Failing" Schools? A Framework for Institutional Choice*, Michigan State University Education Policy Center (Aug. 2003), *available at* http://www.epc.msu.edu/publications/workpapers/failingschools.pdf (referring to intermediary institutions as decision makers and thus qualifying them for this analysis); David Klooster, *Institutional Choice, or a Process of Struggle?,* Crossing Boundaries Conference, June 10-14, 1998. The 7th Conference of the International Association for the Study of Common Property, Vancouver (citing land resource management agencies as decision makers in forest preservation issues in Mexico and thus qualifying for the framework). *See* KOMESAR, *supra* note 32, at 10. The NFL as an institution is relevant and should be included in the Komesar framework. *Id.*

[53] William W. Buzbee, *Sprawl's Dynamics: A Comparative Institutional Analysis Critique*, 35 WAKE FOREST L. REV. 3 (2000).

[54] KOMESAR, *supra* note 32, at 270-73.

[55] *See generally* KOMESAR, *supra* note 32.

[56] NICHOLUS MERCURO, STEVEN G. MEDEMA, ECONOMICS AND THE LAW: FROM POSNER TO POST MODERNISM, 122-23 (1997).

[57] KOMESAR, *supra* note 32, at 28 (claiming that both positive and normative legal analysis requires comparative institutional analysis).

[58] Susan Freiwald, *Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation*, 14 HARV. J. LAW & TECH. 569, 575-76 (2001).

can be chosen. The second step is to identify the relevant institutions that could implement that policy.[59] Third, the relevant actors within each institution must be identified.[60] Fourth, costs and benefits are weighed for each actor taking into account forces that act upon those actors.[61] Fifth, the likely outcomes of each institution are compared.[62]

The central premise of Komesar's framework is that it is participation-centered. This approach relies on actions likely to be taken by relevant actors in an institution. The participation-centered approach requires interested parties to act in order to facilitate legal change.[63] Susan Freiwald sums up the participation-centered approach as follows:

> The participation-centered approach involves positive analysis: identification of the different groups interested in a particular legal rule and of the costs and benefits to each group of participation in any of the three institutions. In order to focus on comparative institutional analysis, the approach assumes a social policy goal and then evaluates the comparative abilities of each institution to achieve that social policy goal given the likely participation level of each group. The approach also embodies normative visions of what it means for each institution to function properly.[64]

In other words, in applying institutional choice theory, the analyst must first assume the social policy goal at the outset in order to use it to assess comparative institutional performance.[65] The policy goal must remain constant so that a proper analysis of the institutional competence of each institution involved can be made. The reason why a policy goal must be determined at the onset of the analysis is because it would be indeterminable which institutions could be involved and relevant to the discussion. Once a goal is in place, the relevant institutions can be identified followed by the relevant actors within that institution.

The relevant actors in an institution are people who generate legal change through their activities in each institution, whether as litigants, voters and lobbyists, or consumers and producers.[66] In order to compare institutions consistently,

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[59] *Id.*
[60] *Id.*
[61] *Id.*; *see also* KOMESAR, *supra* note 32, at 8.
[62] *Id.*
[63] Freiwald, *supra* note 58, at 579.
[64] *Id.*
[65] *Id.*
[66] KOMESAR, *supra* note 32, at 7.

the participation-centered model focuses on the actions of those people.[67] There are several ways that an actor can facilitate change within an institution. For example, "concerned parties can put pressure on the legislature to make changes by voting for politicians who share their views or by lobbying and attempting to educate legislators and other voters with propaganda."[68] Also, people can create change through the court system by bringing cases.[69] Finally, change can be made in the marketplace by transacting in ways that achieve it.[70]

The differences in those actors' distribution of stakes in the outcome, costs of information, and costs of organizing, leads to consistent differences in institutional performance.[71] Participation will not occur unless the benefits of participation outweigh the costs.[72] Freiwald stated "[t]he benefits from participating directly relate to a party's stake in the outcome."[73] In other words, the more the party has at stake, the more that party is likely to facilitate change in a direction that will benefit that party. Friewald also notes that "[o]n the other hand, the costs of participation stem from the costs of acquiring information about the current legal rule and the path towards change, as well as the costs of organization."[74] Freiwald continues by saying:

> Some characteristics of participation costs and benefits are true across all institutions. In general, the more diffusely an interest is spread over a group of people, the lower each person's stake in the outcome and the more likely that small increases in the costs of participation will inhibit any call for change to promote that interest.[75]

Costs of participation increase when the interest is complex because it takes organization, time, and energy to understand the relevant information.[76]

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[67] Freiwald, *supra* note 58, at 577 (stating that the actors' collective willingness to participate in a given institution determines the institution's competence).
[68] *Id.* at 575-76 (citing KOMESAR, *supra* note 32, at 63-64).
[69] *Id.* at 576.
[70] *Id.* (citing KOMESAR, *supra* note 32, at 98).
[71] *Id.*
[72] *Id.* at 577 (citing KOMESAR, *supra* note 32, at 125-28).
[73] Freiwald, *supra* note 58, at 576 n.24. (Freiwald uses "stake" as a shorthand for what Komesar discusses as either an impact from an injury or a stake in its prevention. Komesar uses stakes and impacts interchangeably). *See also* KOMESAR, *supra* note 32, at 161.
[74] *See* Freiwald, *supra* note 58, at 576 (citing KOMESAR, *supra* note 32, at 8, 71). Komesar breaks down participation costs more finely into "the complexity or difficulty of understanding the issue in question, the numbers of people on one side or the other of the interest in question, and the formal barriers to access associated with institutional rules and procedures"). KOMESAR, *supra* note 32, at 8, 71.
[75] Freiwald, *supra* note 58, at 576.
[76] Freiwald, *supra* note 58, at 577 (citing KOMESAR, *supra* note 32 at 68-75). Komesar's analysis is dependant on interest group theory of public choice scholarship. *See, e.g.*,

Institutions also create their own costs that affect whether the particular institution will take account of all interests. For example, the adjudicative process, with its formal rules and its limited scale, likely poses the highest cost to participation for a diffusely spread interest.[77] The costs of access to the political process can also be significant if lobbyists are required to achieve the desired results.[78] Other methods of participation in the political process are not as expensive, such as informing the general public, including legislators, and voting for legislators with sympathetic views.[79] However, the cost of acquiring the information to make an informed decision may prevent those who want change from acting.[80] Applying these concepts to the real world, Freiwald states:

> To apply the model in real world settings, the comparative institutional analyst first chooses the social policy goal to be promoted. Then, the analyst determines which groups would be most affected by a legal change and considers how the costs of participation inherent in each institution compare with the expected benefits of using the institution. Under the participation-centered approach, actors' collective willingness to participate in a given institution determines that institution's competence.[81]

In addition to weighing the costs and benefits to the individual actors within an institution, other dynamics threaten to skew outcomes in the market, the political process, as well as the courts in many instances.[82] Freiwald stated that "[The political process] represents a poor institutional choice when it is subject to the over-representation of one group and the under-representation of another. When one group has concentrated and high-stakes interests as compared to its opponents, Congress will be subject to a distorting minoritarian bias."[83] Generally,

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FABER & FRICKEY, LAW AND PUBLIC CHOICE, at 12-37 (1991) (reviewing literature and insights of interest group theory); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 35-43 (1991); MANCUR OLSEN, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GOODS, (1971) (laying out the foundation for the approach).

[77] KOMESAR, *supra* note 32, at 125-28.

[78] *Id.*

[79] Freiwald, *supra* note 58, at 577.

[80] KOMESAR, *supra* note 32, at 91.

[81] Freiwald, *supra* note 58, at 577.

[82] KOMESAR, *supra* note 32, at 153-52 (comparing dynamics affecting choice and likely outcomes in court, market, and political processes).

[83] Freiwald, *supra* note 58, at 578 (citing KOMESAR, *supra* note 32, at 56, 76, 173, 192). Under Komesar's model, minoritarian bias does not always lead to distorted legislation. It depends on whether there is a countervailing majoritarian bias. *Id. See also* KOMESAR, *supra* note 32, at 65-67. Komesar refines the interest group theory by devising a "two-force" model, in which both minorities and majorities can exercise improper sway. *Id.*

a minoritarian bias occurs when a group with small numbers has a high stake in the outcome of the policy decision and also has the financing to get the attention of the policy makers.[84] Policy makers will hear more from the minority and will likely not hear as much concerning the needs of the group with the diffuse interests, which may in fact be the majority of those affected by the policy decision.[85] According to the participation-centered approach, one must evaluate whether one group has disproportionate influence with reference to the social policy goal.[86] This is conducted by evaluating whether a group's influence leads to a law that grants it more benefits than are efficient for society.[87]

The participation-centered approach assesses court performance in a similar manner, weighing the costs with the benefits conferred. The courts operate well for the purposes of creating legal change only if parties actually bring suit. If courts are selected as the institution to decide the question, the legal rule may fail to change as needed, or it may be decided on the basis of the one case that are brought.[88] It is difficult for a court to create policy in a vacuum and the parties to the suit must present the question to the court in a way that can affect policy. For instance, if a party elects for a bench trial instead of a jury trial it is possible that the most relevant actor would be the judge in determining policy.[89] If a determination hinges on particular facts, then the jury may be the most relevant actor in determining policy.[90] Therefore, the parties that bring the case have the most at stake and are the most likely to affect how the policy is implemented due to the decisions that they make when presenting the case. If one of the parties is a government agency of the government itself, then all the forces that affect the political process are also at work in the courts.

Finally, when assessing market performance, transaction costs are the determinative factor.[91] When transaction costs take away the gains from contracting, the market will not be well suited to make a legal change.[92] As Friewald stated, "Instead, transactions that are favorable in terms of their ability to further the

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[84] KOMESAR, *supra* note 32, at 91.
[85] *Id.* at 65-67.
[86] *Id.*
[87] *See id.* A hypothetical example of this kind of evaluation would be if the assumed policy goal was to stop minors from using tobacco products and the federal regulation was to incarcerate all minors found using tobacco products. Although this is an extreme example, it is obvious that the costs to society for incarceration and the burden on the courts and police, is too high for this to be an acceptable solution. Therefore society would have to bear the burden of the minority view, which in this case would be tobacco sellers who would be in favor of more lenient sanctions. *Id.*
[88] Freiwald, *supra* note 58, at 579.
[89] KOMESAR, *supra* note 32, at 124.
[90] *Id.*
[91] KOMESAR, *supra* note 32, at 121.
[92] *Id.* at 111-12, 171.

social policy goal will be avoided. Under the participation-centered approach, market competence requires transactions to take place, and it seems to require also that contracts reflect real bargaining by informed parties."[93]

The Komesar framework can be a valuable tool in comparing institutional choices for a given policy goal. However, the framework analysis is specific to a given situation. The next section will apply Komesar's participation-centered approach of institutional choice to the ephedrine case study. This case study illustrates how the Komesar framework actually can predict outcomes since each of the relevant institutions made decisions to implement policy in regards to banning ephedrine. The institutions implicated in the ephedrine situation, the NFL, the political processes, and the courts engaged in efforts to implement performance enhancing drug policy for the NFL. This case study gives credence to Komesar's work as an indicator of institutional action, as it describes the acts of the relevant institutions and the decisions they made in regard to ephedrine and shows that the institution which would theoretically be best under Komesar's framework was in fact the best in real life.

III. EPHEDRINE CASE STUDY

Before conducting an institutional choice analysis regarding performance enhancing drug programs in the NFL, this article will first examine a similar scenario that has already played itself out in the NFL, the political process, the market, and the courts. The application of the participation-centered approach to the facts of this particular case will assist in forecasting how each institution might react to the question of how to best implement policy for performance enhancing drugs. It will also provide evidence that the Komesar framework is a tool that could be used to determine who is in fact the best decision maker in this particular scenario. By comparing the theoretical and actual outcomes for each institution, one can see that institutional choice theory is a good indicator of how these institutions actually function to affect social change. Thus, an accurate forecast can be made of how these institutions, under similar circumstances, would respond to the policy of drug testing for professional athletes, in particularly changes in policy for the NFL.

As stated, the first step in Komesar's institutional choice analysis is to define the public policy goal.[94] After the goal is identified, an analyst can then identify the institution.[95] Third, the analyst must identify the actors within that institution and perform a cost/benefit analysis in order to determine the forces that will affect that

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[93] Freiwald, *supra* note 35, at 578 (citing KOMESAR, *supra* note 32, at 116-21) (describing misled consumers with relatively low stakes as victims of market rent-seeking).
[94] Freiwald, *supra* note 58, at 577.
[95] *Id.*

actor's decision.[96] Finally, those forces acting upon the actor within a given institution that will affect the ultimate decision of the institution regarding the policy at issue must be illustrated.[97] In this section the institutional choice framework will be applied to each institution—the political process, the courts, the market, and the NFL—and will provide insight into how these institutions have approached the issue of banning ephedrine.

A. Introduction

Ephedrine is defined as:

> A common ingredient in herbal dietary supplements used for weight loss. Ephedrine can slightly suppress your appetite, but no studies have shown it to be effective in weight loss. Ephedrine is the main active ingredient of ephedra. Ephedra is also known as Ma Huang, not ephedrine. High doses of ephedra can cause very fast heartbeat, high blood pressure, irregular heart beats, stroke, vomiting, psychoses and even death.[98]

In the summer of 2001, Minnesota Vikings offensive lineman, Kory Stringer, died of heatstroke during training camp.[99] It was later discovered that Stringer had taken the supplement Ripped Fuel, which is an ephedrine product.[100] Ephedrine was not a banned substance at the time of Stringer's death. Former NFL Commissioner, Paul Tagliabue, stated at that time that ephedrine would be added to the NFL's banned substances list:

> Manufactures can market so-called "dietary supplements" without any prior governmental review for safety, efficacy or purity. In other words, there is no way to be certain that these types of products are safe and effective or that they contain the exact ingredients listed on their label . . . . One example is the proliferation of products containing ephedrine . . . . Last December, players and clubs were alerted to the risks of ephedrine in a notice from Dr. John Lombardo-NFL Advisor on Anabolic Steroids. He advised that, particularly with regard

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[96] *Id.*
[97] *Id.*
[98] WebMD.com (Nov. 22, 2006), *available at* http://my.webmd.com/content/article/46/2731_1672.
[99] MEALY'S LITIGATION REPORT, 2-12 Mealey's Litig. Rep. Ephedra & PPA 5 (2003).
[100] MEALY'S LITIGATION REPORT, 1-8 Mealey's Litig. Rep. Ephedra & PPA 11 (2001).

> to athletes, there is growing evidence linking ephedrine to fatal heart rhythm difficulties, strokes, thermo-regulatory problem . . . and other serious conditions.[101]

The relevant institutions here are the NFL, the market, the political process, and the courts. Since the first step in the analysis is to assume a policy goal, it will be assumed that the social policy goal is to eliminate ephedrine from the market due to its adverse health effects. Accordingly, assume that the public policy is consumer safety.

B. NFL Analysis

In a matter where death is a possible side effect, institutional efficiency is of utmost concern. In order to begin an institutional choice analysis, one must first consider the assumed social policy goal and actors in the market.[102]

The second step is to identify the actors within the institution.[103] The actors that will facilitate legal change are the labor union representatives of the NFL Players Association (NFLPA), the players themselves, and the NFL Management Council.[104] Komesar referred to labor/management relations as a "little government" in that labor and management have the delegated responsibility to represent the best interests of either the ownership groups or the players.[105] For the purposes of this discussion it can be assumed that biases are not relevant in the negotiation process between owners and players because the groups are to small to be influenced by factors outside the scope of representation for both the owners and players and are therefore the only relevant actors.[106] The result that would come from negotiating impacts the league as a whole as well as public perception. The goals of labor and management can be looked at like interest groups in the decision making process.[107] Consumers could choose not to watch the NFL if they do not change the status of ephedrine. It could be argued that the league is really only protecting players and the idea of the league policing itself is akin to the fox

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[101] *NFL General Counsel Adolpho Birch Speaks on the NFL's Drug Policy,* 5 VAND. J. ENT. L. & PRAC. 6, 10 (Winter 2002)(interview with Adolpho Birch, Counsel for NFL Labor Relations).

[102] Freiwald, *supra* note 58, at 597. "To consider Institutional choice in depth, one must simplify the public policy goal discussion by assuming the goal rather than providing detailed proof." *Id.*

[103] *Id.* at 577.

[104] Telephone Interview with Neil Komesar, (Aug. 25, 2005). *See also* KOMESAR, *supra* note 32, at 10.

[105] Telephone Interview with Neil Komesar, (Aug. 25, 2005).

[106] *Id.* The NFLPA and the Owners are in agreement on the banning of ephedrine because it protects the integrity of the game. According to Komesar, since both the union and management are in agreement, bias does not come into play. *Id.*

[107] *Id.*

guarding the hen house. NFL General Counsel Adolpho Birch scoffs at this by pointing out the fact that generally where there are criminal violations involved, the player will face league discipline as well as whatever discipline he receives from the court.[108] He argues that the testing program is in the best interest of the game which is the reason for the policy to begin with. According to Birch, the integrity of the game is more important than protecting the league and its players from scrutiny.[109] Therefore the only relevant actors within the NFL are the union and the Management Council.

In the third step, the evaluator must examine the costs versus the benefits with the assumption that all actors will act in a way that is most beneficial to the particular actor.[110] In assessing costs for the NFL, the evaluator must examine transactional costs and the cost of information.[111] Information costs for the NFL in this situation are comparatively low considering that several transactions have already occurred.[112] Basically, the evaluation of different substances is ongoing. Drug evaluation is not intended simply to identify ephedrine as a possible unsafe substance. The transactions that have occurred in an ongoing basis have lead to the conclusion that ephedrine was dangerous without that exact intent. The fact that the NFL consistently keeps track of research and continues to actively endeavor to examine performance enhancing drugs, demonstrates the efficiency with which the NFL can disseminate the information since they already have it on hand.[113] Since drug evaluation is an ongoing process, the information is received and examined quickly because all actors who could participate in legal change for the NFL (NFLPA and the Management Council) have a background and understanding of the potential ramifications of performance enhancing drugs. Therefore, they can make concise, educated decisions on actions that would be required to produce the desired social goal. In this case study, the NFL, through its normal process of research and education, already had the information necessary to make a decision at the time of Stringer's death.[114] Accordingly, the cost of information in this particular case study was built-in to the cost of doing business. Therefore, the cost of research for this particular purpose was very low because no

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[108] *NFL General Counsel Adolpho Birch Speaks on the NFL's Drug Policy*, 5 VAND. J. ENT. L. & PRAC. 6, 7 (Winter 2002). Use of illegal steroids, or, for example, driving while intoxicated can have criminal sanctions, as well as league sanctions. *Id.*

[109] *Id.*

[110] Freiwald, *supra* note 58, at 577.

[111] *Id*. *See also* KOMESAR, *supra* note 32, at 10.

[112] KOMESAR, *supra* note 32, at 98-100.

[113] Paul Tagliabue, *What the N.F.L. Is Doing to Stamp Out Steroid Abuse*, NEW YORK TIMES Feb. 29, 2004, at 10. *See also Steroid Use in Sports: Hearing on H.R. 1862 Before the H.R. Gov't. Reform Comm.*, 109th Cong. (2005) (testimony of Gene Upshaw, President of the NFL Players Association).

[114] *Id*.

new expenditures needed to be made in order to find out the adverse health risks involved with ephedrine use.[115]

The transactional cost of this decision could potentially be much higher. The legal costs of labor negotiations between the NFLPA and the NFL Management Council to agree on the status of ephedrine as a banned substance under the collectively bargained performance enhancing drug program, and the drafting of the amended policy could be expensive, but in this instance, not cost prohibitive because protecting players' lives is in the best interest of both parties. The benefit to the players, whom the union represents, of not dying greatly outweighs the associated costs. Additionally, since the policy goal is one of consumer safety, the fact that a well-known entity such as the NFL would ban the substance because of the adverse health risk may help to regulate the consumer market for this product. The consumers of professional sports, who may have been inclined to use this product, will see that a respected organization such as the NFL banned the supplement, it may cause the consumer to conclude the substance is not safe and to subsequently stop buying the product.

Last, the examiner would need to evaluate who has the greatest stakes in the outcome of the decision and what the benefits would be.[116] The actors most affected by the decision would be the players through the actions of the NFLPA. Management will also be affected because if another player dies at practice, or for that matter on Monday Night Football, the public relations backlash could potentially cost more than it would to simply add this product to the banned substance list.[117] There are several benefits to the players and the owners. The players get a level playing field where one does not have to worry about competing with chemically altered athletes, and the risks that accompany the use of these substances. The owners receive the benefit of reduced risk of injury to players, and the negative attention that goes along with "roid rage." It could be argued that the players do indeed receive benefits from the use of performance enhancing drugs in the form of lucrative contracts and longer playing careers. If an analyst were to apply the Nash equilibrium in the form of the famous "Prisoner's Dilemma" example to this problem, it would become obvious that the player has a great incentive to cheat by using performance enhancing drugs and a minimal chance of being caught.[118] What this doesn't take into account is the concept of repeated

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[115] Freiwald, *supra* note 58, at 576-77. *See also* KOMESAR, *supra* note 32, at 68-75 (stating that technical issues are difficult to deal with because of research costs).
[116] Freiwald, *supra* note 58, at 577.
[117] KOMESAR, *supra* note 32, at 98-100 (stating potential losses could com from public relations transactional costs since they are costs associated with doing business.).
[118] Roger A. McCain, *Game Theory: An Introductory Sketch*, THE DR. WILLIAM KING SERVER, *available at* http://william-king.www.drexel.edu/top/eco/game/nash.html. The Nash Equilibrium Defined: If there is a set of strategies with the property that no player can benefit by changing her strategy while the other players keep their strategies unchanged,

play.[119] If testing is ongoing, then players will likely not cheat because it is in their best interest.[120] In this case, testing is ongoing.

The NFL appears to be an efficient institution that will act in the best interests of the players and the owners. It is clear that the relevant actors, the NFLPA and the Management Council, would incur more benefits than costs associated with the banning of ephedrine from the league. It is good for the business of both parties to protect the players from taking this substance and it also protects the owners from liability concerning ephedrine. Although the policy may not be far reaching, it could have an effect on the market by affecting consumers of this product in furtherance of the goal to ban ephedrine. Next, the discussion turns to how the market generally could affect the status of ephedrine as a nutritional supplement for the purpose of consumer safety.

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then that set of strategies and the corresponding payoffs constitute the Nash Equilibrium. This was created by Nobel Laureate (in economics) and mathematician John Nash. Nash contributed several key concepts to game theory around 1950. *Id. See also* ANDREW GAVIL ET AL, ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY, at 241-42 (2002). *See* Bruce Schneier, *Doping in Professional Sports*, Schneier.com (Aug. 10, 2006), *available at* http://www.schneier.com/blog/archives/2006/08/doping_in_profe.html.

> The doping arms race will continue because of the incentives. It's a classic Prisoner's Dilemma.
>
> Consider two competing athletes: Alice and Bob. Both Alice and Bob have to individually decide if they are going to take drugs or not. Imagine Alice evaluating her two options:
>
> "If Bob doesn't take any drugs," she thinks, "then it will be in my best interest to take them. They will give me a performance edge against Bob. I have a better chance of winning."
>
> "Similarly, if Bob takes drugs, it's also in my interest to agree to take them. At least that way Bob won't have an advantage over me."
>
> "So even though I have no control over what Bob chooses to do, taking drugs gives me the better outcome, regardless of what his action."
>
> Unfortunately, Bob goes through exactly the same analysis. As a result, they both take performance-enhancing drugs and neither has the advantage over the other. If they could just trust each other, they could refrain from taking the drugs and maintain the same non-advantage status—without any legal or physical danger. But competing athletes can't trust each other, and everyone feels he has to dope—and continues to search out newer and more undetectable drugs—in order to compete. And the arms race continues.

Id.

[119] GAVIL, *supra* note 129, at 241-42.

[120] *Id.*

C. Market Analysis

In the case of the market, the relevant actors involved would be the producers, sellers, and consumers of ephedrine products. The actors who will benefit from this legal change would be the consumers. The problem with the consumer is that there are many diffused actors who may or may not want to take action to precipitate change.[121]

The costs associated with the production of ephedrine include the costs of advertising since producers advertise to create a market.[122] As long as the costs of advertising create sales and profits, the benefits to the producers and sellers will obviously outweigh the costs. This advertising could create a bias among consumers.[123] The advertising for ephedrine products depicts it as a weight loss wonder and not as a high risk supplement.[124] Thus, advertising may lead consumers within the market to think that the product is a safe, weight-loss drug; without emphasizing the potential hazards of use. This is a form of minoritaian bias.[125] The benefit to the consumer, as discussed earlier, is not facing adverse health risks such as death, heart attack, or stroke.[126] Even though the benefit of possible weight loss seems to pale in comparison to possible death, the misinformation distributed by the ephedrine producers creates a failure in the market.

Skewed market perception due to advertising to a diffused consumer base has prevented the market from making progress in eliminating this substance. Although the stakes that the consumer has may be high, and the benefits may also be high, the consumer may not be aware of the potential for harm due to the advertising practices of ephedrine producers. In this situation, initially the market seems like an efficient, cost effective institution to facilitate the implementation of public policy because if consumers become aware of the risks involved in use, it would be in their best interest to stop using the product. Thus, the product

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[121] Freiwald, *supra* note 58, at 577. *See also* KOMESAR, *supra* note 32, at 105.

[122] Press Release, Federal Trade Commission, FTC Releases Report on Weight-Loss Advertising (Sept. 17, 2002), *available at* http://www.ftc.gov/opa/2002/09/weightlossrpt.htm. *Id.* The U.S. Federal Trade Commission has published a forty-eight-page staff report on current trends in weight-loss advertising. *Id.* FTC releases report on weight-loss advertising. FTC news release, Sept 17, 2002. *Id.* The report noted that nearly 40 percent of the ads made at least one representation that is almost certainly false and 55 percent made at least one representation that is very likely to be false. *Id.*

[123] KOMESAR, *supra* note 32, at 100-105.

[124] METABOLIFE, *Me Looking Pretty* (July 1, 2006), *available at* Metabolife.com (2005). An advertisement for Metabolife, an ephedrine product, claimed it was "[a] breakthrough appetite suppressant, Metabolife Ultra is formulated for sustained energy, Metabolife Ultra helps you stay on track so you can meet your weight-loss goals." *Id.*

[125] *See* KOMESAR, *supra* note 32, at 115-16.

[126] *NFL General Counsel Adolpho Birch Speaks on the NFL's Drug Policy,* 5 VAND. J. ENT. L. & PRAC. 6 (Winter 2002).

no longer produces profits for the producers and is no longer a viable product. However, because of advertising affecting the dissemination of information concerning the health risks involved with use, the market may not have optimal ability to facilitate public policy change on a large scale. In fact the market did not facilitate any change in the production of ephedrine products.

D. Political Process Analysis

Taking the same institutional choice analytical framework and applying it to the political process, an evaluator would find that that the actors in this case study would be legislators; lobbyists for the sports supplement industry, consumers, and voters. Assuming that the public policy goal is consumer safety, the evaluator would next need to examine the costs of information, efficiency in the decision making process, the stakes each actor has in the decision, and possible skewed reasoning resulting from a minoritarian bias, if it is not countered with a majoritarian bias.[127]

The cost of information, the amount of time and energy it would take to understand the information, considering it is of a technical nature, and the number of legislators involved who would need to be informed before they could make an educated decision, would result in a very high cost of information.[128] Similarly, the amount of time it would take to inform and draft a bill affecting public policy was in reality also not efficient.[129] The legislature and FDA worked to ban the substance for several years before having success.

The actors with the highest stakes in the decision are the lobbyists who work for the producers and are therefore dependent on the continued sales of ephedrine for their livelihood, the legislators who need to answer to the voters for the decisions that are made, and the consumer who is at risk for using the product.[130] Skewed information is again where this process, like the market process has the potential to break down.[131] If the consumers are unaware of the potential for adverse health risks, and do not make their elected officials aware of the desire for social policy change, then the legislators may not have an accurate portrayal of public sentiment. Similarly, the lobbyists who are highly paid to influence decision-makers, may be in the minority against public sentiment, but as the old saying goes "the squeaky wheel gets the grease."

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[127] *See* KOMESAR, *supra* note 32, at 53-97.
[128] Freiwald, *supra* note 58, at 577. *See also* KOMESAR, *supra* note 32, at 105-15.
[129] *See generally* Nutraceutical Corp. v. Crawford, 364 F. Supp. 2d 1310 (D.Utah 2005). The FDA invested 3 years in drafting and defending their final rule from the ephedrine producer's attacks just to have the rule overturned by the courts. *Id.*
[130] *See* KOMESAR, *supra* note 32, at 125-28 (referring to the roles and stakes within the political system). *See also* Freiwald, *supra* note 58, at 577.
[131] *See* KOMESAR, *supra* note 32, at 53-97.

To illustrate how public sentiment and the goals of the lobbyists for the sports supplement industry are at odds, the following three example of public sentiment are included. The University of California-Berkeley Wellness Letter recently made this statement:

> In 1994 federal legislation—the Dietary Supplement Health and Education Act, passed after intensive lobbying by the supplements industry—essentially removed so-called "dietary supplements" from FDA control. Manufacturers can now suggest almost anything on their packages and in ads, without any proof of safety or efficacy, but in theory at least, cannot make medical claims. Flawed studies are vigorously cited in support of dubious or even dangerous products. Studies that show a negative effect are never mentioned, and indeed may never be published.[132]

At the recent International Symposium of Supplements in Sports held in Montreal, Canada, the official conclusion was that:

> The use of nutritional supplements in sport is a matter of great concern. It represents a significant doping risk with all too often devastating consequences for athletes. In addition to the possibility of inadvertent doping from the consumption of a contaminated or mislabelled [sic] supplement, athletes face problems including risks to health and safety.[133]

The NCAA also informed its student athletes that "[d]ietary supplements are not strictly regulated and may contain substances banned by the NCAA. What's in the bottle is not always on the label. If you don't know what you're taking, you are risking both your health and your eligibility."[134]

The skewed perception created by lobbyists creates a minoritarian bias that may greatly influence the decision of governmental actors.[135] If the diffused consumer/voter base does not organize, there is a substantial chance that legislators will not make the decision that the majority of stakeholders actually desire. The cost of creating a majoritarian bias with a diffused stakeholder base is very high due to the number of people and amount of energy it would take to organize.[136] If the minoritarian view prevails, voters have the option to vote for new policy

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[132] Rick Collins, *Insider's Update on the Regulatory Issues Surrounding Sports Supplements*, Anabolic-Pharma.com (June 18, 2004), *available at* http://www.mesomorphosis.com/articles/collins/sports-supplements.htm.
[133] *Id.*
[134] *Id.*
[135] *See* KOMESAR, *supra* note 32, at 53-97.
[136] *See id.*

makers, but then the process would need to begin all over again and time and resources would have been wasted.

The one positive for the political process in this case study is that their decision could be far-reaching and legally binding. The rest of the evaluation shows that it is an inefficient institution to make this decision, the costs are extremely high, and there is a greater chance of minoritarian bias offsetting the majority goal. In sum, the political process does not seem like the best choice of institution to achieve the desired social policy goal of consumer safety and in this case study, this institution failed to facilitate any change in policy for quite some time.

Komesar's theory seems to have predicted the behavior of the political process quite accurately. To contrast the NFL action concerning ephedrine with the federal government's actions concerning the same substance, the NFL took initial action in December 2000 to inform players of the dangers of ephedrine products.[137] Within two months of Stringer's death, the league and player's association were able to agree to ban all ephedrine products.[138] Although this may seem too late, and the government may argue that if the NFL had banned the substance earlier Stringer may still be alive, the FDA was not able to ban ephedrine products for over three years.[139] One year and one day after the FDA implemented its final rule banning the sale of all ephedrine dietary supplements, a United States District Court determined that the final rule was invalid.[140] Finally, on August 17, 2006, the United States Court of Appeals for the Tenth Circuit in Denver upheld the FDA's final rule declaring all dietary supplements containing ephedrine illegal for marketing in the United States, reversing a decision by the District Court of Utah.[141] Subsequently on August 21, 2006, the FDA in a press release stated in no uncertain terms, "[n]o dosage of dietary supplements containing ephedrine alkaloids is safe and the sale of these products in the United States is illegal and subject to FDA enforcement action."[142] Clearly, the political process has worked for the policy at issue, but it is also clearly not the most efficient institution to facilitate the desired change. As Sidney Wolfe, M.D., Director of Public Citizen's Health Research Group stated,

> All the scientific evidence and legal authority to ban ephedra was in place at the time of our petition, which we filed in September 2001. One reason major manufacturers have stopped selling

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[137] *See* Birch interview, *supra* note 126 at 8.
[138] *Id.*
[139] Nutraceutical Corp. v. Crawford, 364 F. Supp. 2d 1310 (D.Utah 2005).
[140] *Id.*
[141] Nutraceutical Corp. v. Von Eschenbach, 459 F.3d 1033 (10th Cir. 2006).
[142] Press Release, Food and Drug Administration, FDA Statement on Tenth Circuit's Ruling to Uphold FDA Decision Banning Dietary Supplements Containing Ephedrine Alkaloids (Aug. 21, 2006), *available at* http://www.fda.gov/bbs/topics/NEWS/2006/NEW01434.html.

> ephedra is that the companies have become uninsurable because of massive losses in product liability cases. When we filed our petition, there were reports of 81 ephedra-related deaths. Now . . . that number has nearly doubled.[143]

With that number of fatalities, the ultimate success of the FDA ban cannot be called a success.

E. Judiciary Analysis

The central purpose of the participation-centered approach is that legal change will not take place without interested parties acting to generate the desired change.[144] This is no more evident than in the court system. The actors in this case are the litigants; a supplement company that manufactures ephedrine products and the FDA. Other relevant actors include the judge, the lawyers who represented the litigants, and other court employees.

The interests of the relevant actors are varied. The supplement producer in this case was forced to bring an action against the FDA in order to continue to produce and sell ephedrine products.[145] The FDA's interest is in preventing the adverse affects that ephedrine products can inflict on the consumer. Federal judges are appointed for life and generally cannot be swayed by opinion, but rather by how the law applies to the facts in a given circumstance.[146] Finally, lawyers are interested in representing their clients interests.

Institutions create their own costs that affect whether they will take account of all interests. The adjudicative process, with its formal rules and its limited scale, likely poses the highest cost to participation for a diffusely spread interest.[147] The structure and evenhandedness that the courts possess come at a cost.[148] The interested parties must take action in order to affect change because the courts cannot create social change without interested parties bringing suit. The costs of litigation are generally assumed to be very high.[149] These costs not only includes lawyers, but also expert witnesses, researchers, writers, and the time it takes the litigants away from their own profession which limits their earning potential.[150] What

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[143] Mark Moran, Did Delay of Ephedra Ban Cause Unnecessary Deaths?, PSYCHIATRIC NEWS (Feb. 6, 2004), *available at* http://pn.psychiatryonline.org/cgi/content/full/39/3/24.
[144] Freiwald, *supra* note 58, at 556.
[145] Nutraceutical Corp. v. Crawford, 364 F. Supp. 2d 1310-12 (2005).
[146] Justice Thurgood Marshall, Address at the Second Circuit Judicial Conference (May 8, 1981), (transcript *available at* http://www.thurgoodmarshall.com/speeches/sword_article.htm).
[147] *See* KOMESAR, *supra* note 32, at 123-25.
[148] *Id.*
[149] *Id.*
[150] *See* KOMESAR, *supra* note 32, at 127.

the courts do potentially offer is a lack of minority bias which, as demonstrated, is present in the political process through lobbyists, and in the market through advertising. However, if one set of stakeholders is the diffused consumer base, and the other is a wealthy corporation and the costs of organization for the diffused party may be cost prohibitive. Additionally, the opportunity for the corporation to hire legal counsel and possibly drag out litigation long enough to bankrupt its less organized and diffused opponent is present. The courts' approach to the ephedrine issue was illustrated in Nutraceutical Corp. v. Crawford.[151]

In Nutraceutical Corp. v. Crawford, Nutraceutical sued the Food and Drug Administration (FDA) claiming that the FDA's application of the final rule as applied to ephedrine federal law.[152] Plaintiffs, ephedrine-alkaloid dietary supplements (EDS) manufacturers sued Defendants, the Commissioner of the United States FDA and other officials, challenging the validity of the FDA's regulation which banned all EDS. They claim the rule was in violation of the Dietary Supplement Health and Education Act (DSHEA).[153] After extensive review, the FDA concluded that all EDS, regardless of the dose suggested in labeling, presented an unreasonable risk of illness or injury, and banned the distribution of all such products on the basis that they were adulterated within the meaning of the DSHEA.[154] The court determined that the FDA's imposition of a risk-benefit analysis placed a burden on the producers of EDS to demonstrate a benefit as a precondition to sale, which was contrary to Congress' intent.[155] Congress unequivocally stated that the United States had to bear the burden of proof on each element to show that a dietary supplement was adulterated.[156] Thus, the FDA's requirement that the manufacturers demonstrate a benefit was contrary to the clear intent of Congress.[157] For those same reasons, the FDA's definition of "unreasonable", which entailed a risk-benefit analysis, was also improper.[158] Additionally, there was insufficient evidence in the administrative record to establish that the risks identified by the FDA were associated with the intake of low-dose EDS.[159] The statement by the FDA that a safe level of ephedrine could not be determined, was simply not sufficient to meet the Government's burden.[160]

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[151] Nutraceutical Corp. v. Crawford, 364 F. Supp. 2d 1310 (D.Utah 2005).
[152] *Id.* at 1321. Safety of dietary supplements and burden of proof on FDA; the FDA concluded that when the minimal benefits of ephedrine are weighed against the substantial risks, ephedrine presents an unreasonable risk of illness under ordinary conditions of use. *Id. See also* 69 FR 6788-01.
[153] *Nutraceutical*, 364 F. Supp. 2d at 1319.
[154] *Id.* at 1312.
[155] *Id.* at 1318-19.
[156] *Id.* at 1319.
[157] *Id.*
[158] *Id.*
[159] *Id* at 1321.
[160] *Id.*

Being bound by precedent, statutory construction, and legislative intent, the court eventually granted summary judgment in favor of the Plaintiffs and stated that, "[t]he statute reads that the government's burden is met only if it has demonstrated the presence of a risk under the conditions of use recommended or suggested in labeling."[161] The court also noted that the plain language of the statute requires a dose specific analysis.[162] Legislative history also confirms Congress' "intent to require . . . that the finding be dose-specific."[163]

Finally, as stated in the previous section, in August 2006, the United States Court of Appeals for the Tenth Circuit in Denver upheld the Food and Drug Administration's (FDA) final rule, declaring all dietary supplements containing ephedrine alkaloids adulterated, and therefore illegal for marketing in the United States, reversing a decision by the District Court of Utah.[164] The FDA explained the decision in the following press release excerpt:

> The Tenth Circuit Court of Appeal's ruling demonstrates the soundness of FDA's decision to ban dietary supplements containing ephedrine alkaloids, consistent with the Dietary Supplement Health and Education Act (DSHEA) of 1994. The Tenth Circuit Court of Appeals also found that Congress clearly required FDA to conduct a risk-benefit analysis under DSHEA.
>
> FDA conducted an exhaustive and highly resource-intensive evaluation of the relevant scientific data evidence on ephedrine alkaloids before issuing its final rule, which became effective in 2004. The court found that the 133,000-page administrative record compiled by FDA supports the agency's findings that dietary supplements containing ephedrine alkaloids pose an unreasonable risk of illness or injury to users, especially those suffering from heart disease and high blood pressure.[165]

The inherent problem when the court considers public policy, is the institution's inability to change anything but the issue before the courts, and that decision may not best serve public policy. The Utah court clearly did not affect change in the social policy of consumer safety in this instance. Although the decision was efficient and far-reaching, the underlying goal was not achieved. Finally, the court of appeals did effect the appropriate change by upholding the ephedrine ban, however, several more ephedrine related deaths occurred during the interim.[166]

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[161] *Id. See also* 21 U.S.C. § 342(f)(1)(A)(1) (2005).
[162] *Id.* at 1320 (interpreting the language of 21 U.S.C. § 342(f)(1)(A)(1) (2005)).
[163] Nutraceutical Corp. v. Crawford, 364 F. Supp. 2d 1310, 1319-20 (D.Utah 2005).
[164] Nutraceutical Corp. v. Von Eschenbach, 459 F.3d 1033 (10th Cir. 2006).
[165] FDA Press Release, *supra* note 142.
[166] Moran, *supra* note 143.

Finally, Nutraceutical can still appeal this decision to the Supreme Court and have it overturned again, negating the tenth circuit decision. This case study shows that the courts are high cost because of the time and man hours associated with litigation, and achieving the desired policy implementation through the court is difficult. The courts are not likely to be the best choice of institutions for the purposes of this goal of implementing the policy of consumer safety.

F. Conclusions of Study

The overall outcome of the case study demonstrates that even though these institutions were all able to facilitate the desired policy change and protect the public from the adverse affects of ephedrine, the political process and the courts had far-reaching and permanent implications while operating inefficiently. The market facilitated almost no change. The NFL facilitated an efficient change that did not affect the general public. It could be argued that the NFL's actions and subsequent press releases concerning ephedrine may have prompted the governmental action and subsequent court cases, and then those institutions facilitated the desired public policy change. The purpose of this case study was to test the theory and demonstrate how the institutions acted in real life. By changing the assumed policy goal from consumer safety to the elimination of ephedrine in sports, it can be seen that the NFL would be the most efficient institution in facilitating that goal.

Now that the framework has been applied to a situation that involves the same institutions and actors, utilizing a very similar policy goal, we can apply the framework to the question of who decides drug testing policy for the NFL. The actors in each institution will be the same. Because the ephedrine case study demonstrated how these actors reacted to the job of implementing policy, it is assumed that the institutions will react in a similar manner given a similar public policy to implement. Therefore, the next section bases its conclusions on the actual actions taken by each institution in the ephedrine case study.

IV. INSTITUTIONAL ANALYSIS FOR PERFORMANCE ENHANCING DRUG POLICY

The NFL has dealt with the problem of performance enhancing drugs for more than twenty years.[167] Over time the league has developed a program of testing and deterrence that is commonly regarded as the "most comprehensive in professional sports today."[168] Since the congressional hearings and the grand jury investigations in the BALCO scandal erupted, Congress has expressed its opinion, that as an institution, it is better able to determine how best to deter professional and student athletes from using steroids and other performance enhancing

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[167] Tagliabue, *supra* note 113.

[168] *Steroid Use in Sports: Hearing on H.R. 1862 Before the H.R. Gov't. Reform Comm.*, 109th Cong. (2005) (testimony of Gene Upshaw, President of the NFL Players Association).

drugs.[169] This next section begins by reviewing the current NFL performance enhancing drug testing policy. Then it will illustrate the history of each institution in regards to drug testing programs, how the decisions have been made in the past, and how using the institutional choice framework will predict the institution best able to make the decision to achieve the desired policy in the future.

A. History of the NFL's Performance Enhancing Drug Testing Program

The NFL began testing for steroids in 1987.[170] The Policy and Program on Anabolic Steroids and Related Substances began suspensions for violators in 1989, and in 1990 instituted a year-round random testing program including off-season testing that is backed by suspensions without pay for violations.[171] The program also has strong features to deter evasion including suspension for players testing positive for masking agents.[172] Players who test positive are subject to up to 24 unannounced tests per year, including off-season testing.[173] They will also be subject to frequent, year-round testing for the remainder of their professional football careers. [174]

The NFL policy apparently does have its flaws, as pointed out by Rep. Elijah Cummings (D-MD).[175] In the April 27, 2005, Hearing of the House Government Reform Committee he stated,

> In the past five years, only 0.5% of the 15,000 NFL players have tested positive. However, while the NFL's drug testing policy is strong, it needs to be one of zero tolerance and it needs to be airtight. [The] NFL's policy fails to meet the Olympic standard in several key areas, from insufficiently prohibiting the testing [of] stimulants to inadequately penalizing players who test positive. Allegations that the NFL steroid testing policy may be underestimating the scope of the problem must be considered in light of a recent *60 Minutes* report that . . . three Carolina Panthers obtained steroids before the 2004 Super Bowl and evaded detection.[176]

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[169] *Id.*
[170] Birch interview, *supra* note 126, at 6.
[171] *Id.*
[172] *Id.* A masking agent is a substance that covers or "masks" a performance enhancing drug present in the body. It is used to avoid detection of the performance enhancing drug in a test sample. *Id.*
[173] *Id.*
[174] *Id.*
[175] *Steroid Use in Sports: Hearing on H.R. 1862 Before the H.R. Gov't. Reform Comm.*, 109th Cong. (2005).
[176] *Id.*

There are many obstacles that need to be addressed by both labor and management. Besides, the basic issues raised by drug testing, like test reliability, and privacy rights of players, there is also the potential conflict between employer and employee rights under federal labor laws. The following will discuss the current program bargained for by the NFL and the NFLPA.

Paul Tagliabue, former Commissioner of the NFL, addressed the steroid issue in an appearance in Washington to testify before Congress. Although Tagliabue commended the congressional involvement, he also stated that he does not believe that there is rampant cheating in professional football.[177] Tagliabue also released a statement to NFL.com outlining the goals of the program as well as an outline as to what the current parameters are. Tagliabue's statement outlining the current policy stated that the program consists of:

> (1) An annual test for all players plus unannounced random testing in and out of season. We test players on all teams each week of the season, conducting more than 8,000 tests per year for steroids and related substances.
>
> (2) A list of more than 70 prohibited substances, including anabolic steroids, steroid precursors, growth hormone, stimulants, and masking agents. This list is revised and expanded on an ongoing basis.
>
> (3) A mandatory four-game suspension (25 percent of the season) without pay upon a first violation. A second violation would result in a six-game suspension and a third would ban a player for a minimum of one year. Players cannot return to the field until they test clean and are cleared for play.
>
> (4) Strict liability for players who test positive. Violations are not excused because a player says he was unaware that a product contained a banned substance.
>
> (5) Education of players and teams about the program through literature, videos, a toll-free hotline, and mandatory meetings. [178]

As Representative Cummings noted, there are very few positive tests in the NFL.[179] The league maintains its research and testing facilities at the UCLA Olympic

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[177] Associated Press, *NFL Against Uniform Drug Tests*, NFL.com (April 27, 2005), *available at* http://www.nfl.com/news/story/8423675.
[178] Tagliabue, *supra* note 113.
[179] *Id.*

Analytical Laboratory in Los Angeles, which is the same institution responsible for upholding the Olympic standard of which Cummings spoke.[180]

As an example of how the NFL's policy can adapt, Tagliabue stated that as soon as the lab informed them of the designer steroid THG, it was banned and a test was developed and implemented into the current program seamlessly.[181] Tagliabue pointed out in his statement, and later to Congress, that through the collective bargaining process, the NFL addressed the issue of performance enhancing drugs over a decade and $100 million ago.[182]

B. NFL Analysis

In order to consider institutional choice in depth, the analyst must simplify the public policy goal discussion and assume the goal rather than providing detailed proof.[183] In this case, Congress has stated that the high visibility of the steroid problem in professional sports has caused a marked increase in performance enhancing drug use by high school students.[184] Adolpho Birch, Counsel for Labor Relations for the National Football League, stated that the performance enhancing drug testing program was created to attain three main goals,

> . . . the first goal is to ensure the competitive integrity of the game; the second goal is to prevent the adverse health effects related to use of those types of substances; and the third would be to protect the league in terms of its role model obligations with respect to the youth who are particularly vulnerable to things that they see NFL players doing.[185]

Based on these statements, the analyst could assume that the underlying public policy goal is to eliminate the use of performance enhancing drugs at all levels of athletic competition for the purpose of public safety.

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[180] *Id. See also Steroid Use in Sports Hearing on H.R. 1862 Before the H.R. Gov't Reform Comm.,* 109th Cong. (2005).

[181] *See* Tagliabue, *supra* note 113 (citing that the UCLA lab informed the league in 2002 of the new designer steroid called THG. The league immediately added it to the banned substance list and started officially testing for it on a uniform basis on October 6, 2003. Since then, the league has randomly tested more than 3,000 player urine samples and there have been no THG positives).

[182] *Id.*

[183] Freiwald, *supra* note 58, at 597.

[184] *Steroid Use in Sports, Hearing on H.R. 1862 Before the H.R. Gov't Reform Comm.,* 109th Cong. (2005).

[185] Birch interview, *supra* note 126, at 6.

As in the ephedrine study, the relevant actors are the NFLPA, the NFL Management Council, and the players.[186] The evaluator must also look at the NFL not only as solitary institution, but also as a market force within football as a whole.[187]

The information that is applicable to making this decision is already available to the actors in this situation due to the nature of the collectively bargained for policy currently in place.[188] Although the cost of gathering this information is well over the $100 million range, it would generally be the same information that any other institution planning on making the same decision would need to acquire and utilize at its own expense.[189] This cost has been accumulating over a considerable period of time for the NFL. The cost of inflation and time pressure to analyze the technical data could potentially be more expensive for other institutions that are not well-versed in performance enhancing drugs. The aggregate transactions that have led to this accumulation of costs over time have also influenced the current testing model used by the NFL, and while not perfect, it is the contention of the NFL and the NFLPA that the process is constantly evolving and changing.[190] Since the program is a product of transactions, it is flexible enough that it can change as conditions dictate more readily than a prescribed program from outside the league. This mirrors the actual outcome that was illustrated in the ephedrine case study.[191] The NFL in both situations has already assessed the costs of their program and can ban a substance quickly and effectively. Thus, the NFL as an institution can effectively implement an efficient plan to further the public policy goal of eliminating performance enhancing drugs from professional football. However, there needs to be further inquiry into whether it can eliminate these substances in all levels of athletic competition.

C. Market Analysis

As mentioned at the beginning of this section, the NFL acts as an institution in and of itself and it also acts like a market for professional athletes. The next part of this analysis will draw on the fact that the NFL is the market for professional football players and as such, has the capacity to determine the behaviors of the athletes it seeks to employ.

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[186] *See* discussion *supra* Part III.B.
[187] *See* discussion *infra* Part IV.C.
[188] Johnson-Bateman Co. 295 NLRB 180, 187 (1989) (holding that the National Labor Relations Board under the National Labor Relations Act, has already ruled that drug testing is a mandatory subject of collective bargaining.).
[189] *See* Tagliabue, *supra* note 113.
[190] Birch interview, *supra* note 126, at 8.
[191] *See* discussion *supra* Part III.B.

The actors in the market are the same as the NFL since the NFL is the market for professional football players. Therefore, the actions of the players, the NFL Management Council, need to be examined, as well as the producers and consumers of performance enhancing drugs. The consumers within the world of professional football are football players who aspire to play in the NFL, and the producers of performance enhancing drugs. The consumers/athletes are affected because the market for professional athletes (NFL) denies the ability of consumers of performance enhancing drugs (consumers/athletes) to have an opportunity to play at the elite level.

The costs and benefits to the players are balanced between having the speed and strength to play at the elite level and whether or not to use performance enhancing drugs to achieve that goal. There is a possibility that the consumers/athletes who have aspirations to play football professionally, may stop their use of the banned substances during their amateur career in order to play for the NFL. The NFPLA and the Management Council have agreed that performance enhancing drugs do not belong in pro football. If the players improve their skills through these substances there is a substantial likelihood they will be caught and prevented from competing at the highest level of play.[192] Therefore it would be in the best interest of the player who aspires to play professionally not to use performance enhancing drugs. This does further the public policy goal of eliminating performance enhancing drugs from all levels of athletic competition.

There is of course the influence of producers of these drugs on the players. Producers like Conte and BALCO allegedly convinced several high profile professionals to use substances that could not be detected. Though the majority of banned substances are also illegal, some are not. Therefore advertising can be tricky. In Conte's case, he advertised a service. That service included the use of performance enhancing drugs. Some substances which are banned by the league can be advertised as supplements.[193] Other substances, like anabolic steroids, could be endorsed through high profile athletes, as Jose Canseco claimed.[194] The league does not allow NFL players to publicly endorse any banned substance or companies that produce any known banned substance.[195]

The ultimate choice to use these products belongs to the player. Therefore, the bias that could affect the players comes from the league's collective bargaining agreement in the form of limits on participation based banned substance use, and through the advertising of these same substances. As the ephedrine study

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[192] *See supra* text accompanying note 118.
[193] *See supra* text accompanying notes 133, 135.
[194] *See generally* CANSECO, *supra* note 1.
[195] Associated Press, *Hasselbeck Embraces Supplements Endorsement,* July 28, 2006, *available at* http://www.nfl.com/teams/story/SEA/9576231.

illustrated, the NFLPA, as representatives for the players, made it clear that performance enhancing substances that adversely affect a player's health should not be part of the game.[196]

Due to the fact that the NFL does not allow performance enhancing drugs as an institution, and the NFL is the most influential market force in professional football, the league would be able to efficiently implement a performance enhancing drug testing program for its current players as it creates a market force that helps eliminate these drugs in all levels of the game. The NFL demonstrated, through development of its performance enhancing drug program and the ephedrine case study, it is able to make efficient, cost effective, decisions in regards to drug testing policy for the desired public policy goal of eliminating performance-enhancing drugs from all levels of competition. This makes the NFL, and more accurately, all professional sports leagues unique. The leagues have a tremendous market share of the professional sport, and are also in position to set policy for that market. The caveat is that since all sports do not have similar testing regimens, the data is inconclusive in regards to how the all the professional sports leagues, as markets for professional athletes, would be able to handle elimination of performance enhancing drugs in all sports.

D. Political Process Analysis—The Drug Free Sports Act

Taking the same analytical framework and applying it to the political process, an evaluator would find that that the actors in this case study would be legislators, lobbyists for the sports leagues, and the voters.[197] Assuming that the public policy goal is the elimination of performance enhancing drugs from all levels of athletic competition, the evaluator would next need to examine the costs of information, efficiency in the decision making process, the stakes each actor has in the decision, and possible skewed reasoning resulting from a minoritarian bias, if it is not countered with a majoritarian bias.[198]

The cost of information, the amount of time and energy it would take to understand the information, considering it is of a technical nature, and the number of legislators involved who would need to be informed before they could make an educated decision, would result in a very high cost of information.[199] Similarly, the amount of time it would take to inform and draft a bill affecting public policy would also not be efficient. The bill that Congress introduced on April 26, 2005, is being called the Drug Free Sports Act.[200] The bill explains generally

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[196] *See* discussion *supra* Part III.B.

[197] This article will concentrate on the NFL, although it should be noted that all leagues with collective bargaining agreements would be a consolidated high stakes actor in this process.

[198] *See* KOMESAR, *supra* note 32, at 53-97.

[199] Freiwald, *supra* note 58, at 576.

[200] Drug Free Sports Act, H.R. 1862, 109th Cong. (2005).

that the list of banned substances will be determined by the World Anti-Doping Agency [WADA], and the program would be administered by the Secretary of Commerce.[201] It also contains a very strict suspension provision that states:

> (A) Suspension.
>
> (i) An athlete who tests positive shall be suspended from participation in the professional sports association for a minimum of 2 years.
>
> (ii) An athlete who tests positive, having once previously tested positive shall be permanently suspended from participation in the professional sports association.[202]

This universally adaptable program was created to further the public policy goal of eliminating performance enhancing drugs from all levels of athletic competition.[203] This bill, if voted into law, would likely be able to achieve the desired public policy goal, but at what cost? Since this framework is based on economic theory, the costs to the applicable actors in the political process, as well as the benefits, must be considered in determining their actions.[204]

The lobbyists for the NFL, and for that matter, lobbyists for the entirety of professional sports and the leagues they represent, have a high stake in how the public policy goal is implemented. The implementation decision, if not favorable to the leagues, would drastically reduce the amount of control that they have enjoyed in policing their own rules. It would also diminish the amount of capital already invested over the last twenty years by the NFL. All the research and development that the NFL has invested in their program would be assimilated by the federal government's new plan of discipline for professional athletes. The leagues are a consolidated high stakes actor in this process and will expend their legal resources to prevent government control of their market. To date, the NFL has appeared before Congress and has offered legal documents in support of its position.[205]

Since the policy of keeping performance enhancing drugs out of all levels of athletic competition affects public safety, voters with children who are involved in athletic competition, have a high stake in the outcome of the decision. The voters are a diffused group with high stakes, so according to Komesar's participation-

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[201] *Id.,* § 3(2).
[202] *Id.,* § 3(A)(iii).
[203] *Steroid Use in Sports: Hearing on H.R. 1862 Before the H.R. Gov't. Reform Comm.*, 109th Cong. (2005).
[204] Freiwald, *supra* note 58, at 577. *See also* KOMESAR, *supra* note 32, at 105-15.
[205] *Steroid Use in Sports: Hearing on H.R. 1862 Before the H.R. Gov't. Reform Comm.*, 109th Cong. (2005) (testimony of Paul Tagliabue).

centered approach, it would be very costly to organize this group into any kind of politically effective organization.[206] It would also cost money to be represented in the decision-making process for any interested party through lobbyist groups. A problem also arises when the information that concerns the general public is of a technical nature.[207] The diffused power base of voters may not be aware that drug testing at the professional level could have an impact on their children's health and may not agree that changing policy at the professional level will in fact lead to the awareness that the policy goal is aimed to achieve.

As in the ephedrine case study, the time and costs associated with governmental intervention will not likely be efficient.[208] Political action may end up costing the taxpayers millions of dollars to administer a program that was previously financed privately by the leagues. Accordingly, the voters would be reluctant to finance this program. If the Drug Free Sports Act becomes law without the voters backing, the only recourse voters have is to vote for different representation. Unfortunately, there is no guarantee that the issue will be properly addressed by the new representation. This wastes time and resources. This is inefficient and mirrors the political process' shortcomings illustrated by the ephedrine case study.[209]

Assuming that actors will act in their best interest, it would seem that the legislators would only try to address this issue if they believe that the majority of their constituents would like them to do so. Assuming the majority of voters polled approve of government action, it becomes the legislator's job to hear the majority and the minority views. The majority of voters may not have the resources to properly be heard by the legislators and that may lead to a minoritarian dominant view. In this particular case, it would seem that the cost of this proposed legislation would be high since the research is of a technical nature and specific to the sports industry. The scientific research required to administer the program outlined in the Drug Free Sports Act would require consistent review by performance enhancing drug testing experts in order to make sure that new designer steroids like THG do not impede the integrity of the program.[210] As denoted in H.R. 1862 § 3, the proposed program would be officially managed by the federal government.[211]

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[206] KOMESAR, *supra* note 32, at 69.
[207] Freiwald, *supra* note 58, at 556-77.
[208] *See* discussion *supra* Part III.D.
[209] *See* discussion *supra* Part III.D.
[210] *See* Tagliabue, *supra* note 113.
[211] Drug Free Sports Act, H.R. 1862, 109th Cong. § 3 (2005) (stating that the Secretary shall, by rule, issue a list of substances for which each athlete shall be tested. Such substances shall be those that are determined by the World Anti-Doping Agency to be prohibited substances; and determined by the Secretary to be performance-enhancing substances for which testing is reasonable and practicable).

So who pays for this program? The NFL has claimed they have invested over $100 million over the past twenty years in performance enhancing drug testing programs and it could be assumed that through a proper economic analysis, this number would be quite a bit higher for the next twenty years.[212] The legislation does not indicate who will pay for this proposed program, its organization, research, or management. It is likely that the government would need to finance the program's research as well as a staff to administer the outlined program. This government expenditure would need to come from somewhere and it is likely that the taxpayers would bear the brunt. If voters act in their own best interest, they would not want to financially support this legislation since they would now have to pay for the costs that the leagues currently pay. If this information is not clearly understood by the voter base, it is an indication that a misrepresentation in the polling process occurred because of the difficulty of disseminating the correct information to a diffused majority stakeholder power base. If this becomes the case, the polling process and the cost to obtain information become inefficient.

The sports leagues and the NFL in particular, have a high stake in the decision and the financing to influence decision makers. In evaluating the political process, an evaluator can determine the political process has a far reaching result that will likely be inefficient, costly, and not in the best interest of the public policy goal of eliminating performance enhancing drugs from all levels of athletic competition for the purpose of promoting public health. As in the ephedrine case study, and judging from the current progress of the Drug Free Sports Act, Congress would not be the best institution to make this decision.[213]

E. Judiciary Analysis

In order for the courts to become an institution that is relevant, there would need to be a party that tests the law or rule. This can be done through judicial review or individual player action. An example of the judicial review process can be found in the ephedrine case study. Nutraceutical Corporation brought a claim against the FDA for its final rule on ephedrine.[214] The judicial review court found that the final rule violated agency rulemaking procedure and was consequently found invalid.[215] In individual player actions, a player who has been found to have violated the new law can challenge the validity after he has exhausted all of the remedies provided for by statute. In this section this article will examine relevant case law on the subject of workplace drug testing. Then institutional

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[212] *See Steroid Use in Sports: Hearing on H.R. 1862 Before the H.R. Gov't. Reform Comm.*, 109th Cong. (2005) (testimony of Paul Tagliabue). U.S. DEPARTMENT OF TRANSP., Fed. Highway Admin., Economic Analysis Primer (May 8, 2005), *available at* http://www.fhwa.dot.gov/infrastructure/asstmgmt/primer03.htm. The Consumer Price index (CPI) is the best known inflation index and an explanation is provided. *Id.*

[213] *See* discussion *supra* Part III.D.

[214] Nutraceutical Corp. v. Crawford, 364 F. Supp. 2d 1310 (D.Utah 2005).

[215] *Id.*

choice theory will be applied to the relevant decision makers keeping the relevant case law in mind and drawing conclusions based on the ephedrine case study. This analysis will determine if the judiciary could implement a program that would achieve the public policy goal of eliminating performance enhancing drugs from all levels of athletic competition for public health reasons.

1. *Relevant Drug Testing Case Law*

Two of the first Supreme Court cases to test the constitutionality of drug testing in the workplace were *Skinner v. Railway Labor Executive Association*, and *National Treasury Employees Union v. Von Raab*.[216] The decisions for these companion cases were handed down from the Supreme Court on March 21, 1989.[217]

> The court held that railroad employers had limited discretion under the regulations and there was a strong governmental interest to regulate railroad employees' conduct to ensure public safety. The tests were not considered intrusive because there was a diminished expectation of privacy on the information relating to the physical condition of covered employees and to reasonable means of procuring the information because the industry was highly regulated for safety. The court found that most railroads required periodic physical exams for certain employees.[218]

The testing programs in question were the first that considered random drug testing without any suspicion of use.[219] Prior to these two cases, an employer would need to have a reasonable suspicion in order to test an employee for drugs.[220] The Court upheld the two testing programs because it found that drug testing comported with the Fourth Amendment's "reasonableness" requirement.[221] The majority in both cases decided, "What is reasonable, of course, depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself. Thus, the permissibility of a particular practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its

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[216] Skinner v. Railway Labor Executive Assn., 489 U.S. 602 (1989); National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).

[217] ACLU, *Legislative Briefing Kit: Drug Testing* (Dec. 31, 1998), *available at* http://aclu.org/news/NewsPrint.cfm?ID=9078&c=178. *See also Skinner*, 489 U.S. at 614.

[218] *See Skinner*, 489 U.S. at 602 (1989).

[219] *See* ACLU, *supra* note 217.

[220] *Id.*

[221] *Skinner*, 489 U.S. at 625 (upholding the reasonable requirement by saying, "[w]hen the balance of interests precludes insistence on a showing of probable cause, we have usually required some quantum of individualized suspicion before concluding that a search is reasonable").

promotion of legitimate governmental interests."[222] The majority went on to hold that where the government could demonstrate "special needs" it could subject its workforce to suspicionless searches, in this case drug tests.[223]

Justice Scalia noted in his dissent, "[t]he broad, public safety rational of the majority could lead to the suspicionless testing of automobile drivers, construction workers, and school crossing guards."[224] It seems that Justice Scalia was justified in his concerns because there has been over a 140 percent increase in private sector drug screening since 1987.[225] In the post *Skinner/Von Raab* decisions, several trends have evolved. In general, courts are upholding drug-testing programs for jobs that implicate public safety.[226] These are jobs like motor vehicle operator, locomotive engineers, and aircraft pilots.[227] Secondly, the courts are upholding testing programs for jobs requiring the carrying of firearms.[228] This would include police officers and prison guards.[229] Finally the courts upheld programs for jobs that access highly classified material.[230]

Congress is trying to argue that because athletes are role models for children, there is an implicit nexus with public safety if athletes are perceived to have used performance-enhancing drugs. [231] The courts have developed the case law to the degree that they have balancing tests to determine if the act of drug testing interferers with the constitutionally given right to privacy as well as guides as to what professions may be tested. In order to continue the analysis, the evaluator must realize that this case law and the accompanying tests are what will be used by the courts to verify a challenge to the rule or law.

2. Institutional Choice Analysis

The central purpose of the participation-centered approach is that legal change will not occur without interested parties who push for it.[232] The institutional analysis must begin with the parties that are willing to bring suit.[233] In this

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[222] *Id.* at 619.
[223] *Id.*
[224] *Id.*
[225] ACLU, *Drug Testing: An Overview* (Oct. 21 2002), *available at* http://ww.aclu.org/news/NewsPrint.cfm?ID=10997&c=79.
[226] AFGE Local 1533 v. Cheney, 944 F. 2d 503 (N.D. Cal. 1990).
[227] *Id.*.
[228] Taylor v. O'Grady, 888 F.2d 1189 (7th Cir. 1989). *See also* Brown v. City of Detroit, 715 F. Supp. 832 (E.D. Mich. 1989).
[229] *Taylor*, 888 F.2d at 1198; *Brown*, 715 F. Supp. at 834-35.
[230] Harmon v. Thornburgh, 878 F.2d 484, 488 (D.C. Cir. 1989).
[231] *Steroid Use in Sports: Hearing on H.R. 1862 Before the H.R. Gov't. Reform Comm.*, 109th Cong. (2005).
[232] Freiwald, *supra* note 58, at 576.
[233] *Id.* at 557.

case, that would be the NFL, the NFLPA, the federal government, and individual athletes who will be affected by the change in policy. The remaining actors are the lawyers and the officers of the court or the administrative law judge and the appropriate government agency. As mentioned in the ephedrine case study, the costs of litigation are very high.[234] This not only includes lawyers fees, but also expert witnesses, researchers, writers, and the time it takes the litigants away from their own profession which limits their earning potential.[235] What the courts do offer is a lack of minority bias as can be seen in the political process through lobbyists, and the market through advertising.[236] If courts are selected as the institution to decide the question, the legal rule may fail to change as needed, or it may be decided on the basis of the one case that does go to court.[237]

Assuming that the challenge has a valid legal basis, the costs for the litigants would be substantial. The benefits however, would also be substantial. One problem in having the courts decide this policy is that the diffused majority of consumers who have a stake in the outcome are not given the right to be heard without high costs to organize and the high costs of attorneys.

The courts may also not be able to reach a decision that is far reaching because of the facts of the case. Depending on the cause of action, the courts may find that there is no legal recourse for those wishing to have the law examined. If this is the case, the courts would be the wrong institution to make the decision.

Although the officers of the court do not have a high stake in the outcome of the case, they are actors in the process and since they are human beings, they have the capacity to allow their own biases to be reflected in the decision making process.[238] A federal judge has a lifetime appointment and has no outside pressure to disavow his own biases.[239]

In applying the institutional choice framework to the question at hand, we would first need to determine what kinds of challenges are available to potential litigants. In this case, the litigants would either be the leagues and the unions of the professional sports leagues and the U.S. government in a claim that would challenge the constitutionality of the law, or the procedure followed in the creation of such a rule like in the ephedrine case study. Alternatively, a player who tests positive may challenge the rule on the basis that the job of professional athlete has no inherent nexus with public safety.

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[234] *See* discussion *supra* Part III.E. *See also* KOMESAR, *supra* note 32, at 123, 227.
[235] *See* KOMESAR, *supra* note 32, at 123-25.
[236] *See* KOMESAR, *supra* note 32, at 100-105. *See also* discussion *supra* Part III.C.
[237] Freiwald, *supra* note 58, at 578.
[238] Jon'a Meyer & Paul Jesilow, *Research on Bias in Judicial Sentencing*, 26 N.M.L. REV. 107, 108 (1996).
[239] *See* Marshall, *supra* note 146.

As discussed, the courts are bound to the facts of the case that is brought. As in the ephedrine case study, the circuit courts could only conclude that the FDA did not follow correct statutory procedure in the rulemaking, thus the rule was invalid.[240] This delay caused several more ephedrine related deaths until the appeals court overturned the lower court's decision.[241] In this case, it is not clear what the controlling agency would be if any, and if there is a procedural rule that would need to be followed. If the challenge was based on the implicit nexus with public safety, it could certainly be argued that professional athletes are role models and as such have an implicit nexus with public safety if they promote the use of performance enhancing drugs.

The courts as a decision making institution, for the purpose of deciding how to implement the public policy goal of eliminating performance enhancing drugs from all levels of athletic competition for public health reasons, would be costly and inefficient. The majority of affected consumers and voters can not bring a suit with out the high costs of litigation. The litigation is costly, and if the case needs to be appealed, it could take years before a final decision is made. The decision may, after all of this, be limited to the facts of the case.

V. CONCLUSION

So here we are in 2006 estranged from the dreams of a level playing field and integrity in sport. Where do we go from here? Do I explain to my children that I was able to watch Barry Bonds in person the year he broke the record? Or do I tell them that I was witness to one of the greatest shams ever pulled on the American people? After all, sport is not only an American obsession, but it also encompasses how we define ourselves and how we play the game of life. "Don't stop playing till the whistle blows . . . fight for the extra yard . . . play by the rules . . . second place is the first to lose . . . it ain't over till its over . . . ." These euphemisms *are* our culture. In a country that is made up of several diverse and unique cultures, we can all relate to sports. Just ask. Now we need to put some ice on this black eye that we collectively share. Who should apply the ice? The NFL as an institution is the best alternative for deciding how to implement public policy with a goal of eliminating performance-enhancing drugs from all levels of athletic competition for the purpose of public health. This has been demonstrated through the application of institutional choice theory to potential decision making institutions and previous actions of these institutions under similar circumstances. As discussed, the NFL has already made the considerable investment in research and technology and due to the language of the collective bargaining agreement is capable of adapting to new drugs in a quick and decisive manner, as the ephedrine case study

[240] Nutraceutical Corp. v. Crawford, 364 F. Supp. 2d 1310, 1321 (D.Utah 2005).
[241] *See* Moran, *supra* note 143. *See also* discussion *supra* Part III.D-III.E.

demonstrated.[242] Through the Drug Free Sports Act, the federal government is trying to decide policy for the market which in turn will promote policy for the nation as a whole. This is inefficient and the cost to the public should be prohibitive. The legislation, although instant and far-reaching, may not have an effect on the policy goal it is trying to achieve because of its inefficiency in digesting technical information and inherent delays due to biases. Although it is in the public interest to require performance-enhancing drug testing for all professional athletes, Congress is not the best alternative in deciding how this policy is to be instituted.

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[242] NATIONAL FOOTBALL LEAGUE PLAYERS ASSOC., COLLECTIVE BARGAINING AGREEMENT BETWEENTHE NFL MANAGEMENT COUNCIL AND THE NFL PLAYERS ASSOCIATION, Art. XLIV § 6(b) (2006), *available at* http://nflpa.org/CBA/CBA_Complete.aspx.

> Anabolic Steroids and Related Substances—The League's existing Policy and Procedure with respect to Anabolic Steroids and Related Substances will remain in effect, except as it may be modified in the future due to scientific advances with respect to testing techniques or other matters. The parties will establish a joint Advisory Committee, consisting of the League's Advisor for Anabolic Steroids and Related Substances and an equal number of members appointed by the NFLPA and by the Management Council, to study pertinent scientific and medical issues and to advise the parties on such matters.

Id. See also discussion *supra* Part IV.B.

CASE NOTE

CONSTITUTIONAL LAW—The Supreme Court Can't Have It Both Ways Under RFRA: The Tale of Two Compelling Interest Tests. *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 126 S. Ct. 1211 (2006).

*Aaron D. Bieber**

Introduction

O Centro Epirita Beneficente Uniao do Vegetal (UDV) is a Christian Spiritist sect based in Brazil, with an American branch of approximately 130 individuals. Founded in Brazil in 1961, the UDV church blends aspects of Christian theology with traditional Brazilian indigenous religious beliefs.[1] In 1993, the UDV officially established a United States branch headquartered in Santa Fe, New Mexico.[2] Central and essential to the UDV's faith is receiving communion by ingesting hoasca (pronounced "wass-ca"), a sacramental tea made from two plants unique to the Amazon region.[3] One of the plants, *psychotria viridis*, contains dimethyltryptamine (DMT), a hallucinogen whose effects are enhanced by alkaloids from the other plant, *banisteriopsis caapi*.[4] Hoasca is made by brewing together these two indigenous Brazilian plants.[5] Members of the UDV believe that taking hoasca during communion helps them understand, perceive, and connect with God.[6] UDV regards the two plants as sacred and does not substitute other plants or materials as its sacrament.[7] The UDV considers the use of hoasca outside

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*Candidate for J.D., University of Wyoming, 2008. I'd like to thank my wife for constant love and support during this project. I would also like to thank Professor Stephen M. Feldman for his insight and guidance.

[1] O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft, 282 F. Supp. 2d 1236, 1240 (D.N.M. 2002).

[2] *Id.* at 1240.

[3] *O Centro*, 126. S. Ct. at 1217.

[4] *Id.*

[5] O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft, 342 F.3d 1170, 1175 (2003). The court explained:

> *Psychotria* contains DMT; *banisteriopsis* contains harmala alkaloids, known as beta-carbolines, that allow DMT's hallucinogenic effects to occur by suppressing monoamine oxidase enzymes in the digestive system that otherwise would break down the DMT. Ingestion of the combination of plants allows DMT to reach the brain in levels sufficient to significantly alter consciousness.

Id. at 1175.

[6] Brief for Respondents at 5, Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 126 S. Ct. 1211, 1217 (2006) (No. 04-1084). The UDV alleged these facts which are not disputed significantly. *Id*.

[7] *Id*.

of religious ceremonies to be sacrilegious.[8] Unfortunately for the UDV, DMT, along with "any material, compound, mixture, or preparation, which contains any quantity of [DMT]," is listed in Schedule I of the Controlled Substances Act (CSA).[9]

Hoasca is prepared by church officials in Brazil and exported to the United States since these plants do not grow naturally in the United States.[10] On May 21, 1999, United States Customs Service agents seized a shipment of three drums of hoasca labeled "tea extract."[11] A subsequent investigation revealed that the American branch of the UDV had received fourteen prior shipments of hoasca.[12] The inspectors seized the intercepted shipment and threatened the UDV with prosecution under the CSA.[13] UDV filed suit against United States Attorney General John Ashcroft and other federal law enforcement officials seeking declaratory and injunctive relief prohibiting the government officials from applying the CSA to hoasca.[14] UDV alleged, inter alia, that applying the Controlled Substances Act (CSA) to sacramental hoasca violated the Religious Freedom Restoration Act of 1993 (RFRA).[15] Before trial, the UDV moved for a preliminary injunction to allow its members to continue their religious practices until the issue could be determined on the merits.[16]

During a hearing on the preliminary injunction, the Government conceded that the challenged application of the CSA would satisfy the UDV's prima facie case under RFRA and substantially burden the UDV's sincere exercise of religion.[17]

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[8] *Id.* at 5, 6. Respondents noted that "UDV's ceremonies also include recitation of church law, invocations, question-and-answer exchanges, and religious teachings . . . . A person must be eighteen years old to join . . . prospective members often wait as long as two years before their first [hoasca] ceremony." *Id.*

[9] Controlled Substances Act, 21 U.S.C. § 801, 812(c), Schedule I(c) (2006). A drug's placement in Schedule I indicates that the substance "has a high potential for abuse," that it "has no currently accepted medical use in treatment in the United States," and that "[t]here is a lack of accepted safety for use of the drug . . . under medical supervision." *Id.* at § 812(b)(1).

[10] *O Centro*, 342 F.3d at 1175.

[11] *Id.*

[12] *O Centro*, 126 S. Ct. at 1217.

[13] *Id.*

[14] *Id.*

[15] *O Centro*, 282 F. Supp. 2d at 1252-55 (citing Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb (2000)). RFRA states that the government may substantially burden a person's free exercise of religion only if it demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest. 42 U.S.C. § 2000bb-1 (2000).

[16] *O Centro*, 126 S. Ct. at 1217.

[17] *O Centro*, 282 F. Supp. 2d at 1252.

The United States argued, however, the injunction did not violate RFRA because applying the CSA was the least restrictive means of advancing three compelling governmental interests: (1) protecting the health and safety of UDV members; (2) preventing the diversion of hoasca to recreational uses; and (3) complying with the 1971 United Nations Convention on Pyschotropic Substances.[18] The district court heard arguments from both parties on the health risks of hoasca and the potential for its diversion away from the church.[19] The district court found the evidence regarding the health risks of hoasca to be "in equipoise."[20] In addition, the court determined that the evidence was "virtually balanced" regarding the hoasca's diversion away from the church to recreational users.[21] In light of such an even showing, the court held that the Government failed to demonstrate a compelling interest to justify the application of the CSA after it acknowledged the substantial burden enforcement would have on the UDV's sincere religious exercise.[22] The court further rejected the Government's position that it had a compelling governmental interest in complying with the 1971 Convention on Psychotropic Substances by finding that the convention does not apply to hoasca.[23]

Since the Government did not meet its burden under RFRA, and the UDV demonstrated a substantial likelihood of success as to their RFRA claim, the district court turned to the question of whether the preliminary injunction should be granted to the UDV.[24] Under Tenth Circuit law, "[a] movant is entitled to a preliminary injunction if he can establish the following: (1) a substantial likelihood of success on the merits of the case; (2) irreparable injury to the movant if the preliminary injunction is denied; (3) the threatened injury to the movant

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[18] *Id*. at 1252-53.

[19] *Id*. at 1255-66. The Government and UDV presented conflicting expert testimony about the health risks hoasca posed to the members of the UDV and the risk of diversion hoasca would have outside of the UDV's religious uses. *Id.* On the issue of health risks, the Government presented evidence to the effect that the use of hoasca, or DMT more generally, can cause adverse drug reactions including psychotic reactions and cardiac irregularities. *Id*. at 1256-62. UDV countered by citing studies documenting the safety of its sacramental use of hoasca and presenting evidence that minimized the likelihood of the health risks raised by the Government. *Id.* at 1255-62. On the issue of diversion of hoasca, the Government cited a general rise in the illicit use of hallucinogens, and pointed to interest in the illegal use of DMT and hoasca in particular. *Id.* at 1262-65. UDV countered by emphasizing the thinness of any market for hoasca, the relatively small amounts imported by the church, and the absence of any diversion problem in the past. *Id*. at 1265-66.

[20] *Id*. at 1262.

[21] *Id*. at 1262, 1266. On the issue of health risks, "in equipoise" meant that evidence presented by both sides was "virtually balanced." *Id.* at 1262. It is also noteworthy that on the issue of risk of diversion the evidence presented by the UDV's experts "may even tip the scale slightly in favor of the Plaintiff's position." *Id*. at 1266.

[22] *Id.* at 1255.

[23] *Id.* at 1266-69 (citing 32 U.S.T. 543, T.I.A.S. No. 9725).

[24] *O Centro*, 282 F. Supp. 2d at 1241, 1270-71.

outweighs the injury to the other party under the preliminary injunction; and (4) the injunction is not adverse to the public interest."[25] In considering irreparable injury, the district court stated that "tenth circuit law indicates that the violations of the religious exercise rights protected under RFRA represent irreparable injuries."[26] Next, the court weighed the threatened injury to the movant (the UDV) against the injury to the other party (the Government) and considered whether the grant of the injunction would be adverse to the public interest.[27] The district court stated that the Government's inability to prove a compelling interest coupled with the public's interest in protecting First Amendment rights satisfied these elements.[28] In conclusion, the court held that since the UDV was likely to succeed on the merits of its claim under RFRA, the grant of a preliminary injunction was proper.[29]

Due to its findings, the district court entered a preliminary injunction prohibiting the Government from enforcing the CSA against the UDV for its importation and use of hoasca.[30] The injunction allowed the church to import the tea if it complied with federal permits, restricted control over the tea to persons of UDV church authority, and warned of the dangers of hoasca to those particularly susceptible UDV members.[31]

The Government appealed the preliminary injunction and the Tenth Circuit Court of Appeals affirmed the district court's grant of the preliminary injunction.[32] Subsequently, a majority of the Tenth Circuit sitting en banc affirmed.[33] The Supreme Court granted the Government's petition for certiorari to determine whether the Government failed to demonstrate, at the preliminary injunction stage, a compelling interest in barring the UDV's sacramental use of hoasca.[34]

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[25] *Id.* at 1241 (citing Kikumura v. Hurley, 242 F.3d 950, 955 (10th Cir. 2001)).
[26] *O Centro*, 282 F. Supp. 2d at 1270-71 (citing *Kikumura*, 242 F.3d at 963).
[27] *Id.* at 1271.
[28] *Id.*
[29] *Id.*
[30] *Id.* at 1270-71.
[31] *See O Centro*, 126 S. Ct. at 1218; Appellant Pet. for Cert. at 5-9, Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 126 S. Ct. 1211 (2006) (No. 04-1084); Appellee Mem. in Opp'n to Pet. for Cert. at 5-7, Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 126 S. Ct. 1211 (2006) (No. 04-1084).
[32] *O Centro*, 342 F.3d at 1181 (holding that "[the] UDV has demonstrated a substantial likelihood of success on the claim for an exemption to the CSA for sacramental use of hoasca").
[33] O Centro Espirita Beneficente Uniao Do Vegetal v. Ashcroft, 389 F.3d 973 (10th Cir. 2004). The court "granted rehearing to review the different standards by which we evaluate the grant of preliminary injunctions, and to decide how those standards should be applied in this case." *Id.* at 975.
[34] Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 544 U.S. 973 (2005).

The Supreme Court held that "[t]he courts below did not err in determining that the Government failed to demonstrate, at the preliminary injunction stage, a compelling interest in barring the UDV's sacramental use of hoasca."[35]

This case note will demonstrate how the Supreme Court's interpretation of RFRA is contradictory, and does not give a clear definition of which compelling interest test RFRA demands. Specifically, this case note will examine the indistinct legislative intent of RFRA and demonstrate how the Court's decision is ambiguous in light of the legislative intent. When enacting and codifying RFRA, Congress approved of stronger, more fact specific applications of compelling interest standards previously applied by the Supreme Court, and a weaker, more generalized applications that the Court used throughout the later half of the twentieth century.

First, this case note will display how the Court's approval of a stronger and a weaker compelling interest standard does not clarify which standard the Court will use in the future. Second, this case note will analyze the Court's reasoning in denying the Government's proffered compelling interest of the uniformity of enforcement of the CSA for denying a religious exemption and explain how the Court gives conflicting reasoning to justify their holding on that matter. Finally, this case note will conclude that *O Centro* gives a nebulous and conflicted interpretation of RFRA that is unsuitable for future use.

BACKGROUND

The Free Exercise Clause of the First Amendment guarantees that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[36] From 1791 to just prior to the 1960s, the Supreme Court ruled that the Free Exercise Clause protected religiously motivated beliefs, not actions, against general regulation.[37]

In 1961, in *Braunfield v. Brown*, the Supreme Court decided that a Sunday closing law did not inflict constitutionally recognized harm on Orthodox Jewish shopkeepers, who kept a Saturday Sabbath, because the laws did not directly stop their religious practice.[38] The Court held that the state can regulate conduct by a generally applicable law despite its indirect burden on religious observance unless the state may accomplish its purpose by means which do not impose that

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[35] *O Centro*, 126 S. Ct. at 1213.
[36] U.S. CONST. amend. I.
[37] *See* Reynolds v. United States, 98 U.S. 145 (1878) (affirming a Mormon leader's bigamy conviction). *Cf.* Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940) (recognizing two aspects of free exercise: freedom to believe and freedom to act, and that the former is absolute and the later is not).
[38] *Braunfield*, 366 U.S. 599, 606-10 (1961).

burden.[39] The shopkeepers argued that the purpose of the statute, a day of rest for the people of the state, could still be fulfilled by granting an exemption because they rested on Saturdays.[40] The Court found, however, that the possibility that the shopkeepers might receive an economic advantage over those adhering to the statute justified denial of an exemption.[41] *Braunfield* represented the possibility courts could grant an exemption to a general law of applicability for religious conduct.[42] But under *Braunfield*, the Court still gave much deference to the Government's reasons for enforcing a general law despite its admitted negative consequences on religious exercise.[43]

The Court Increased Protection Under the Free Exercise Clause

Protection under the Free Exercise Clause dramatically increased after the Supreme Court's decisions in *Sherbert v. Verner* and *Wisconsin v. Yoder*.[44] In *Sherbert*, a Seventh Day Adventist woman was fired from her job because her religion prohibited her from working on Saturdays.[45] Since she could not work on Saturdays, she was ineligible for South Carolina's unemployment compensation plan.[46] The Court considered the question whether a law denying the plaintiff unemployment compensation benefits violated her right to free exercise.[47] The Court looked at three criteria: (1) whether the law infringed on a person's free

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[39] *Id*. at 607.
[40] *Id*. at 608.
[41] *Id.* at 608-09. The Court also noted that denying the exemption would reduce the amount of commercial noise and activity. *Id*. at 608.
[42] *See* Tania Saison, *Restoring Obscurity: The Shortcomings of the Religious Freedom Restoration Act*, 28 COLUM. J. L. & SOC. PROBS. 653, 664-65 (1995). Recognizing the change that *Braunfield* brought about in free exercise jurisprudence, Saison stated:

> Though the claimants did not prevail in that case, the manner which the Supreme Court reached its decision marked a radical departure from the Reynolds rationale, and suggested that the Court would not always accord deference to legislative enactments. Unlike the approach used in Reynolds, the Braunfield Court explored the effect the statute would have on religious practice. A balancing informed the decision.

Id. (citations omitted).
[43] *Braunfied*, 366 U.S. at 606. Writing for the majority, Justice Warren stated: "[i]t cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of various religions." *Id*. *See also* Justice Brennan's dissent: "It is not even the interest in seeing that everyone rests one day a week, for appellants' religion requires that they take such a rest. It is mere convenience of having everyone rest on the same day." *Id*. at 614 (Brennan, J., dissenting).
[44] Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972).
[45] *Sherbert*, 374 U.S. at 398.
[46] *Id*.
[47] *Id*. at 402-03, 407-08.

exercise of religion; (2) whether the law served a compelling state interest; and (3) whether the law was proportionately made to achieve the means by the method least intrusive of the religious freedom.[48] Despite the fact the law was not explicitly written to discriminate against Seventh Day Adventists, the Court stated that a law of general applicability could violate an individual's free exercise rights whether the law placed a direct or indirect burden on the person.[49]

The *Sherbert* Court held that the plaintiff was entitled to unemployment compensation.[50] The Court reasoned that the Government's reason of uniform application of the unemployment compensation statute, when applied to the specific facts of the case, was not a compelling interest because the government had not shown evidence of "unscrupulous claimants feigning religious objections to Saturday work."[51] *Sherbert* demanded the Government show fact-specific evidence of how allowing an exemption to the plaintiff would dilute the unemployment compensation fund and disrupt work scheduling.[52] In addition, the holding required the Government to show there were no alternative regulations that would fulfill its interest without infringing First Amendment rights.[53] Although *Sherbert* found that the Government's interest in the uniform application of the unemployment compensation statute was not compelling, it suggested that a bare interest in uniform application of a law might justify burdens on religious practice.[54]

The Supreme Court reaffirmed this standard nine years later in *Wisconsin v. Yoder*.[55] In that case, the Court held that the Free Exercise Clause entitled Old Order Amish to an exemption from Wisconsin compulsory school laws for children between the ages of fourteen and sixteen.[56] The high court applied the compelling interest test in which it measured the state's interest for the education of its youth against the likely impact on the Amish community if compliance were forced by

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[48] *Id*. at 403, 404 (citing Braunfield v. Brown, 366 U.S. 599 at 607 (1961) ("For '[i]f the purpose or effect of a law is to impede the observance of one or all religions or it is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.'")).
[49] *Id*. at 403-04.
[50] *Id*. at 408-09.
[51] *Sherbert*, 374 U.S. at 407-09 (reasoning that there was a need for uniform application of the unemployment statute to prevent "unscrupulous claimants feigning religious objections to Saturday work").
[52] *Id*. at 407.
[53] *Id*.
[54] *Id*. at 408. The Court noted that applying a Sunday closing law to Orthodox Jewish merchants, who were already closed on Saturday due to their religious practice, had been justified by a "strong state interest in providing one uniform day of rest for all workers." *Id*. (citing *Braunfield v. Brown*, 366 U.S. at 605).
[55] *Yoder*, 406 U.S. 205 (1972).
[56] *Id.* at 234-36.

the law's criminal penalties.[57] As in *Sherbert*, the *Yoder* Court rejected sweeping claims of a compelling interest in uniform application in a general law of applicability.[58] Instead, courts must use a fact specific inquiry to "examine the interest that the State seeks to promote by its requirement of compulsory education to age 16, and that impediment to those objectives that would flow from recognizing the claimed Amish exemption."[59] In rejecting the State's asserted compelling interest of uniformity in the compulsory attendance law, the *Yoder* Court again affirmed that general laws of applicability can violate the Free Exercise Clause.[60] By holding that the Government, in this instance, did not have a compelling interest in uniform application of its education laws, the Court focused its decision on the unique history and success of the Old Amish Order's community in educating its youth.[61] The compelling interest set forth by *Sherbert* and *Yoder* has been said to be the "high water mark" of free exercise.[62]

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[57] *Id*. at 214-34. Although providing public schools ranked at the "very apex" of the function of the state, and the state had a very strong interest in the health, welfare, and public education of its children, applied to the facts of the case, the compulsory school law "would do little to serve those interests." *Id*. at 213, 222.

[58] *Id*. at 221.

[59] *Id.*

[60] *Id*. at 220. The Court stated "[a] regulation neutral on its face, may in application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." *Id*.

[61] *Id*. at 222-26.

[62] Ira C. Lupu, *Of Time And The RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171, 185 (1995). Professor Lupu stated that between 1972 and 1980,

> [T]he Court had announced a strict review standard to govern claims, and had not yet created exceptions or limiting doctrines to funnel claims in a different, more government favoring direction. During that period, however, those principles were never put to any test and no Supreme Court decisions relied upon them.

Id. at 185.

The Supreme Court Applied the Compelling Interest Test

In the years following *Sherbert*, the Court upheld numerous laws against free exercise challenges using the compelling interest test.[63] The only exception to the Supreme Court's deference to the government during this time was a line of unemployment compensation cases.[64] The Supreme Court used a variety of methods to deny free exercise exemptions during this time and academics differ

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[63] Seeger v. United States, 380 U.S. 163 (1965) (denying claimant's exemption from the Universal Military Training and Service Act because language defining "religious training and belief" as used in the statute exempting conscientious objectors from military service excludes those persons who, disavowing religious belief, decide on basis of essentially political, sociological or economic considerations that they will not participate in the war); Johnson v. Robison, 415 U.S. 361 (1974) (denying religious conscientious objector's claim to benefits under the Veterans Readjustment Act because the legislation furthered the objectives of enhancing and making more attractive service in the armed forces of the United States which was plainly within the power of Congress to raise and support armies); Gillette v. United States, 401 U.S. 437 (1971); United States v. Lee, 455 U.S. 252 (1982); Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (denying claimant's requested classification under the tax code because the government's fundamental, overriding interest in eradicating racial discrimination in education substantially outweighed whatever burden denial of tax benefits placed on the exercise of the religious beliefs of nonprofit private schools that prescribe and enforce racially discriminatory admission standards on the basis of religion); Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290 (1985) (denying claimant's exemption to the Fair Labor Standards Act because the Act placed no substantial burden on the free exercise of the claimants); Goldman v. Weinberger, 475 U.S. 503 (1986); Bowen v. Roy, 476 U.S. 693 (1986); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (denying claimant's exemption from prison regulations because State prison officials acted in reasonable manner in precluding prisoners who were members of Islamic faith from attending religious service held on Friday afternoons, and prison regulations to that effect did not violate free exercise of religion clause of the First Amendment); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); Hernandez v. Commissioner, 490 U.S. 680 (1989).

[64] *See* Thomas v. Review Bd. of the Ind. Employ. Sec. Div., 450 U.S. 707 (1981) (denying unemployment benefits to applicant whose religion forbade him to fabricate weapons found unconstitutional under Free Exercise Clause); Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136 (1987) (denying unemployment benefits to religious convert who resigned position that required her to work on the Sabbath found unconstitutional under Free Exercise); Frazee v. Ill. Dept. of Employment Sec., 489 U.S. 829 (1989) (denying unemployment benefits to a claimant who refused a position because the job would have required him to work on Sunday found unconstitutional under Free Exercise Clause, even though refusal was not based on tenets or dogma of an established religious sect).

as to classification of these methods.[65] One way the Supreme Court denied free exercise exemptions was by giving great deference to military policy.[66]

The Supreme Court also gave great deference to the government when the government argued that a religious exemption is precluded by a policy embodied in a congressional statute or government policy.[67] For example, in *Bowen v. Roy,* a Native American family requested an exemption from an Aid to Families with Dependent Children (AFDC) policy requiring a Social Security number to receive

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[65] *See* Lupu, *supra* note 62, at 177-78; Thomas A. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 5-12 (1994); Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 264-83 (1995). Professor Lupu states that in employing the compelling interest test from *Sherbert* and *Yoder* prior to *Smith*, the Court rarely granted an exemption:

> This startling trend, in which the existence of a purportedly religion protective doctrine turned out to be no barrier to a long string of religion-suppressing decisions, had three crucial components—the exemption doctrines triggering mechanism [using the substantial burden requirement to find that the religious person or groups were not actually burdened by the application of the general law], its exclusion of certain government enclaves [military and prison policy was given deferential treatment by the courts], and the force and focus of its demand for governmental justification [watering down the compelling interest test by citing the general importance of tax laws].

See generally Lupu, *supra* note 62, at 264-83 (citations omitted).

[66] *See Goldman*, 475 U.S. 503 (1986); *Seeger*, 380 U.S. 163 (1965); *Robison*, 415 U.S. 361 (1974); *Gillette*, 401 U.S. 437 (1971). In *Goldman* a Jewish Air Force captain sought a religious exemption from a military regulation prohibiting headgear indoors so that he could wear his yarmulke, which is traditional Jewish headgear. *Goldman*, 475 U.S. at 505. The Government's interest for the policy was to maintain discipline, morale, order and hierarchical unity. *Id*. at 507-08. The Court refused to apply a compelling interest standard stating that "great deference" must be given to the judgment of military officials in applying their uniform policies. *Id*. at 507. *See also Gillette*, 401 U.S. at 437, 462 (holding that the "substantial governmental interest" of procuring necessary manpower to raise an army precluded an exception under the conscientious objector's statute, despite the objector's "incidential burdens"); *Robison*, 415 U.S. at 384-85 (finding the compelling interests of making the military more attractive and raising manpower for the military justified a burden on the religious convictions of the plaintiff religious conscientious objector).

[67] *See* Bowen v. Roy, 476 U.S. 693 (1986); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988). *Lyng* presented a similar line of reasoning to that used in *Bowen*. *Lyng*, 485 U.S. 439 (1988). In *Lyng*, a group of Native Americans sought to enjoin the U.S. Forest Service from building a road through a sacred area which "would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest California Indian peoples." *Id*. at 442. The group argued that the burden on their religious practices was heavy enough to violate the Free Exercise Clause unless the Government could demonstrate a compelling need to

benefits because giving their daughter a Social Security number would "rob her spirit."[68] The Court declined to use the compelling interest test stating:

> Absent proof of an intent to discriminate against particular religious beliefs or against religion in general, the Government meets its burden when it demonstrates that a challenged requirement for government benefits, neutral and uniform in its application, is a *reasonable means of promoting public interest*.[69]

Since the law was facially neutral, the Court reasoned that Congress made no individualized exemptions within AFDC and the Government had a compelling interest in preventing fraud and facilitating administrative ease by using social security numbers.[70] The Court noted that there was no proof of fraudulent attempts to obtain benefits from the AFDC through use of false Social Security numbers.[71] A "slight risk," however, would justify the Government's reasons to disallow an exemption.[72]

During this time, the high court also deferred to the government's interest in uniform application of its laws.[73] In *United States v. Lee*, a member of the

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complete the road. *Id*. at 447. The Court disagreed stating the Government's determination to use its land in the manner it did was a compelling interest in itself. *Id*. at 452. The Court basically provided a rule that admitted no judicially crafted exemptions:

> The First Amendment must apply to all citizens alike, and it can give to none of them a veto power over public programs that do not prohibit the free exercise of religion. The Constitution does not, and the courts cannot, offer to reconcile the various competing demands on government, many of them rooted in sincere religious belief, that inevitably arise in so diverse a society as ours. That task, to the extent that it is feasible, is for the legislature and other institutions.

Id.

[68] *Bowen*, 476 U.S. at 696.

[69] *Id*. at 707-08 (emphasis added).

[70] *Id*. at 709-12.

[71] *Id*. at 711.

[72] *Id*. The Court stated that:

> [W]e know of no case obligating the Government to tolerate a slight risk of "one or perhaps a few individuals" fraudulently obtaining benefits in order to satisfy a religious objection to a requirement designed to combat that very risk. Appellees may not use the Free Exercise Clause to demand Government benefits, but only on their own terms, particularly where that insistence works a demonstrable disadvantage to the Government in the administration of the programs.

Id.

[73] *See* United States v. Lee, 455 U.S. 252 (1982); Hernandez v. C.I.R., 490 U.S. 680 (1989).

Old Amish Order challenged his mandatory participation in the Social Security system.[74] The Order's claim rested on the ground that "the Amish believe it sinful not to provide for their own elderly and therefore are religiously opposed to the national social security system."[75] The Court held that "[b]ecause the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax."[76] The Court's reasoning did not rest on applying the exemption to the Amish so much as to any religious objector.[77] The Court used general statements regarding the importance of uniformity rather than a fact-specific inquiry into the Social Security system's feasibility in allowing an exemption for the Amish.[78]

Similarly, the issue in *Hernandez v. Commissioner* was whether religious training sessions (called "auditing") conducted by the Church of Scientology were deductible under the Internal Revenue Service (IRS) code.[79] The IRS argued that a contribution is not a true "gift" if there is some quid pro quo, and therefore not tax deductible under an executive branch interpretation of the tax statutes.[80] Relying heavily on *Lee*, the Court held that, although it was questionable as to whether the Scientology Church suffered a burden, "even a substantial burden [on religious practice] would be justified by the 'broad public interest in maintaining a sound tax system' free from 'myriad of exceptions flowing from a wide variety of religious beliefs.'"[81] Again, the overriding governmental interest in uniformity precluded any individualized exemptions from a government law.[82]

Thus, the compelling interest test set forth in *Sherbert* and *Yoder* was slowly diminished: "Between 1980 and 1990, the law became decidedly less favorable to free exercise. The law . . . beg[a]n to operate in ways that insulated the government from having to satisfy the compelling interest standard, and the standard itself had been subtly weakened in *Lee* . . . ."[83] It is clear that the Supreme Court

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[74] *Lee*, 455 U.S. at 254-55.
[75] *Id.* at 255.
[76] *Id.* at 260.
[77] *Id.* at 259-60 (stating if religious exemptions were allowed, "it would be difficult to accommodate the comprehensive social security system with myriad exceptions flowing from a wide variety of religious beliefs.").
[78] *Id.* at 258. The Court noted that "[w]idespread individual voluntary coverage under social security . . . would undermine the soundness of the social security program." *Id.* (citing S. REP. NO. 404, pt. 1 at 116 (1965)).
[79] Hernandez v. C.I.R., 490 U.S. 680, 684-85 (1989).
[80] *Id.* at 687-88.
[81] *Id.* at 699-700.
[82] *Id.* at 700. The Court stated that the tax code "must be uniformly applicable to all, except as Congress provides explicitly otherwise." *Id.* (citing United States v. Lee, 455 U.S. 252, 261 (1982)).
[83] *See* Lupu, *supra* note 62, at 85.

employed both a stronger, fact-specific compelling interest test, like that used in *Sherbert* and *Yoder*, and a weaker, generalized compelling interest test used prior to, and after, *Sherbert* and *Yoder* in *Braunfield*, *Lee*, *Goldman,* and *Bowen*.[84]

The Supreme Court Abolished the Compelling Interest Test of the Free Exercise Clause

Twenty-seven years after the Supreme Court's decision in *Sherbert*, the high court completely abolished the compelling interest test for claims of exemption under free exercise in *Employment Division, Department of Human Resources of Oregon v. Smith*.[85] In *Smith*, two members of the Native American Church were fired from a drug rehabilitation facility for using peyote for sacramental purposes as part of their religious ceremonies.[86] When they applied for unemployment benefits, the state deemed them ineligible because they had been fired for work-related misconduct.[87] A state law criminalizing possession of peyote prohibited the sacramental peyote use by the two men.[88] With Justice Scalia writing for the majority, the Court held that the right to religious free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).[89] Free exercise was still protected from laws that purposefully prohibited it.[90] Neutral generally applicable laws that substantially burden a religious practice, however, no longer had to be justified by a "compelling governmental interest."[91] The high court justified its position by pointing out that, since *Sherbert*, the Court had not allowed an exemption to a general law of applicability unless suit was brought in conjunction with other constitutional protections.[92] The Court also stated that its decision was consistent with decisions it made in the past because it generally upheld a government's reason for applying

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[84] *See supra* notes 44-83 and accompanying text.
[85] Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990).
[86] *Id*. at 875-76.
[87] *Id*.
[88] *Id*.
[89] *Id*. at 879 (citing United States v. Lee, 455 U.S. 252, 263 n.3 (1982)).
[90] Smith, 494 U.S. at 877.
[91] *Id*. at 886-88.
[92] *Id*. at 881 (citing Wisconsin v. Yoder, 406 U.S. 205 (1972)). The Court noted that the issue in *Yoder* was: "Invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school." *Id*. *Smith* also distinguished itself from *Sherbert* and other unemployment cases granting an exemption under a Free Exercise theory by stating that, in those cases, the state law did not prohibit the conduct of those seeking religious exemption. In *Smith*, however, the Oregon statute did prohibit the use of peyote. *Id.* at 876.

a law to those seeking religious exemption.[93] The Court explained that, before *Smith*, it never applied a true compelling interest test because applying a true compelling interest test to government laws of general applicability would have a disastrous effect.[94]

Congress Codifies the Compelling Interest Test

In 1993, in response to *Smith*, Congress passed the Religious Freedom Restoration Act (RFRA).[95] The congressional findings incorporated into RFRA provide that "the compelling interest test as set forth in prior federal court rulings is a workable test for striking sensible balances between religious liberty and competing governmental interests."[96] RFRA states that laws that are religiously neutral on their face can be as burdensome on religious exercise as laws designed to interfere with religion.[97] The act's operative section states:

> (a) IN GENERAL.—Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
> (b) EXCEPTION.—Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
> (1) is in furtherance of a compelling governmental interest; and
> (2) is the least restrictive means of furthering that compelling governmental interest.[98]

Congress's purpose for passing RFRA was to restore "the compelling interest test as set forth in Sherbert v. Verner . . . and Wisconsin v. Yoder . . . and its application

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[93] *Id.* at 883-84 (citing Bowen v. Roy, 476 U.S. 693 (1986); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); Goldman v. Weinberger, 475 U.S. 503 (1986); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987)).
[94] *Id.* at 888. The Court stated:

> If the "compelling interest" test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded. Moreover, if 'compelling interest' really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test. Any society adopting such a system would be courting anarchy . . . .

Id.
[95] Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-1-4 (2000); Religious Freedom Restoration Act, Pub. L. 103-14, 107 Stat. 1488) (1993).
[96] 42 U.S.C. § 2000bb(a)(5) (2000).
[97] *Id.* § 2000bb(a)(2).
[98] *Id.* § 2000bb-1.

in all cases where free exercise is substantially burdened."[99] RFRA is set up to "provide a claim or defense to persons whose religious exercise is substantially burdened by the government."[100]

Legislative Intent of RFRA's Compelling Interest Test

Although the language in RFRA restored the compelling interest test set forth in *Sherbert* and *Yoder*, the legislative history makes it unclear as to whether RFRA is meant to restore the more heightened test set forth by *Sherbert* and *Yoder* or the subsequent Supreme Court interpretations of the compelling interest test which limited and distinguished *Sherbert* and *Yoder*.[101] RFRA does not codify the result reached in any prior free exercise decision.[102] The House Committee instructed courts to refer to free exercise cases prior to *Smith*:

> It is the Committee's expectation that the courts will look to free exercise of religion cases decided prior to Smith for guidance in determining whether or not religious exercise has been burdened and the least restrictive means have been employed in furthering a compelling governmental interest. Furthermore, by enacting this legislation, *the Committee neither approves nor disapproves of the result in any particular court decision involving the free exercise of religion, including those cited in this bill*. This bill is not a codification of any prior free exercise decision but *rather the restoration of the legal standard that was applied in those decisions*. Therefore, the compelling governmental interest test should be applied to all cases where the exercise of religion is substantially burdened; however, *the test generally should be construed more stringently or more leniently than it was prior to Smith*.[103]

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[99] *Id*. § 2000bb(b)(1).

[100] *Id*. § 2000bb(b)(2).

[101] *See* Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 217-35 (1994); Berg, *supra* note 65, at 17-21; Paulsen, *supra* note 65, at 283-91 (analyzing the language and legislative history of RFRA to determine which standard Congress intended).

[102] *See* S. REP. NO. 103-111, at 19 (1993); H. REP. NO. 103-88, at 16 (1993). *See also* 139 CONG. REC. H2358 (1993) (statement of Rep. Hyde) (statements concerning RFRA: these "concerns have been resolved either through explicit statutory changes or through committee report language").

[103] S. REP. NO. 103-111, at 16 (emphasis added). H. REP. NO. 103-88, at 16 (reciting substantially the same language as the Senate Report). *Cf.* H. REP. NO. 103-88, at 19 (stating "[t]o be absolutely clear, the bill does not expand, contract or alter the ability of a claimant to obtain relief in a manner consistent with free exercise jurisprudence, including Supreme Court jurisprudence, under the compelling governmental interest test prior to Smith.").

In addition to this language, there are several points in the committee reports that state the Act's purpose "is only to overturn the Supreme Court's decision in Smith."[104] Congress cited to *Sherbert* and *Yoder* and subsequent decisions applying a reduced compelling interest test in the background section of the House and Senate Reports.[105]

Congress clearly stated that general laws of applicability are subject to RFRA.[106] But Congress also granted exemptions to particular government activities, stating, "it is clear that strict scrutiny does not apply to government actions involving only management or internal Government affairs or the use of the Government's own property or resources."[107] Thus, RFRA "will not guarantee that religious claimants bringing free exercise challenges will win, but only that they have a chance to fight."[108]

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[104] S. REP. NO. 103-111, at 36; *cf.* H. REP. NO. 103-88, at 16 (stating that the committee expects "the courts will look to free exercise cases decided prior to Smith for guidance in determining whether the exercise of religion has been substantially burdened and the least restrictive means have been employed in furthering a compelling interest"); *cf. Id.* at 3 (Views of Rep. Hyde, Rep. Sensenbrenner, Rep. McCollum, Rep. Coble, Rep. Canady, Rep. Inglis, Rep. Goodlatte): "[RFRA did not reflect] the high water mark as found in Sherbert v. Verner and Wisconsin v. Yoder, but merely returns the law to the state as it existed prior to Smith").

[105] S. REP. NO. 103-111, at 3-6; *see also* H. REP. NO. 103-88, at 2-3, 10-13. Congress stated: "using strict scrutiny, the Court held that the free exercise interest of the Old Order Amish outweighed the interest of the state compulsory education statute." *Id.* at 13 (citing Wisconsin v. Yoder, 406 U.S. 205 (1972)). "[S]imilarly the Court has used the compelling governmental interest test and upheld the disputed governmental statute or regulation." *Id.* (citing United States v. Lee, 455 U.S. 252 (1982)).

[106] H. REP. NO. 103-88 at 16. The Congressional Report stated:

> All governmental actions which have a substantial impact on the practice of religion would be subject to the restrictions in this bill. In this regard, in order to violate the statute, government activity need not coerce individuals into violating their religious beliefs nor penalize religious activity by denying any person an equal share of the rights, benefits and privileges enjoyed by any citizen. Rather, the test applies whenever a law or an action taken by the government to implement a law burdens a person's exercise of religion.

Id.

[107] S. REP. NO. 103-111 at 16 (citing Bowen v. Roy, 476 U.S. 693 (1986); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988). Congress stated: "the Court held that the manner in which the Government manages its internal affairs and uses its own property does not constitute a cognizable 'burden' on anyone's exercise of religion." *Id.* at 19.

[108] 139 CONG. REC. H2358 (1993) (statement of Rep. Hyde). *See also* 139 CONG. REC. H2358 at S14, 351 (1993) (statement of Sen. Kennedy) ("Not every free exercise claim will prevail, just as not every claim prevailed prior to the Smith decision.").

RFRA Applied in the Federal Courts

RFRA originally applied to both state and federal governments.[109] In *City of Boerne v. Flores*, however, the Supreme Court found RFRA unconstitutional as applied to state laws.[110] In the wake of *Boerne*, Congress amended RFRA only to apply to the federal government.[111] Since *Boerne*, some courts have found RFRA unconstitutional as applied to federal law.[112] A majority of federal circuit courts, however, still find applying RFRA to federal laws is constitutional.[113]

PRINCIPAL CASE

In *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal* the question presented was whether the district court erred in finding that, under RFRA, the Government had not met its burden of demonstrating a compelling interest thereby

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[109] *See* 42 U.S.C. § 2000bb-2(1). RFRA originally applied to any "branch, department agency, instrumentality, and official (or other person acting under color of law) of the United States," as well as to any "State, or . . . subdivision of a State." *Id.*

[110] City of Boerne v. Flores, 521 U.S. 507 (1997). In *City of Boerne* the Court reasoned that RFRA exceeded Congress' power under § 5 of the Fourteenth Amendment to enforce provisions of the Fourteenth Amendment. *Id.* at 532-34. Also, RFRA contradicted principles necessary to maintain separation of powers and federal-state balance. *Id.* at 534-36. RFRA was not based on a history of religious discrimination nor in proportion to supposed remedial or preventative object and constitutes a high level congressional intrusion into states' traditional prerogatives and general authority to regulate themselves. *Id.* at 531-32.

[111] *See* Religious Freedom Restoration Act, Pub.L. 106-274, § 7(a)(1) (2000); 42 U.S.C. § 2000bb-2 (2000).

[112] *See* Edward J.W. Blatnik, *No RFRAF Allowed: The Status of the Religious Freedom Restoration Act's Federal Application in the Wake of City of Boerne v. Flores*, 98 COLUM. L. REV. 1410, 1412 (1998) (citing cases in the sixth circuit, seventh circuit, bankruptcy courts and district courts which have rejected claims under RFRA reasoning that such claims are moot as a result of *Boerne*).

[113] *See generally* Hankins v. Lyght, 441 F.3d 96 (2d Cir. 2006) (holding RFRA constitutional as applied to federal law under Necessary and Proper Clause of the Constitution). *See also* O'Bryan v. Bureau of Prisons, 349 F.3d 399 (7th Cir. 2003) (holding RFRA is constitutional as applied to federal law under Necessary and Proper Clause of the Constitution); Guam v. Guerrero, 290 F.3d 1210 (9th Cir. 2002) (holding RFRA applied to the federal realm is within Congress' plenary power and thus comported with separation of powers doctrine); In re Young, 141 F.3d 854 (8th Cir. 1998), cert. denied, 525 U.S. 811 (1998) (holding Congress had the plenary authority to enact Religious Freedom Restoration Act (RFRA) and make it applicable to the United States bankruptcy laws); Kikumura v. Hurley, 242 F.3d 950 (10th Cir. 2001) (*Boerne* invalidated RFRA only as applied to state and local governments, not as applied to federal government through Congress's Article I enforcement powers); Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156 (D.C. Cir. 2003) (RFRA constitutionally applies to the federal government).

granting the preliminary injunction to the UDV.[114] The United States Supreme Court reviewed the district court's legal rulings de novo and its ultimate decision to issue the preliminary injunction to the UDV for abuse of discretion.[115]

Justice Roberts, writing the unanimous decision for the Court, noted *Smith* held that the Free Exercise Clause of the First Amendment does not prohibit the government from burdening religious practices through generally applicable laws.[116] The Court followed by stating that under RFRA, the federal government may not, as a statutory matter, substantially burden a person's exercise of religion "even if the burden results from a rule of general applicability."[117] The only exception recognized by the statute requires the Government to satisfy a compelling interest test, or demonstrate that the burden to the person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.[118]

The Government did not challenge the district court's factual findings or the conclusion that the evidence submitted on the issues was evenly balanced.[119] Instead the Government maintained that such evidentiary equipoise was an insufficient basis for issuing a preliminary injunction against the enforcement of the Controlled Substances Act.[120] The Government began by stating that the party seeking pretrial relief bears the burden of demonstrating a likelihood of success on the merits.[121] The Government argued that in granting the preliminary injunction based on a tie in the evidentiary record, the district court lost sight of the burden that UDV would have to bear in order to receive the injunction under RFRA.[122]

UDV countered that, since the Government conceded its prima facie case under RFRA (application of the CSA would substantially burden a sincere religious exercise of their religion), the Government had the burden of demonstrating that it

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[114] Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 126 S. Ct. 1211, 1216 (2006).
[115] *Id.* at 1219 (citing McCreary County v. A.C.L.U., 125 S. Ct. 2722, 2737-38 (2005)).
[116] *Id.* at 1216 (citing Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990)). The Court noted that *Smith* rejected the interpretation of the Free Exercise Clause announced in *Sherbert*, and in doing so held that the Constitution does not require judges to engage in a case-by-case assessment of the religious burdens imposed by facially constitutional laws. *Id.* (citing *Smith*, 494 U.S. at 883-90).
[117] *Id.* at 1216-17 (citing 42 U.S.C. § 2000bb-1(a)).
[118] *Id.* at 1217 (citing 42 U.S.C. § 2000bb-1(b)).
[119] *Id.* at 1218. *See* Brief for Petitioners at 8-9, Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 126 S. Ct. 1211 (2006) (No. 04-1084).
[120] *Id.*
[121] *O Centro*, 126 S. Ct. at 1219 (citing Mazurek v. Armstrong, 520 U.S. 968, 972 (1997); Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975)).
[122] *Id.* at 1219.

had a compelling interest to apply the CSA to the UDV.[123] Since the Government bore this burden, and the evidence was in equipoise, the Government must lose at the preliminary injunction stage of the litigation.[124]

The *O Centro* Court rejected the Government's argument that under RFRA evidentiary equipoise is an insufficient basis for issuing a preliminary injunction against application of the CSA.[125] Because the Government conceded the UDV's prima facie case under RFRA, the evidence the district court found to be in equipoise related to the compelling interests by the Government asserted as part of its affirmative defense.[126] However, according to the provisions of the statute, the government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person is in furtherance of a compelling governmental interest.[127] Since the Court's recent decision in *Ashcroft v. A.C.L.U.* stated the burdens at the preliminary injunction stage track the burdens at trial, the Government bore the burden of showing a compelling governmental interest in applying the CSA to the UDV's religious exercise at the preliminary injunction stage.[128]

The Government's second argument centered on the language of the CSA itself.[129] The Government focused on the description of the CSA's Schedule I substances as having "a high potential for abuse . . ., no currently accepted use in treatment in the United States . . ., [and] a lack of accepted safety for use . . . under medical supervision."[130] The Government argued this language itself precluded individualized exemptions like that sought by the UDV.[131] The Government further argued that the regulatory regime established by the CSA was a "closed" system that prohibited all use of controlled substances except as authorized by the

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[123] Brief for Respondents at 34, Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 126 S. Ct. 1211 (2006) (No. 04-1048).
[124] *Id*. at 24 (citing Dir. Office of Workers Comp. Programs v. Greenwich Collieries, 512 U.S. 267, 272 (1994)) ("[When] the evidence is evenly balanced, the party that bears the burden of persuasion must lose.").
[125] *O Centro*, 126 S. Ct. at 1219-20.
[126] *Id*. at 1219.
[127] *Id*. (citing 42 U.S.C. § 2000bb-2(3) (stating that "demonstrates" means meets the burden of going forward with the evidence and persuasion)).
[128] *Id*. at 1219-20 (citing Ashcroft v. A.C.L.U., 542 U.S. 656 (2004)). The Government argued that *Ashcroft v. A.C.L.U.* was distinguishable from *O Centro* because it involved content based restrictions on speech. *Id*. The Court reasoned that Congress's express decision to legislate the compelling interest test indicated that RFRA challenges should be adjudicated in the same manner as other applications of the test. *Id*.
[129] *O Centro*, 126 S. Ct. at 1220.
[130] *Id*. (citing 21 U.S.C. § 812(b)(1)).
[131] *Id*. at 1220.

Act itself.[132] Because the CSA was a "closed" system, religious exceptions could not be cabined once recognized and the "public will misread" such exceptions as signaling that the substance at issue is not harmful.[133] Based on the Government's argument, there was no need to assess the particular facts of the UDV's use or weigh the impact of an exemption for that specific use because the CSA serves a compelling purpose and simply admits no exceptions.[134]

The UDV countered that the uniform application of the CSA is not a compelling interest.[135] UDV's argument focused on the proposition that the Native American Church (NAC) has had a longstanding exemption for peyote, also a Schedule I substance under the CSA.[136] More recently, all members of federally recognized tribes enjoy this exemption under the American Indian Religious Freedom Act Amendments of 1994 (AIRFA).[137] The UDV argued that the proposition the CSA needed to be uniformly applied to the UDV was undermined because the federal government had been successful in allowing a peyote exemption to Native America tribes.[138] The UDV stated that, because RFRA required a fact-specific inquiry of the merits of each claim, recognizing a narrow exemption for UDV based on the unique facts of this case would not inevitably lead to the creation of a large number of religious CSA exemptions.[139] Further, since the Government conceded that application of the CSA to the UDV's religious exercise met the prima facie case under RFRA, the burden shifted to the Government at the preliminary injunction stage of the litigation to show it had a compelling interest in enforcing the CSA and enforcement of the CSA was the least restrictive means of carrying out that compelling interest.[140]

The Court foreclosed the Government's argument that the language of the CSA itself was enough to show a compelling state interest.[141] RFRA and its strict scrutiny test required the government to demonstrate that the compelling interest test is satisfied by applying the challenged law "to the person," the particular

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[132] *See* Brief for Petitioners, *supra* note 119, at 18 ("The effectiveness of that closed system will necessarily be undercut by judicially crafted exemptions on terms far more generous than the narrow clinical studies that Congress authorized." (citing United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 492, 499 (2001)).
[133] *Id*. at 23.
[134] *O Centro*, 126 S. Ct. at 1220. *See* Brief for Petitioners, *supra* note 119 at 19-21 (arguing that if it gives an exception to one group, it would receive a "myriad" of other claims to religious exemptions under CSA).
[135] *See* Brief for Respondents, *supra* note 6, at 40-45.
[136] *Id.* at 4 (citing 21 C.F.R. § 1307.31 (2005)).
[137] *Id*. (citing 42 U.S.C. § 1996a(b)(1) (2000)).
[138] *Id*. at 40-45.
[139] *Id*. at 44.
[140] Brief for Respondents, *supra* note 6, at 47-49.
[141] *O Centro*, 126 S. Ct. at 1220.

claimant, whose sincere exercise of religion is being substantially burdened.[142] RFRA adopted the compelling interest test set forth by *Sherbert* and *Yoder*.[143] *O Centro* stated, "The Court, in those cases, looked beyond the broadly formulated interests justifying the general applicability of government laws and scrutinized the asserted harm of granting specific exemptions to particular religious claimants."[144] Because *Sherbert* and *Yoder* demanded a case-by-case, fact-specific inquiry, the Government's recital of the language from Schedule I of the CSA could not "carry the day."[145]

O Centro then turned its analysis to applying a fact-specific compelling interest test under RFRA.[146] The Court acknowledged the dangers of the DMT found in hoasca, but stated there was no indication that Congress considered the substance's sacramental use when classifying DMT in Schedule I.[147] To support this position, the Supreme Court noted that the CSA contains a provision authorizing the Attorney General to waive registration requirements for "manufacturers,

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[142] *Id*. at 1220 (citing 42 U.S.C. § 2000bb-1(b)).
[143] *Id*. at 1220-21.
[144] *Id*. The Court cited the specific facts of *Yoder* and *Sherbert*:

> In *Yoder*,[. . .]we permitted an exemption for Amish children from a compulsory school attendance law. We recognized that the State had a "paramount" interest in education, but held that "despite its admitted validity in the generality of cases, we must searchingly examine the interests that the State seeks to promote…and the impediment to those objectives that would flow from recognizing *the claimed Amish exemption*." 406 U.S., at 213, 221, 92 S.Ct. 1526. The Court explained that the State needed "to show with more particularity how its admittedly strong interest . . . would be adversely affected by granting an exemption to the *Amish*." *Id*., at 236, 92 S.Ct. 1526. In *Sherbert*, the Court upheld a particular claim to a religious exemption from a state law denying unemployment benefits to those who would not work on Saturdays, but explained that it was not announcing a constitutional right to unemployment benefits "for all persons whose religious convictions are the cause of their unemployment." 374 U.S., at 410, 83 S.Ct. 1790.

O Centro, 126 S. Ct. at 1220-21.
[145] *Id*. at 1221.
[146] *See id*. 1221-25.
[147] *O Centro*, 126 S. Ct. at 1221. The Court considered the Government's argument that the placement of DMT in Schedule I of the CSA automatically made enforcement of the CSA a compelling interest unavailing: "[C]ongress' determination that DMT should be listed under Schedule I simply does not provide a categorical answer that relieves the Government of the obligation to shoulder its burden under RFRA." *Id*.

distributors or dispensers" if he finds it consistent with public health and safety.[148] The Court stated the fact that "the Act itself contemplates that exempting certain people from its requirements would be 'consistent with the public health and safety' and this provision indicates that congressional findings with respect to Schedule I substances should not carry determinative weight, for RFRA purposes, that the Government would ascribe them."[149]

Generally invoking the language of Schedule I was also unavailing because of the thirty-five-year regulatory exemption that the Native American Church has enjoyed for the use of another Schedule I drug, peyote.[150] The Court compared DMT to mescaline peyote and found that the Schedule I provisions considering the alleged harmful effects associated with its use applied in equal measure to both substances, yet the Executive and Legislative branches gave Native Americans an exemption from the CSA for religious uses.[151] The high court reasoned if such an exception was granted to hundreds of thousands of Native Americans for the religious use of peyote, it would be difficult to justify the denial of a similar exception for 130 American members of the UDV for their religious hoasca use.[152] The Government countered that the existence of a congressional exemption for peyote does not indicate that the CSA is vulnerable to judicially made exceptions.[153] The Court made clear, however, that RFRA plainly contemplates that courts should recognize exceptions and it is the Court's obligation to consider whether exceptions are required under RFRA.[154]

The peyote exception completely undermined the Government's contention that the CSA establishes a closed regulatory scheme that admits no exceptions under RFRA.[155] Exceptions to the CSA, judicially created under RFRA, would not necessarily undercut the CSA's effectiveness because there is no evidence the peyote exception has undercut the government's ability to enforce the CSA.[156]

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[148] *Id.* at 1221 (citing 21 U.S.C. § 822(d)).
[149] *Id.* at 1221.
[150] *Id.* at 1222 (citing 21 C.F.R. § 1307.31 (2005)). The Court also noted that in 1994 this exemption was extended to all members of every recognized Indian Tribe. *O Centro*, 126 S. Ct. at 1222 (citing 42 U.S.C. § 1996a(b)(1)).
[151] *Id.* at 1222.
[152] *Id.* (citing Church of Lukumi Balbalu Aye, Inc. v. Hialeah, 508 U.S. 520, 547 (1993) (quoting Florida Star v. B.J. F. 491 U.S. 524, 541-542 (1989)) (Scalia, J., concurring in part and concurring in judgment) ("It is established in our strict scrutiny jurisprudence that [ ] a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.")).
[153] *O Centro*, 126 S. Ct. at 1222.
[154] *Id.* (citing 42 U.S.C. § 2000bb-1(c) ("A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.")).
[155] *Id.* at 1222.
[156] *Id.* at 1223.

The Government's argument that the need for uniformity in application of the CSA justified a substantial burden on the religious free exercise of the UDV was not supported by other pre-*Smith* cases that dealt with the issue of uniformity as a compelling governmental interest.[157] The Court reasoned that the slippery slope argument, if the Government offered an exception to one group, it would have to offer an exception to every group, is unavailing because RFRA mandates consideration of exceptions to rules of general applicability.[158] The Court upheld the feasibility of a case-by-case consideration of religious exemptions to general laws of applicability under this test.[159] In the end, the Court followed Congress's

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[157] *Id*. The Court stated that:

> In United States v. Lee, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 (1982), . . . the Court rejected a claimed exception to the obligation to pay Social Security taxes, noting that "mandatory participation is indispensable to the fiscal vitality of the social security system" and that the "tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manor that violates their religious beliefs." *Id*., at 258, 260, 102 S.Ct. 1051 . . . [citation omitted] . . . In Braunfield v. Brown, 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961) (plurality opinion), the Court decided a claimed exception to Sunday closing laws, in part because allowing such exceptions "might well provide [the claimants] with an economic advantage over their competitors who must remain closed on that day." *Id*., at 608-609, 81 S.Ct. 1144. The whole point of a "uniform day of rest for all workers" would have been defeated by exceptions. [citations omitted]. These cases show that the Government can demonstrate a compelling interest in uniform application of the particular program by offering evidence that granting the request religious accommodations would seriously compromise its ability to administer the program.

Id. at 1223.

[158] *O Centro*, 126 S. Ct. at 1223. The Court stated that "Congress determined that the legislated test 'is a workable test for striking balances between religious liberty and competing prior governmental interest.'" *Id*. (citing 42 U.S.C. § 2000bb(a)(5)).

[159] *Id*. at 1223-24. The Court gave other instances where the high court applied the compelling interest test. *Id*. (citing Cutter v. Wilkinson, 544 U.S. 709 (2005)). The Court also found the district court had erred in determining that the 1971 Convention on Psychotropic Substances did not apply to the CSA. *Id*. at 1224-25. In interpreting the convention, the high court held that, since the convention covered a "preparation" which included "any solution or mixture" and hoasca was a "solution or mixture" in the sense that it is made by the simple process of brewing plants in water, and therefore clearly covered under the convention. *Id*. (citing 32 U.S.T., at 546, Art. 1(f)(i); *id*., at 551, Art. 3.). Although hoasca is covered by the convention, the Court denied the Government's argument that applying the CSA to the UDV's religious exercise, in accordance with the Convention, was a compelling governmental interest. *Id*. at 1225. The Court reasoned this was because the Government failed to submit any evidence addressing the international consequences of granting an exemption for the UDV's use of hoasca. *Id*.

determination that under RFRA, courts should strike sensible balances, using a compelling interest test that requires the government to address the particular practice at issue.[160] In applying the stronger, fact specific compelling interest test and the weaker, more generalized compelling interest test, the Supreme Court concluded that the courts below did not err in determining, at the preliminary injunction stage, the Government failed to demonstrate a compelling interest in barring the UDV's sacramental use of hoasca.[161]

ANALYSIS

This analysis will demonstrate how the Court's simultaneous approval of a heightened and weakened compelling interest standard is irreconcilable. *O Centro* gives conflicting reasoning to justify its holding denying the government's proffered compelling interest of uniformity of enforcement of the CSA. Furthermore, *O Centro* gives us a nebulous and conflicted interpretation of which compelling interest test to use in the future under RFRA.

Despite the apparent ambiguity regarding how leniently or strictly to apply the compelling interest test, RFRA's "findings" section states Congress's view that "the compelling interest test as set forth in prior federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests."[162] It is contradictory for RFRA to apply both the stronger version of the compelling interest test set out by *Sherbert* and *Yoder*, yet also apply the weaker compelling interest test of cases such as *Lee, Braunfield,* and *Hernandez*.[163] To add to the uncertainty, it did not appear that some RFRA supporters had much faith in the compelling interest test to protect free exercise claimants, despite RFRA's language pointing to *Sherbert* and *Yoder*.[164] Indeed, the

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[160] *Id*. at 1224-25.
[161] *Id*.
[162] Religious Freedom Restoration Act, 42 U.S.C. § 2000bb(a)(5) (2000).
[163] *See* Paulsen, *supra* note 65, at 289. Professor Paulsen states a possible explanation:

> While the evidence is that Congress did not wish to get mired down in arguing the merits of each particular case, there is no evidence that they deliberately intended to embrace contradiction. Rather, the evidence is that they consciously chose not to validate the state of free exercise law as it existed the day before Smith was decided but instead to embrace the Sherbert-Yoder test without simultaneously validating all of that test's (mis-) applications by the courts.

Id. (citations omitted).
[164] H. REP. NO. 103-88 at 4 (Views of Rep. Hyde, Rep. Sensenbrenner, Rep. McCollum, Rep. Coble, Rep. Canady, Rep. Inglis, Rep. Goodlatte). Inquiring "will the RFRA work?" Reps. Hyde, Sensenbrenner, McCollum, Coble, Canday, Inglis and Goodlatte stated:

Supreme Court in pre-*Smith* free exercise cases exerted broad discretion in finding that government laws comprised a compelling interest.[165]

Congress clearly recognized the struggle to define the compelling interest test under RFRA would mirror the struggle the Supreme Court had in defining compelling interest prior to RFRA's enactment.[166] Perhaps the ambiguousness of RFRA's compelling interest standard reflects the political compromise involved in formation of a broad coalition of support for RFRA.[167] More optimistic explanations of RFRA's ambiguousness also exist:

> In justification of the need for this legislation, proponents have provided the Committee with long lists of cases in which free exercise claims have failed since Smith was decided. Unfortunately, however, even prior to Smith, it is well known that the "compelling state interest" test had proven an unsatisfactory means of providing protection for individuals trying to exercise their religion in the face of government regulations. Restoration of the pre-Smith standard, although politically practical, will likely prove, over time, to be an insufficient remedy. It would have been preferable, given the unique opportunity presented by this legislation, to find a solution that would give solid protection to religious claimants against unnecessary government intrusion.

Id.

[165] *See* Eric Alan Shumsky, *The Religious Freedom Restoration Act: Postmortem of a Failed Statute*, 102 W. VA. L. REV. 81, 113 (1999). Professor Shumsky points to the broad discretion that courts enjoyed defining a compelling governmental interest in upholding a law prior to RFRA:

> Simply put, "Courts possess enormous discretion over how broadly or narrowly government interests are defined . . . . In the absence of any theoretical guide, judges have used their control over generality to strike down government policies that they just as easily could have upheld." Conversely, in the absence of proper limits, courts might define an interest broadly, thereby ensuring its success. In the context of religious free exercise, broad definition has been the norm.

Id. (quoting Roger Craig Green, *Interest Definition in Equal Protection: A Study of Judicial Technique*, 108 YALE L.J. 439, 447-49 (1998)).

[166] H. REP. NO. 103-88 at 6 (Views of Rep. Hyde, Rep. Sensenbrenner, Rep. McCollum, Rep. Coble, Rep. Canady, Rep. Inglis, Rep. Goodlatte) stating:

> In reality, the Act [RFRA] will not guarantee that religious claimants bringing free exercise challenges will win, but only that they have a chance to fight. It will perpetuate, by statute both the benefits and frustrations faced by religious claimants prior to the Supreme Court's decision in Smith. Although we have this remaining concern, we support enactment of the legislation.

Id.

[167] *See* Laycock &Thomas, *supra* note 101, at 218-19. Professors Laycock and Thomas state:

> But it [RFRA's generality] was not merely a political necessity; it was also an act of high principle. The Act is only a statute, not a constitutional amendment, but it is a statute designed to perform a constitutional function. It is designed to restore the rights that previously existed under the Free Exercise Clause, rights that Congress believes should exist if the Constitution were properly interpreted. As a replacement for the Free Exercise Clause, the Act had to be as universal as the Free Exercise Clause. It had to protect all religions equally against all assertions of regulatory interests. The only way to draft such a protection was in the manner of the Free Exercise Clause itself—as a general principle of universal application.[168]

Regardless of Congress' reasons for the ambiguousness of RFRA's compelling interest test, RFRA contemplates that "the courts will look to free exercise cases decided prior to Smith for guidance in determining whether the exercise of religion has been substantially burdened and the least restrictive means have been employed in furthering a compelling governmental interest."[169] *O Centro* is the first instance where the Supreme Court potentially had the opportunity to clarify which version of the compelling interest standard should be used under RFRA.[170]

> Congress might have provided more guidance about the standard, but it could not supplement the standard with legislative resolutions of specific cases. There were both principled and political reasons for legislating only a general standard. Legislating generally made it possible for a broad coalition of Senators, Representatives, and organizations to support the bill. The bill was enacted unanimously in the House and nearly so in the Senate, yet the vote would not have been similarly unanimous on many applications of the bill. Most of those who would find a compelling interest in protecting fetuses would probably not find a compelling interest in requiring hospitals to perform abortions. Most of those who would find a compelling interest in distributing condoms to students would probably not find a compelling interest in distributing military recruiting literature to students . . . . The cynical explanation for RFRA's generality is that enacting only a general standard was a political necessity.

Id. (citations omitted).

[168] *Id.* at 219 (citations omitted).

[169] S. REP. NO. 103-111 at 16.

[170] *O Centro*, 126 S. Ct. 1211, 1224-25.

O Centro Gives a Nebulous Definition of the Compelling Interest Test under RFRA

The Court in *O Centro* rejected the Government's argument that uniformity of application of the CSA constituted a compelling interest.[171] The Government's uniformity argument relied on the notion that the CSA could not be properly administered without its uniform application.[172] The Government's argument that allowing an exemption to the UDV would require all similar exemptions was slippery slope because this argument "echoed the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make an exception for everyone, so no exceptions."[173] Writing for the unanimous Court, Justice Roberts reasoned the Government in *O Centro* did not offer evidence demonstrating that granting the UDV an exemption would cause the kind of administrative harm recognized as a compelling interest recognized in *Lee*, *Hernandez*, and *Braunfield*.[174] The Court characterized *Lee*, *Hernandez*, and *Braunfield* as cases where "the government . . . demonstrate[d] a compelling interest in uniform application of a particular program by offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program."[175]

But using *Lee*, *Hernandez*, and *Braunfield* to reinforce the proposition that fact-specific evidence is needed to demonstrate a compelling interest in uniformity of application of a law creates ambiguity because none of those cases used the kind of fact-specific analysis found in *O Centro*.[176] In *Braunfield*, the Court relied on hypothetical situations that "might" or "probably" present themselves if it granted the requested exemption from the Sunday closing law.[177] In *Braunfield*, the Government did not offer fact-specific evidence that the requested

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[171] *Id*. at 1224.
[172] *Id*. at 1222-23. *Cf*. Brief for Petitioners, *supra* note 119, at 16-26.
[173] *Id*. at 1223.
[174] *Id*.
[175] *O Centro*, 126 S. Ct. at 1123.
[176] *Id*. at 1223. *See* United States v. Lee, 455 U.S. 252 (1982); Hernandez v. C.I.R., 490 U.S. 680 (1989); Braunfield v. Brown, 366 U.S. 599 (1961).
[177] *See Braunfield*, 366 U.S. at 608-09. In discussing hypothetical situations that could arise if the requested exemption was granted, the Court speculated:

> To allow only people who rest on a day other than Sunday to keep their business open on that day *might* well provide these people with an economic advantage over their competitors who must remain closed on that day; this *might* cause the Sunday-observers to complain that their religions are being discriminated against. With this competitive advantage existing, there *could well be* the temptation for some, in order to keep their businesses open on Sunday, to assert that they have religious convictions which compel them to close their businesses on

exemption would actually cause these harms.[178] In *Lee*, the Court found that the Government had a compelling interest in denying the Amish an exemption from the Social Security tax because, in general, unless it was uniformly applied, the Social Security tax would be difficult to administer with religious exemptions.[179] Again, the asserted compelling interest in *Lee* was hypothetical, not applied to the particular case of the Amish.[180] In reality, the requested Amish exemption in *Lee* was nearly identical to an already existing exemption that Congress gave to self-employed Amish.[181] Indeed, the Court in *Lee* engaged in formulating a compelling interest test at a high level of abstraction, rather than a fact-specific inquiry into the effect the Amish exemption would have on the Social Security system.[182] *Hernandez* used a line of analysis substantially identical to *Lee*, citing

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> what had formerly been their least profitable day. This *might* make necessary a state-conducted inquiry into the sincerety of the individual's religious beliefs . . . . Finally, in order to keep the disruption of the day at a minimum, exempted employees would *probably* have to hire employees who themselves qualified for the exemption because of their own religious beliefs, a practice which a State *might* feel to be opposed to in its general policy prohibiting religious discrimination in hiring.

Id. (emphasis added).

[178] *Id*.

[179] *Lee*, 455 U.S. at 259-60.

[180] *Id*. at 260. In discussing hypothetical situations where religious claimants would seek exemption from the Social Security tax in the future, the Court stated:

> *If*, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals *would have* a similarly valid claim to be exempt from paying the percentage of the income tax. The tax system *could* not function *if* denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious beliefs.

Id. (emphasis added).

[181] *Id*. (citing 26 U.S.C. § 1402(g)). *Cf. id*. at 262. In his concurrence, Justice Stevens noted that:

> As a matter of administration, it would be a relatively simple matter to extend the exemption to the taxes involved in this case. As a matter of fiscal policy, an enlarged exemption probably would benefit the social security system because the nonpayment of these taxes by the Amish would be more than offset by the elimination of their right to collect benefits.

Id. (Stevens, J. concurring).

[182] *See* Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. L.J. 65, 81-2 (1996). Analyzing the approach the Court took in *Lee*, Professors Gressman and Carmella explain that *Lee* engaged in a non-fact-specific "definitional balancing":

to *Lee* for its general reasons why the tax exemption should not be given to the Scientology Church.[183] Paradoxically, the Government in *O Centro* offered the same type of general evidence, that allowing exemptions from the CSA would hypothetically create problems, as it did in *Braunfield*, *Lee*, and *Hernandez*.[184] Yet the Government's argument that it had a compelling interest in uniform application of the CSA was not enough to deny a religious exemption.[185]

The Court attempted to justify this discrepancy by characterizing *Lee*, *Hernandez*, and *Braunfield* as cases that "did not embrace the notion that a general interest in uniformity justified a substantial burden on religious exercise; they instead scrutinized the asserted need and explained why the denied exemptions

> Definitional balancing acts like a compromise between the categorical approach and ad hoc balancing. The particularity of both the religious claim and the government's interest— the focus of ad hoc balancing-is gone. Instead, the Court evaluates the claimed liberty against social interests at a high level of generality (and consequent abstractness) in order to produce a rule directly applicable in future cases without the need to balance. Definitional balancing thus yields classes of protected and unprotected activity . . . The Court's definitional balancing in United States v. Lee did not produce a general rule quite so hospitable to religious claimants . . . Had the Court engaged in an ad hoc balance, it would have been hard to deny the claim [in *Lee*], as it was structurally similar to Yoder: there was a clear burden on free exercise, a showing of a compelling interest of the state in maintaining a social security system for the elderly, but no showing that the social security system would in any way be endangered by providing this exemption for these Amish employers. In fact, an exemption already existed for self-employed Amish, and this lawsuit simply sought to rationalize the government's treatment of all-Amish businesses. But the Court chose a definitional balance that announced a rule far beyond the Amish community. While a burden on their religion was established, so was an "overriding governmental interest" in preservation not of the social security system, *but of a uniform federal taxation scheme free of judicial exemptions*. The government's interest was defined at a very high level of abstraction, the hallmark of definitional balancing. For the Court to carve out an exemption would mean that the floodgates would open: the entire structure of federal taxation would be vulnerable to any religious objections to payment of any tax.

Id. (emphasis added) (citations omitted).

[183] *Hernandez*, 490 U.S. at 699-700.

[184] *See* Brief for Petitioners, *supra* note 119, at 16-24 (the Government stating, inter alia, that any exemption would have to be given to similarly situated adherents, market for hoasca could become prevalent, administrative problems in closely regulating the use of hoasca, medical exemptions to CSA would proliferate).

[185] *O Centro*, 126 at 1223-24 (stating "the Government has not offered evidence demonstrating that granting the UDV an exemption would cause the kind of administrative harm recognized as a compelling interest in *Lee*, *Hernandez*, and *Braunfield*").

could not be accommodated."[186] This analysis is unavailing simply because *Braunfield*, *Lee,* and *Hernandez* embraced the notion that a general interest in uniformity justified a substantial burden on religious exercise.[187] Further, in these cases the Court acknowledged that application of the laws in question burdened the claimant's religious exercise or that the law was compelling regardless of a substantial burden on religion.[188] Thus, *O Centro*'s incorporation of *Braunfield*, *Lee*, and *Hernandez* is problematic because it is difficult to square the Court's analysis of the latter three cases with *O Centro* and RFRA's legislative history.[189]

The Government's argument that the language of the CSA precludes an exemption because the CSA is a "closed system" relied on the assumption that there would be no way to allow for some religious exemptions and not others as soon as an exemption is recognized for the UDV.[190] *O Centro* stated that a law which allows exemptions cannot be cited to show compelling interests in disallowing exemptions to that same law since the CSA already provided for exemptions authorized by the Attorney General and peyote had a longstanding exemption under Schedule I.[191] This principal is problematic because pre-*Smith* case law, including pre-*Smith* case law cited in *O Centro's* analysis, involved laws that granted exemptions to other religious practitioners but denied religious exemptions to the claimants.[192]

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[186] *Id*. at 1223.

[187] *See supra* notes 175-85.

[188] *See* Braunfield v. Brown, 366 U.S. 599, 605-606 (acknowledging the "Sunday Closing Law" would result in financial sacrifice or an "indirect economic burden" for Jewish practitioners); *Lee*, 455 U.S. at 257 (accepting the appellee's contention that both payment and receipt of social security benefits interferes with their free exercise rights); *Hernandez*, 490 U.S. at 699-700 (stating that even a substantial burden would be justified by the "broad public interest in maintaining a sound tax system" free of "myriad exceptions flowing from a wide variety of religious beliefs."); *cf. Braunfield*, 366 U.S. at 616 (Stewart, J., dissenting) ("Pennsylvania has passed a law which compels an Orthodox Jew to choose between his religious faith and his economic survival . . . [i]t is a choice which I think no State can constitutionally demand.").

[189] H. REP. NO. 103-88 at 18 (stating: "Pursuant to the Religious Freedom Restoration Act . . . seemingly reasonable regulations based upon speculation, exaggerated fears or thoughtless policies cannot stand. Officials must show that the relevant regulations are the least restrictive means of protecting a compelling governmental interest.").

[190] *Id*. at 1220. *Cf.* Brief for Petitioners, *supra* note 119, at 16-22.

[191] *Id*. at 1222 (citing Church of Lukumi Balbalu Aye, Inc. v. Hialeah, 508 U.S. 520, 547, (1993) (quoting Florida Star v. B.J. F. 491 U.S. 524, 541-42 (1989)) (Scalia, J., concurring in part and concurring in judgment) ("It is established in our strict scrutiny jurisprudence that [ ] a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.").

[192] *See* Gillette v. United States, 401 U.S. 437, 447-55 (1971) (finding conscientious objector's statute created an exemption from the draft; government's reasons for draft still considered a compelling interest); Goldman v. Weinberger, 475 U.S. 503, 504-507 (1986) (noting Jewish solider wore his traditional religious yarmulke for several years

In *Hernandez*, the Court found a compelling interest in the general uniformity of the IRS code despite countless exemptions given to other religious groups.[193] In *Lee*, the exemption from the Social Security tax granted by the government applied only to self-employed individuals, not Amish who are employers themselves.[194] Despite a very similar exemption from the Social Security tax, the court found that the Government had a compelling interest in the uniform application of the tax.[195] Applying *Sherbert* and *Yoder* fact-specific analysis as interpreted by *O Centro* to the facts in *Lee*, the Government in *Lee* would have been required to show that applying the tax provision to the Old Amish Order represents the least restrictive means of advancing a compelling governmental interest in uniformity of the tax code.[196] Under the *O Centro* analysis, it would seem that since the Social Security tax code (or other law) allows some exemptions, the government

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before he was stopped from wearing it and finding government reasons for the policy forbidding him to wear it were still considered compelling); United States v. Lee, 455 U.S. 252, 254-55 (1982) (finding a similar exemption from the Social Security tax existed; government's reasons for uniform application of the tax still considered compelling); Hernandez v. C.I.R., 490 U.S. 680, 684-86 (1989) (finding tax code allowed exemptions for certain charitable contributions; government's interest in uniform application of the tax code still held to be compelling).

[193] *Hernandez*, 490 U.S. at 701 (noting that a similar exemption was given for Jewish High Holy Day services "[p]ew rents, building fund assessments, and periodic dues paid to a church . . . are all methods of making contributions to the church, and such payments are deductible as charitable contributions within the limitations set out in section 170 of the Code"). *Cf.* Paulsen, *supra* note 65, at 268. Professor Paulsen stated:

> The government, relying on Lee, took the position that the soundness of the tax system depends on the government's ability to apply the tax law in a uniform and evenhanded fashion. But evidence was clear that the government did not take this position with respect to analogous practices—including analogous religious practices—such as "pew rents" or sales of tickets for Jewish High Holy Day services. The IRS had a formal written policy stating that those contributions were deductible. Yet the "quid pro quo" feature of these contributions is indistinguishable from the arrangement in Hernandez . . . Inconsistency of the policy should have belied the assertion of a compelling interest in "maintaining a sound tax system," free from "myriad exceptions." Indeed, Hernandez seems to be a blatant case of discrimination among religions.

Id. (citations omitted).

[194] *Lee*, 455 U.S. at 256.

[195] *Id.* at 258-60.

[196] *See* Michelle O' Connor, *The Religious Freedom Restoration Act: Exactly What Rights Does It "Restore" in the Federal Tax Context?*, 36 ARIZ. ST. L.J. 321, 376-78 (2004). Professor O'Connor explained:

> Construing RFRA as requiring the courts to apply the Sherbert/Yoder balancing test in the tax context would require the government to

could not refer to the importance of uniformly maintaining the Social Security tax code (or other law) as a compelling interest as it did in *Lee*, *Hernandez,* and *Braunfield*.[197] Therein lies the paradox: *O Centro* states that uniform application of laws cannot be considered compelling if exemptions to the laws are already allowed, yet *Lee*, *Hernandez,* and many other pre-*Smith* cases codified by RFRA consider uniformity of application compelling despite their exemptions.[198]

O Centro's citation of the compelling interest tests of *Sherbert*, *Yoder*, *Lee,* and *Hernandez* provides little guidance as to which compelling interest standard Courts will utilize under RFRA in the future.[199] Indeed, granting religious exemptions to some claimants under a stronger compelling interest standard and denying other religious exemptions under a weaker compelling interest standard would lead to

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> introduce evidence and to prove that a tax provision represents the least-restrictive means of advancing a compelling governmental interest. Where the government fails to do so, the precepts of Sherbert and Yoder dictate that it should lose. Because pre-Smith precedent in the tax context never required the government to make such a showing (and indeed the government never lost a tax case based on its failure to do so), such a construction of the RFRA test would result in a more "stringent" application of the pre-Smith compelling-interest test.

Id. at 377 (citations omitted).

[197] *See* James Glenn Hardwood, *Religiously-Based Social Security Exemptions: Who Is Eligible, How Did They Develop, and Are the Exemptions Consistent With the Religion Clauses and the Religious Freedom Restoration Act (RFRA)?*, 17 AKRON TAX J. 1, 17-21 (2002). Professor Hardwood stated:

> In order for the law, which substantially burdens one's Free Exercise, to pass constitutional muster, it must be the least restrictive means of accomplishing a compelling governmental interest. If the compelling governmental interest is the maintenance of the social security system with provision for individuals to opt out, then the existing exemptions provide evidence that either the current law is not the least restrictive means of achieving those ends or those ends are not a compelling interest. If the compelling governmental interest is the maintenance of the social security system, then the least restrictive means of achieving the interest would be for the system to be compulsory to all. However, if the government provides exemptions for some that object to the participation, then the government concedes that providing an exemption does not frustrate the compelling governmental interest.

Id. at 19-20 (citations omitted).

[198] *See supra* notes 190-197 and accompanying text.

[199] Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 126 S. Ct. 1211, 1223-24 (2006).

patently unfair results.[200] Since *O Centro*'s analysis applies two conflicting versions of the compelling interest test, it seems *O Centro's* decision does little to clarify the ambiguities created by RFRA's legislative history and intent.[201]

CONCLUSION

Reasoning the Government had not demonstrated a compelling interest for enforcement of the CSA, the Supreme Court affirmed the grant of a preliminary injunction allowing the UDV to continue to practice its religion by consuming hoasca. The history of free exercise jurisprudence reveals that the Supreme Court used conflicting interpretations of the compelling interest standard prior to *Smith*. At times they would use a stronger, more fact specific compelling interest standard found in *Sherbert* and *Yoder*. Prior to and after these decisions however the Supreme Court relaxed the compelling interest standard, using a weakened, generalized version of it to deny free exercise exemptions to many religious claimants. Since RFRA's authors simultaneously approved of both standards, RFRA left it up to courts to decide which standard to use. Paradoxically, *O Centro* advocates a fact-specific inquiry under the compelling interest test similar to that used in *Sherbert* and *Yoder*, yet appeals to pre-*Smith* decisions that perform less-exacting inquiries into the government's reasons for a compelling interest. Therefore, *O Centro* provides an ambiguous answer for what compelling interest test will be applied under RFRA in the future. Given RFRA's ambiguous legislative history, the Court seemed to have done its job by interpreting an ambiguous compelling interest test ambiguously.

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[200] *See* Shumsky, *supra* note 165, at 114-15 (1999). Professor Shumsky notes the inequity of the courts simultaneously applying two different standards of the compelling interest test of RFRA in federal courts:

> [B]y failing to use the same level of generality on both sides of the balance, courts violate an essential premise of the method [compelling interest standard]. If, in fact, a single scale describes the intersection of individual liberty and government interests, the factors must be measured in the same units. To do otherwise is akin to comparing the weight of an apple in ounces to the weight of an orange in grams. The comparison is possible, but a conversion table would be necessary to understand the result. It is jurisprudentially unfair to manipulate the generality of government and individual interests, amplifying the importance of the government curtailment of religion while using the same technique to mute the interests of the individual religious claimant. Whatever outcome might be desired as a normative matter, this uncalibrated scale is sure to skew the result.

Id. (citations omitted).

[201] *See supra* notes 93-104 and accompanying text.

Editor's Note

Morris Dees is the founder and Chief Trial Counsel of the Southern Poverty Law Center in Montgomery, Alabama. Growing up on a small farm in Alabama, Dees confronted the inequities of racial prejudice at a young age. Dees' father, as Dees explains, "was different from most other white folks when it came to black folks." It seems Dees has been fighting for justice most of his life. As an attorney he is renowned for his courageous advocacy for those who lack access to the legal arena, protecting civil liberties and battling against hate crimes, often to his own peril. The Wyoming State Bar had the distinct pleasure of hosting Mr. Dees as its keynote speaker at the 2006 Annual Meeting. Mr. Dees' Address to the Wyoming State Bar was sponsored by the Carl M. Williams Speaker Series on Ethics and Professionalism, through the University of Wyoming College of Law. The *Wyoming Law Review* is grateful for the opportunity to publish the transcript of his address.

MORRIS DEES, KEYNOTE ADDRESS WYOMING STATE BAR ANNUAL MEETING AUGUST 17, 2006

Thank you for having me at your dinner.

I am glad to be back in Wyoming. I have been here a number of times and thank you for inviting me to share your Bar Association's annual dinner. I am glad to be in a state that has a democratic governor and a red state. Governor Freudenthal, I wish you the absolute best.

I am a Yellow Dog Democrat from Alabama. I am mostly glad to be in a state where I think everybody knows everybody. One time I rode my motorcycle out here and was looking for a place to leave it because I had to fly back. I met a gentleman, Judge Rose, who is now deceased. He was on your Supreme Court. Someone said to call him because he knew somebody that rode motorcycles that might let me park my bike at their farm. He mentioned a man named Pete McNiff. I called McNiff and he said I was welcome to park my bike at his farm. He said, "I have a small farm out here, my family has." I got out there and there were 65,000 acres. He said that they made a lot of money on cattle. I rode to this farm and had to dodge oil wells all the way out there. So, I got to the bottom of that secret.

He invited me back there one time to a round-up. That is where, you know, all the neighbors come and you drive these cattle from thousands of acres. There is not a lot of grass out there and the cows go from blade of grass to blade of grass and walk a mile or two. Back in Alabama, we have a lot of cattle and we are lucky

to see them once a year because they stay in the swamps and it is hard to find them. Well, we got them all up in this big pen and, naturally, they were going to vaccinate the calves and do all the things you do. I jumped off the horse and had them in this big corral. We have big heavy wooden corrals and we run the cows up in a chute and squeeze their heads and grab the calves and wrestle them to the ground. So, we got them up there, and I am standing around waiting and there are teams of people with branding irons and all that stuff. I simply walked over and grabbed a calf by one hind leg and another by another and drug them up there. Pete said, "No, no! You don't do it that way." All of these young girls came up with their ropes and they lassoed these little calves by their hind legs and dragged them up.

So, I had my kind of "commin, uppins," real quick. I kept talking about Alabama. Pete and his buddies all ride motorcycles, so they are kind of gentleman riders. They have someone put their bikes on the back of a truck and haul them to Alabama. Then they fly in. I said, "Pete and Jack, you know I want to warn you before you come that there are going to be a lot of rednecks in Alabama. I don't mean that in a negative way, because I are one." So they came on anyway. They were a little concerned when they got to Montgomery and I had to go to a Dees family reunion. I decided to carry them with me. My cousin was going and he was looking for a date. That kind of got Jack's curiosity up and Jack said, "You know, tell me, what is a redneck?" I said, "Well you know, we used to come from very small towns. The town I came from, a little cotton farm and community in Mountain Lakes, Alabama, was so small that if you blinked your eyes when you drove through, you wouldn't see it. For a long time, I really, really thought I lived in 'Resume Speed.'"

Well, my cousin got a café. There was a one-room schoolhouse they closed and he got it. He has a restaurant there and the name is Red Dees. A lot of Dees hang out in that area. It was on a Sunday when we went down and, naturally, another thing we rednecks do is go to church a lot. We went to this little hard-shell Baptist Church that wasn't but twenty by thirty feet. Pete and all of his motorcycle crowd were there and the bikes were parked out front. My cousin sang a couple of songs and played the guitar. The preacher stood up and started preaching. He was preaching a temperance lesson against drinking. I think that got the best of Jack Speight. Jack stood up and said, "Preacher, now wasn't that Jesus and one of his miracles that turned water into wine?" The preacher didn't even bat an eye. He said, "Sir, you know, if you hadn't done that we would have thought a whole lot more of him and if he hadn't done that." Well, we got out of that place and we left and moved around. We had a good time traveling around with Jack and Pete and others, and I found we had a lot in common.

As lawyers, regardless of a difference in our political philosophies, we believe in justice and fairness. I think that is the bottom line of what we all do together. I really enjoyed the speech made today by the president of the American Bar

Association, as you heard it. She talked about the Rule of Law. We have had lawyers over the centuries and lawyers that staked out great reputations for making a stand for fairness and justice, even in the face of highly unpopular cases.

One of those lawyers was a young lawyer in Boston, Massachusetts. His name was John Adams. Mr. Adams had created quite a reputation for himself up there. He had an opportunity to represent one of the young patriots who was trying to make a change of government in our country. The year was about 1774, and this young man that Adams represented brought a boat load of wine in from Spain. He was captured in the middle of the night with his boat. They took the boat, took his wine and they threw the boat captain in jail. John Adams took the case. Through some clever arguing on his part (and maybe because those taxing officials of the British Crown were a little bit concerned about that budding revolution) they returned the boat to this boat captain and released him from jail. His client in that case that got him a good reputation was John Hancock. The name of his boat was "Miss Liberty."

While times rocked on, and turmoil increased, and bitterness against the King for taxing people without representation, an incident happened in downtown Boston that you have probably heard of. A large group of people were gathered together protesting and began to throw rocks and bottles. They were gathered on Boston Commons and protested against the King. There were about seven or eight British redcoat policemen standing around and these fellows tried to keep law and order. Bottles and rocks began to be thrown from the crowd. I guess you might say in self-defense, they shot into the crowd and killed a couple of citizens. You know this incident as the Boston Massacre.

Well, this kind of disturbed the people there, and there were opportunities for a lot more dissension, so the Governor appointed by King George decided and said, "Well look, I think I will just have the prosecutor indict these soldiers. They are not going to be convicted, because I know that we will get some really fine lawyers to represent the King's business here to step forward and get them acquitted." Well, dutifully, they were indicted and none of these fine lawyers, who were upstanding lawyers at the bar, decided to take on this case because they probably also had their finger in the wind and were aware of the budding revolution that was fixing to take place. So, the Governor now was in a bit of quandary. He called on John Adams to come to his office and said, "Mr. Adams, I know you have a good reputation as a trial lawyer, would you represent Captain Preston and these soldiers?" Adams knew about the case and said, "Well look, I will let you know." So Adams left and talked to his friends and they said he would be an absolute fool to take this case. They said, "These people, these redcoats, these British, they are the most unpopular people that could be in this colony at this time and you will ruin your reputation if you take this case. You have the chance to be a leader in this country that we are going to set up."

He took the case anyway and worked hard on the case. He did a good job, and the jury acquitted these few soldiers of murder and Captain Preston along with them. In this story it is written that Adams' brilliant summation revealed his awareness of the potential personal and political risk for him to take on this popular case, but Adams declared that if he could save only one life, the blessings and tears of that one person, would be for him a sufficient consolation for the contempt of the masses. Adams wrote in his own autobiography that he felt that his representation of these British redcoats in that case, was the greatest piece of service that he ever rendered this country, because he made sure the Rule of Law prevailed.

Shakespeare and Henry VI talked about lawyers and many of you are pretty aware of the slogan that came out of that play. I have seen it on tee-shirts, and I have even seen law students wear these tee-shirts. We all know what it said—"First you must kill all the lawyers." Well, you Shakespeare scholars out here know the real statement from Shakespeare. It says—"If tyranny must prevail, you must first kill the lawyers."

As we have grown as a nation, there have been times that tyrants have ruled this country. We have had George Wallace in Alabama and to oppose him would make you very unpopular in Alabama. Our days in the South, to take a case against the Ku Klux Klan, would put you at odds with people who would ruin your home and kill you if they could.

I think we face a situation today that is very similar. We had a war recently in Afghanistan, and it was a result of the World Trade Center and other buildings being destroyed by people flying airplanes into them. It was a great tragedy, and I have to tell you that my wife and I lay in bed watching those buildings and watching the stories. At that time I wanted to know where I could go sign up; I wanted to join those to track down the Taliban and whoever was responsible.

In the early stages of that war, we began to round up individuals who might be responsible leaders in the Taliban and we carried them to Guantanamo Bay, Cuba and locked them up. Some of those people who were locked up there were nothing but shepherds and farmers, because a $10,000 bounty was offered if you reported on somebody who was in the Taliban. Sometimes the only evidence was the individual's statement, who got the award by turning in someone. Well, those people went to Guantanamo Bay and they languished and they are still there today after many years.

Well, something had to be done so our administration of the Washington Department of Defense came up with an idea to give them a trial to determine their guilt or innocence. They set up a military commission. The rules of this trial supposedly would be that the person would not see the evidence against him or

have the opportunity to attend the trial. And, in most cases, their lawyers would not even know the evidence. It would be some kind of star chamber proceeding.

Well, a young lawyer, thirty-six years old in Washington D. C., took a leave from his job and took on the representation of those people in Guantanamo Bay to be sure and see if he could gain for them a fair trial.

He was a federal public defender who felt that it wasn't a just and fair thing and he has spent the last two years working on defending those people and giving them the opportunity to have a fair trial. Well, the case went to the Supreme Court and a couple of weeks ago, the U.S. Supreme Court ruled that those military commissions violated the Rule of Law. In writing the majority opinion, Justice John Paul Stevens, quoting none other than one of the founders of our nation, James Madison, said, "The accumulation of all powers, legislative, executive and judiciary in the same hands, may justly be pronounced the very definition of tyranny."

I don't know if we went around asking volunteers to represent those people today, how many volunteers we would get. Probably not any more than the Governor of the Massachusetts Bay Colony got when he was trying to represent the redcoats. But as you know, John Adams took that case. It didn't hurt his reputation, and he was elected the second President of the United States. We did have the Rule of Law in the colonies and we have the Rule of Law today. That is what really our justice system is all about.

I think if I had a mentor it would be Clarence Darrow. As you know, he was a great civil libertarian lawyer, but also, Clarence Darrow was the lawyer for the Ohio and Western Railroad. Even though he continued to do cases representing labor unions, the railroad trusted him and liked him so much that they continued to let him do work for them that was not of a competing nature for many, many years to come. He was one of America's great, great lawyers. He said, "Look, what we have to do is to deal with the great questions that are agitating the world today."

Well, America is holding itself up as the gold standard to the Rule of Law to the world. We can't lock up people in Guantanamo Bay and not give them a trial and let them rot away forever. That is a great question that is agitating our world today. The young lawyer that stood up and quit his job, the young lawyer that is in this room tonight representing some of those people, deserves the greatest commendation for living the life of a lawyer seeking justice.

Darrow set many good examples for us. I think one of the best ones he set was when he represented a labor union organizer in the town of Appleton, Wisconsin in 1912. Most of you probably don't even know from history, but during those times, we didn't have any labor unions outside of the great metropolitan areas and

in many states, this state included. Wisconsin passed a law that it was a felony to organize a labor union. In other words, it was a conspiracy to violate the rights of the owner of a factory to organize workers to strike. Well, this labor organizer went to Appleton, Wisconsin because that was a very compelling situation that he felt needed addressing. There was a man who had a factory that made windows and doors and he had about 1,200 people working there. It was the largest employer in Appleton, and he paid them $1.00 per hour and was a ruthless-type fellow. He didn't put safeguards on saws and fans that would suck out sawdust because all of those things cost money and also slowed production.

This labor union organizer got there and went to work doing what labor organizers do. He called people together and explained their rights and told them that, through collective bargaining, they might get a better deal. It wasn't long before the prosecutor, there by the urging of this factory owner, had this man indicted. In order to make sure that he was convicted, this factory owner played a bit part in the trial itself and paid a lawyer to be a special prosecutor. Darrow hadn't had a great reputation and was just getting started. He went out to Appleton to represent this organizer. When he got there, he looked over the town and tried to get himself acclimated to the community and learned who was what and what was going on in the community. At the trial, as the prosecutor put on his evidence, one witness after another, he built an airtight case. Clearly the man was guilty. They had people who heard him and had his flyers and had everything they needed to convict him.

As Darrow sat through this trial, he didn't ask any questions. He didn't question a single witness, except the last one that took the stand. It was the owner of the factory. He had nothing evidentiary-wise to offer, but wanted that jury (many of the jurors had family members who worked in the mill) to know that, if they ruled for this factory owner, that it might be detrimental to the jobs of their loved ones. He took the stand and told about his great accomplishments setting up his factory and that he was trying to do everything he could to help these workers and they had no reason for a union in the town. Darrow listened.

When it came time to cross-examine this factory owner, Mr. Darrow, who hadn't asked many questions, (the judge probably gave him more leeway than he would if he was really involved in a contested case there) began to ask questions that would probably be objectionable to ask. Things that didn't bear guilt or innocence, but he painted a picture of this man in front of that jury. He said, "Sir, you know, I have been riding around Appleton for a few weeks and I noticed when I come into town, on the tallest hill I see this great and beautiful mansion. Is that where you live?" The man said, "Yes, that is where I live." He said, "I noticed there is a big limousine that is always bringing you into the court everyday and taking you home. Is that your car?" He said, "Yes, sir, that is my car." "You know I questioned these jurors and many of them, in fact all of them, send their

children to the wonderful public schools of Appleton, where do you send your children to school?" He said, "Well, you know I send them to Exeter over there in Connecticut."

Darrow continued to ask him questions that kind of painted a picture of him being a very rich and powerful man who lived in luxury.

The prosecutor made his closing argument, adding one brick upon another and an airtight case. Darrow stood before the jury to make a very brief and compelling statement and said, "You have been here for the last two weeks, listening to the evidence in this case and, before long, the judge is going to charge you on the law that you shall use to apply this evidence. It is impossible to present this case to you without a broad survey of the great questions that are agitating our world today. For whatever rich form, ladies and gentlemen of the jury, this is not a criminal case. It is but an episode in that great battle of human liberty, a battle of tyranny and oppression, that will not end so long as the children of one father shall be compelled to toil and poverty to support the children of another in luxury and ease.

Darrow gave that jury an opportunity to lift the simple facts of the case up into something that is meaningful to them as citizens of that community. And, he gave them the opportunity to make a ruling that they would be proud of for the rest of their lives. He appealed to them for justice.

That jury was out in less than an hour and they returned with a not-guilty verdict.

Our nation faces very difficult times. All of these difficult times we have faced in the past and present, have involved lawyers and our legal profession. In my lifetime, I have been a part of some of those difficult periods.

I remember when I got out of law school in 1960. Things were solidly segregated in the South and actually in many other parts of the country. There was more violence in going to school in Boston than in Birmingham, Alabama. And during those times, Dr. King was very concerned about the future of this nation. He must have had a heavy heart when he delivered the eulogy in 1963. He had only been out of the Birmingham jail for a few weeks when those three little Sunday school girls, whose bodies had been blown apart by bombs planted by the Ku Klux Klan, died. But Dr. King believed in us. He had faith in us as a nation. He had faith in our judicial system and he had faith in us as lawyers. He had faith in those who were with us then and those who were coming in the future. He went to Washington, D. C. to express that faith.

He stood at the Mall with 250,000 people at his feet, millions watching on television, when he told us that he believed in us. He said, "I have a dream that one day in the red clay hills of Georgia, the sons of former slaves and the sons of former slave owners, will sit down around the table of brotherhood."

Well, that has happened since Dr. King left us. We have taken three steps forward and two steps back. I doubt if he would recognize the landscape if he was here today, but I think he would still have that faith in us. And if he was making that same speech today, if I might be so bold to put words in this great man's mouth, he might say that, "I have a dream one day in the red clay hills of Georgia" and today might add, "in the barrios, on the reservations, in the ghettos and in the seats of economic and political power in this nation, that the sons and daughter of former slaves and sons and daughters of former slave owners," today he might add, "the poor, the powerless, and those who hold the keys to the economic and political power of this nation, will sit down around the table of personhood and truly learn to love one another."

When Dr. King was with us, he made a little speech and I had the opportunity to hear him. I think he made this little talk as a warning to us, because he questioned whether our nation's democracy would continue at a time when we treated millions of our citizens less than second class. I think he told us this, maybe that we might learn from this story.

The year was 1200 B.C. The Jews and the children of Israel had been slaves in Egypt. They had been released to freedom. They wandered from place to place over many, many centuries looking for homeland. They finally settled and built a city called, City State, back then.

Big high walls had been built around this city and they had big gates at the entrance. They prospered. Those who had good opportunities to make money got nice building lots and built beautiful homes overlooking fertile valleys. In this city they had an education system, banking system, courts and law enforcement, much like we have today. They also had a great marketplace in the middle of this town, where people from far and wide brought their products in to sell. There was one farmer who got there very early in the morning to get a good stall in the market. He came there from a neighboring village, his wagon filled with produce. While he was waiting there he saw able-bodied men and women reaching out and begging for a few grains from his wagon. Upon inquiry, he learned that if he didn't know the right people, he didn't get a good job or job at all, especially if he wasn't from the right group.

When he got to the market, he put his produce out in his stall, and he heard grumbling from the people that walked by. He heard them talking about the court system and they said the people began to say it depends on who you know and what group you are a part of, for the kind of justice you get in the court

system. This bothered the farmer because he knew of the great promise of this new state and this city and he knew the trials and tribulations that came through to form this great state. He wanted an opportunity to go to the leaders and express his concern.

I am sure that most of you know who this farmer was. He was a biblical prophet, Amos. Amos went before the council of leaders and said, "Folks, you know you have a good thing going here, but unless you apply the Rule of Law to anybody fairly, then you won't get to keep what you have and pass it down to future generations. Unless you are fair, I predict, there won't be one stone left upon another of this great city." He spoke to those leaders in the words that Dr. King spoke to us in another dark day in the history of this country. Amos said, "Don't be satisfied until justice rolls down like waters and righteousness like a mighty spring."

I think that is a challenge to all of us in our profession. When we graduated from law school—and most of you graduated from this law school here—they handed you the keys to the gates of justice. I am sure that most of you when you walked away, with that freshly minted license in your hand, expected that you would, and hoped that you could, make a difference in people's lives. Many of you have. It is important as we face the challenges of today, not to get caught up in liberal and conservative politics, Democrat and Republican, you name it.

It is important that we stick with the Rule of Law. That is going to be the salvation of this great nation and you as lawyers as the pillars of the foundation of this nation.

Thank you so very much.

(I would like to thank the many of you here that support the work of the Southern Poverty Law Center. Many of you came up to me tonight and many of you have been contributing. I didn't come here to make a request for funds and do thank you. Tomorrow, I am putting my life in the hands of Jack Speight and Pete and all of his buddies, and we are going to take off at 7:30 in the morning and tour some of the West.)

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