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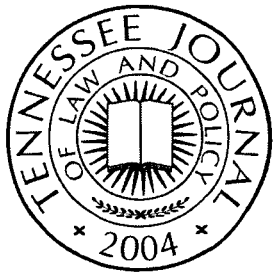

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ARTICLE

UNITED STATES V. JONES: BIG BROTHER AND THE "COMMON GOOD" VERSUS THE FOURTH AMENDMENT AND YOUR RIGHT TO PRIVACY

By Melanie Reid[*]

I. Introduction

In the center of the town of Siena, Italy, lays the Palazzo Publico which was built between 1297 and 1310. Inside the Palazzo Publico is the Sala della Pace, the Hall of Peace, which houses an early piece of Italian secular art- a fresco that illustrates the effect government has on the city, its people, and the countryside.[1] The painter, Ambrogio Lorenzetti, depicted the "Common Good" as a king, sitting tall and strong above a line of smaller-sized, everyday people who are slowly making their way towards the "Common Good."[2] This picture represents the subordination of private interest to the common good.[3]

Lorenzetti, who painted the fresco between 1338 and 1339, was one of the first of many who began to ponder what makes a good government;[4] he concluded that all citizens must make personal sacrifices for the common

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[*] Assistant Professor of Law, Lincoln Memorial University-Duncan School of Law. I want to thank the participants at the Sixth Circuit Judicial Conference in Lexington, Kentucky, where I presented *Trespass and the Expectation of Privacy: The Impact of United States v. Jones on Law Enforcement and Private Entities,* a precursor to this article. I would like to thank Victoria Herman, Barbara Bavis, Mary Laflin, and Bob Reid for their invaluable assistance on this article.

[1] MARIA LUISA MEONI, UTOPIA AND REALITY IN AMBROGIO LORENZETTI'S GOOD GOVERNMENT 9 (2005).

[2] *Id.* at 16.

[3] *Id.*

[4] *Id.* at 13.

good of the town.[5] Most modern day democracies struggle with the concept of the rights of individuals versus the needs of the state. In light of rapid technological advancement of the past fifty years, one of the biggest issues citizens of the world face today is whether to sacrifice some right to privacy for the common good, so that the scales of Justice may remain in balance and to promote the order Lorenzetti painted centuries ago.

In 1787, the United States Constitution was drafted to establish mechanisms for an effective federal government, which would become the "Common Good". However, the Constitution contained few guarantees as to what private interests would be protected in this new government. Without the protection of individual rights, this new central government had the potential to create tyranny and transform into a police state of some sort. James Madison stated that a declaration of rights would help install the judiciary as "guardians" of individual rights.[6] And so, in 1789, the first Congress proposed 12 amendments to the Constitution. The Fourth Amendment was the most important of these for the protection of privacy rights.

This article will trace the evolution of Fourth Amendment law, what constitutes a "search" which evolved from English property law and notions of trespass, to the reasonable expectation of privacy under *United States v. Katz*.[7] The Supreme Court's recent decision in *United States v. Jones*,[8] which relied upon historical property law, impacts law enforcement's future ability to use tracking devices, especially when exigent

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[5] *Id.* at 16.

[6] John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1394-95 (1997) (citing James Madison, Remarks to the House of Representatives (June 8, 1789), *in* 2 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY REVIEW (1971)).

[7] Katz v. United States, 389 U.S. 347 (1967).

[8] 132 S. Ct. 945 (2012).

circumstances exist.[9] The *Jones* case forces law enforcement and the courts to reevaluate the extent of an individual's right to privacy in the age of new technology and the complications this may have on the ability of law enforcement to utilize warrantless electronic monitoring, technical surveillances, and other investigative techniques.

The Supreme Court's unanimous decision in *Jones* based its decision on early Fourth Amendment law; therefore, Part II of this article will provide a brief overview and history of the Fourth Amendment and the concerns of the Framers. It is important to review what constitutes a "search" under the Fourth Amendment and provide a history of how the Court has viewed tracking devices and other law enforcement tools that enhance criminal investigations.

Part III of this article will examine the *Jones* decision and its impact on law enforcement, as trespass is now considered an additional argument towards what is considered a "search." The *Jones* decision raises legal and ethical issues for law enforcement working with companies such as OnStar, which allow for monitoring without installation, any type of factory- or owner-installed tracking device, or GPS-enabled smartphones and raises issues for law enforcement who find themselves in exigent circumstances without the ability to place tracking devices on automobiles and other such "effects." The *Jones* decision may also have implications on other investigatory tools, such as trash pulls, stationary cameras, open fields, and undercover agent or informant non-consensual recordings.

Part IV will explore private investigators' tort liability, specifically the tort of trespass and invasion of privacy, which can, in turn, enlighten the discussion as to the impact of *Jones* on law enforcement. Post-*Jones*, the Supreme Court should consider similar trespass and

[9] *Id.*

privacy laws but in the civil context. Private investigators frequently utilize similar techniques and resources which are the stock and trade of law enforcement, but private investigators are governed by state licensing requirements. Private investigators are also concerned with potential civil tort liability and the admissibility of evidence collected by them in any future criminal proceeding.

Previously, the rules which govern trespass in a criminal context and civil proceeding were quite different. The decision in *Jones* brings the common law tort of trespass back into the criminal context. It can be argued that there is an unwarranted dichotomy between what the public, e.g., private investigator, is entitled to view versus what law enforcement is entitled to view. The torts of "trespass" and "invasion of privacy" used in the civil, public context may now come into the forefront in determining similar legal guidelines and constraints for law enforcement. Investigative techniques such as open fields, aerial surveillance, trash searches, undercover recordings, and database searches may now be scrutinized under the tort "trespass" theory.

The Court acknowledged in *Jones* that there may be an "end to privacy" and the law of trespass may take its place as society's subjective expectations of privacy are becoming more and more reduced.[10] This article will discuss the relationship between Fourth Amendment law for public officers, tort law for private investigators, and the impact of *Jones* in their respective duties and investigatory behavior. The trespass model should be considered in the application of other methods of investigation, and due to the ever-fluctuating state of individual privacy expectations, an analysis similar to the tort of invasion of privacy should supplement the *Katz* analysis.

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[10] *Jones*, 132 S. Ct. at 962.

II. The Fourth Amendment and What Constitutes a "Search"

When drafting the Fourth Amendment, the Framers were concerned with the exercise of discretionary authority by public officers and abusive warrants, such as writs of assistance and general warrants.[11] The Framers wanted to ensure that the right to privacy extended to an individual's home; they recalled the practice of British customs agents who were authorized via the writs of assistance to search colonists' homes for taxable goods which included small items such as salt, soap, paper, and glass.[12] The writ was effective during the entire lifetime of the reigning sovereign, and the delegation to the official to enforce the writ was absolute and unlimited. Therefore, the Framers believed the chief evil was the physical entry into one's home without a proper warrant.[13] To rectify this abuse, henceforth, any intrusion into one's home without a warrant, i.e., without judicial scrutiny, would constitute a "search" and a violation under the Fourth Amendment.

The Framers decided the Fourth Amendment would apply to "persons, houses, papers, and effects."[14] Scholars, over the years, determined that the Fourth Amendment contains three separate requirements: a warrant requirement, a reasonableness requirement, and a particularity requirement.[15] The Fourth Amendment does not explicitly discuss an individual's right to privacy.

While courts may remain confident that any warrantless, government-sponsored intrusion into the home would violate the Framer's intent behind the Fourth Amendment, new technologies have evolved that now

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[11] 1 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE: INVESTIGATION 52 (5th ed. 2010).
[12] *Id.*
[13] *Id. at 53.*
[14] *Id.*
[15] *Id.* at 50-51.

allow law enforcement to secure evidence within the home without physically entering the home. The question now being considered is whether this non-intrusive government technique qualifies as a "search" and if so, whether this "search" triggers the warrant requirement of the Fourth Amendment.

The courts originally looked to property law and the common law tort of trespass to frame what constitutes a "search." In *Boyd v. United States*,[16] the Supreme Court quoted Lord Camden, stating "every invasion of private property, be it ever so minute is a trespass."[17] The Court also used "trespass" as a trigger for the Fourth Amendment to apply when it reviewed the case against Roy Olmstead, who ran a large bootleg operation in the Puget Sound area.[18] Olmstead, a former police lieutenant, sold a substantial amount of illegal liquor in the Seattle, Washington area after the Volstead Act was passed in 1925.[19] Olmstead sold his liquor out of an office in downtown Seattle and had six telephone numbers that buyers could use to contact his operation.[20]

Prohibition Bureau agents wiretapped the phones in Olmstead's office and home by placing devices in the basement of his office and in phone installations near his and other employees' homes.[21] The Ninth Circuit upheld Olmstead's eventual conviction.[22] Justice Taft later wrote

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[16] 116 U.S. 616 (1886).
[17] *Id.* at 627.
[18] Olmstead v. United States, 277 U.S. 438, 455-56 (1928).
[19] *Id.*
[20] *Id.* at 456.
[21] *Id.* at 456-57.
[22] Olmstead v. United States, 19 F.2d 842 (Wash. Ct. App. 1927). Justice Frank H. Rudkin dissented and wrote:

> What is the distinction between a message sent by letter and a message sent by telegraph or by telephone? True, the one is visible, the other invisible; the one is tangible, the other intangible; the

the Supreme Court's majority opinion in *Olmstead*, Taft relied upon the trespass precedent, stating that the wiretapping that occurred outside Olmstead's office and home did not constitute a "search" under the Fourth Amendment because there was no trespass or no physical invasion of a protected location such as the home or office.[23]

> one is sealed, and the other unsealed; but these are distinctions without a difference. A person using the telegraph or telephone is not broadcasting to the world. His conversation is sealed from the public as completely as the nature of the instrumentalities employed will permit, and no federal officer or federal agent has a right to take his message from the wires, in order that it may be used against him. Such a situation would be deplorable and intolerable, to say the least. Must the millions of people who use the telephone every day for lawful purposes have their messages interrupted and intercepted in this way? . . . If ills such as these must be borne, our forefathers signally failed in their desire to ordain and establish a government to secure the blessings of liberty to themselves and their posterity.

Id. at 850 (Rudkin, J dissenting).

[23] *Olmstead*, 277 U.S. at 465. Justice Taft explains:

> There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the house or offices of the defendants. . . The reasonable view is that one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside, and that the wires beyond his house, and messages while passing over them are not within the protection of the Fourth Amendment. Here those who intercepted the projected voices were not in the house of either party to the conversation.

Id. at 464-66.

This rationale held firm in the *Goldman*[24] case in 1942 and the *Silverman* case of 1961.[25] In *Goldman*, agents placed a detectaphone[26] against the outside wall of an office and monitored the conversation from the outside wall using the detectaphone.[27] The Court found that there had been no physical trespass into the office, and therefore, there was no search or seizure.[28] In *Silverman*, a spike mike was inserted into the wall of an adjoining row house to capture Silverman's conversations.[29] Since the mike made contact with the targeted row house's heating duct, the Court found that a physical intrusion occurred which constituted a search under the Fourth Amendment.[30]

The year 1967 began the *Katz* revolution, which fundamentally altered the Court's understanding of Fourth Amendment privacy protections.[31] Katz, a professional gambler, used a bank of telephones on Sunset Boulevard to place bets for himself and others.[32] The Federal Bureau of Investigation ("FBI") attached a tape recorder to the roof of the middle phone booth, placed a microphone on the back of two of the booths and attached an "out of order" sign on the other booth.[33] Since the FBI placed the listening device on the outside of the phone booth, the government could argue there was no physical intrusion, no trespass, inside

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[24] Goldman v. United States, 316 U.S. 129 (1942).
[25] Silverman v. United States, 365 U.S. 505 (1961).
[26] A detectaphone is a telephonic apparatus with an attached microphone transmitter used especially for listening secretly. *Detectaphone – Definition*, MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/detectaphone (last visited June 18, 2012).
[27] *Goldman*, 316 U.S. at 131-32.
[28] *Id.* at 134.
[29] *Silverman*, 365 U.S. at 506.
[30] *Id.* at 511-12.
[31] *Katz*, 389 U.S. at 347.
[32] *Id.* at 348.
[33] Brief of Petitioner at *5, Katz v. United States, 389 U.S. 347 (1967) (No. 35), 1967 WL 113605.

the booth.[34] Justice Stewart disagreed and seemed to overturn years of Fourth Amendment law by arguing the Fourth Amendment protected "people, not places."[35] It did not matter whether the device was placed inside or outside the booth, "what a person seeks to preserve as private even in an area accessible to the public may be constitutionally protected."[36] Justice Harlan, in his concurrence, set the stage for future Fourth Amendment cases. The pertinent question for future Fourth Amendment cases was to become whether the governmental action violated the defendant's subjective expectation of privacy and if so, was that expectation of privacy one that society considers reasonable.[37]

Law enforcement's invasion of privacy in the 18th century was limited to physical searches of homes and businesses. Once technology advanced, the Court seemed to abandon the tort of trespass as the sole standard, and the invasion of property was now possible without an accompanying trespass. Police now have the ability to invade one's privacy through wiretaps, informant or undercover recordings, pen registers, aerial surveillance, trash searches, thermal imaging, tracking devices, etc.

By the 20th century, the trespass doctrine alone provided inadequate protection of Fourth Amendment rights because technology had reached the point that it was now possible for law enforcement to intercept communications and monitor individuals without the requirement of physical trespass. The trespass doctrine was substituted for *Katz* in 1967, which said that a violation of the Fourth Amendment occurs when government officers violate a "reasonable expectation of privacy."[38] Under

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[34] *Katz*, 389 U.S. at 352.
[35] *Id.* at 351.
[36] *Id.* (internal citations omitted).
[37] *Id.* at 360-62 (Harlan, J. concurring).
[38] *Id.* at 360 (Harlan, J. concurring).

Katz, the expectation of privacy doctrine was born, and using this new analysis, the Court decided what constituted a "search"[39] under the Fourth Amendment.[40]

III. The *Jones* decision and its Impact on Law Enforcement

As the Court began to consider various investigatory tools and whether these tools constituted a "search" that would require a warrant, the issue of electronic beepers and tracking devices arose. In *United States v. Knotts*,[41] police placed a radio transmitter[42], also called a beeper, in a container and traced the beeper in the

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[39] Kyllo v. United States, 533 U.S. 27, 37 at n. 4 (2001) (use of thermal imaging is a "search"); United States v. Dunn, 480 U.S. 294, 300 (1987) (trespassing on curtilage is a "search"); *Katz*, 389 U.S. at 358 (wiretapping is a "search").

[40] Florida v. Riley, 488 U.S. 445, 451 (1989) (aerial surveillance is not a "search"); California v. Ciraolo, 476 U.S. 207, 215 (1986) (aerial surveillance is not a "search"); California v. Greenwood, 486 U.S. 35, 40-41 (1988) (looking through trash is not a "search"); Oliver v. United States, 466 U.S. 170, 183 (1984) (says searches of open fields is not a 4th Amendment violation but searches of curtilage would be a violation); Smith v. Maryland, 442 U.S. 735, 745-46 (1979) (use or inspection of pen registers is not a "search"); Cal. Bankers Ass'n v. Shultz, 416 U.S. 21, 55 (1974) (looking at bank records is not a "search"); United States v. White, 401 U.S. 745, 753-54 (1971) (use of false friends or wired confidential informants are not "searches"); United States v. Lee, 274 U.S. 559, 563 (1927) (use of searchlights does not create a "search" that implicates the 4th Amendment); United States v. Wright, 449 F.2d 1355, 1363 (D.C. Cir. 1971) (use of a flashlight did not create a search, but was a plain view search); People v. Vermouth, 116 Cal. Rptr. 675, 680 (Cal. Ct. App. 1974) (use of binoculars to confirm what is seen with unaided observation is not a "search").

[41] United States v. Knotts, 460 U.S. 276, 277 (1983).

[42] A radio transmitter, which is usually battery operated, emits periodic signals that can be picked up by a radio receiver. Marshall Brian, *How Radio Works*, HOW STUFF WORKS, http://howstuffworks.com/radio.htm (last visited August 6, 2012).

container to Knotts' cabin.[43] The Court focused on the site of the information disclosed by the beeper.[44] The Court held this monitoring did not constitute a search under the Fourth Amendment, since the beeper disclosed the location of the container in public places and revealed nothing to the police about the interior of Knotts' cabin.[45]

In *United States v. Karo*,[46] the Court addressed the issue of whether the installation of a beeper in a container constituted a "search" if the original owner gave consent to the monitoring yet the buyer had no knowledge of the presence of the beeper.[47] In this instance, the Court found that the person who possessed the container at the time of the installation was the confidential informant; therefore, the police had the consent of the owner prior to installing the tracking device.[48] This is the first mention of installation possibly triggering the Fourth Amendment.[49]

The Court also considered the monitoring of the container as it moved from a public area to inside a private residence as it had in *Knotts*.[50] Since the beeper in *Karo* disclosed information not available from visual surveillance but rather revealed critical facts about the interior of the premises, the Court decided the monitoring violated the Fourth Amendment.[51] The Court felt that requiring a warrant to monitor private areas would have the effect of ensuring that the use of electronic beepers or tracking devices would not be abused.[52]

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[43] *Knotts*, 460 U.S. at 277.
[44] *Id.* at 281-82.
[45] *Id.* at 285.
[46] 468 U.S. 705 (1984).
[47] *Id.* at 707.
[48] *Id.* at 711.
[49] *Id.* at 713.
[50] *Id.* at 713-14.
[51] *Id.* at 714.
[52] *Id.* at 716.

Knotts and *Karo* created the framework for law enforcement to follow when using electronic beepers and tracking devices. Tracking devices were divided into "slap-on" devices which are battery operated and placed on the undercarriage of vehicles, and devices that are installed or hard wired into the car so that the device no longer needs a battery. Monitoring also became divided into two areas: those instances in which there would only be monitoring in public places and those with monitoring in private areas.

Congress gave the courts the authority to review warrants for mobile tracking devices in Title 18, United States Code, section 3117. In instances in which the tracking device was to be installed or hard wired into the car and/or instances in which the tracking device was to monitor private areas, a warrant containing probable cause was needed.[53] Thus, the only time law enforcement would not be required to seek a court order would be in a situation where a "slap-on" tracking device would be used or law enforcement intended to monitor only public areas.

Knotts and *Karo* were decided in the 1980's and much has changed in tracking device technology. Law enforcement used to place a tracking device on a vehicle and follow a blip on the screen as they attempted to maintain surveillance a block or two away. The global positioning system (GPS) tracking technology that the Court in *Jones* examined in 2012 is much more sophisticated and extensive.[54] The Court was suddenly faced with advanced technology and the only area of tracking device law still in dispute was the warrantless utilization of a "slap-on" device and the monitoring of only public areas. Many assumed the Court would follow the D.C. Circuit court's argument and use the mosaic theory of privacy to justify a warrant requirement. Under the mosaic theory of privacy, extensive monitoring of a vehicle for

[53] 18 U.S.C. § 3117 (2012).
[54] United States v. Jones, 132 S.Ct. 945 (2012).

twenty-eight days constituted more than just a day's surveillance of a vehicle in public thoroughfares and when all of the vehicle's movements were taken together after the twenty-eight day period, the defendant had a reasonable expectation of privacy in the sum of his movements.[55]

Instead, the majority of the Court chose a different route. The Court explained that it had never truly abandoned the argument that a physical trespass triggers the Fourth Amendment, but that the centuries-old torts of trespass to land and trespass to chattel merely supplemented the *Katz* reasonable expectation of privacy analysis.[56] Therefore, utilizing a "slap-on" tracking device constitutes a "search" because it is a trespass of a person's "effect", chattel, which is protected by the Fourth Amendment.[57] Justice Scalia likened a GPS "slap-on" tracking device, which is approximately the size of a credit card, to an 18th century constable "concealing himself in the target's coach in order to track its movements."[58] Both investigatory tools would constitute a trespass on a person's effect or chattel.[59]

The majority decided not to utilize the *Katz* analysis in *Jones* because "[the Court's] cases suggest that such visual observation is constitutionally permissible."[60] However, the majority did not close the door to further

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[55] United States v. Maynard, 615 F.3d 544, 562-63 (D.C. Cir. 2010) (using mosaic theory to conclude that individuals have a reasonable expectation of privacy in collective movements).
[56] *Jones*, 132 S.Ct. at 952.
[57] *Id.* at 953. Justice Scalia mentions in footnote 5 that "[t]respass alone does not qualify, but there must be conjoined with that what was present here: an attempt to find something or to obtain information." Id. at 951 n.5. Since law enforcement is usually going to trespass on land or a person's property when they are conducting an investigation, this point that you need "trespass +" is somewhat diminished. *Id.* at 951.
[58] *Id.* at 950 n. 3.
[59] *Id.*
[60] *Id.* at 953-54.

argument if this extensive monitoring by GPS tracking devices was to arise again in a separate case under different circumstances, "[i]t may be that achieving the same result through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy, but the present case does not require us to answer that question. And answering it affirmatively leads us needlessly into additional thorny problems."[61]

In a nutshell, it was questionable to the majority whether this sort of monitoring actually violated Jones' right to privacy. In an age of Facebook, Twitter, Google, iPads, smartphones, etc., the Court was not ready to decide how much government monitoring of information placed in the public domain would trigger protections under the Fourth Amendment. However, the majority did note that "[s]ituations involving merely the transmission of electronic signals without trespass would *remain* subject to *Katz* analysis."[62] So owner- or factory-installed tracking devices such as Onstar or GPS tracking using smartphones would be subject to the *Katz* analysis since the trespass argument would not apply.

Although *Jones* is a 9-0 decision, the concurrences by Justice Sotomayor and Justice Alito, joined by Justices Ginsburg, Breyer, and Kagan, demonstrate divergent views as to the use of trespass and the *Katz* analysis in determining which investigatory tools constitute a "search" and which do not. Justice Alito criticized the majority's decision to re-introduce the idea of trespass through property law into the Fourth Amendment context and preferred to examine the problem utilizing the *Katz* analysis.[63] Justice Alito first argued that the placement of a "slap-on" tracking device on the undercarriage of Jones'

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[61] *Jones*, 132 S.Ct. at 954.
[62] *Id.* at 953 (emphasis in original).
[63] *Id.* at 957-58 (Alito, J., concurring).

vehicle was not a true trespass to chattel.[64] Liability for a trespass to chattel occurs when an actor intentionally dispossesses another of the chattel or intermeddles with a chattel in the possession of another.[65] The elements of trespass to chattel include an act, intent, an invasion of chattel interest (either an intermeddling or dispossession[66]), and the plaintiff must be in possession or entitled to immediate possession, causation, and damages.[67]

In the *Jones* case, the placement of the GPS device would be considered "intermeddling" as no substantial invasion of the chattel interest occurred. As Justice Alito pointed out in his concurrence, "there was no actual damage to the vehicle to which the GPS device was attached."[68] Under the common law definition of trespass to chattel, the intermeddling would not constitute a trespass to chattel and therefore would not be a search under the Fourth Amendment because no actual damage occurred to the vehicle.[69] Justice Alito also disagreed that the Court should look to 18th century law and apply it to advanced technology.[70] Referring to Justice Scalia's 18th century example of trespass, Justice Alito argued that a constable in 1791 could not have possibly hidden inside a stage coach to survey the target's activities. Therefore, the Court need not concern itself with exploring the past to provide insight on present-day technological dilemmas.[71] According to Justice

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[64] *Id.*
[65] *Id.* at 957, n. 2.
[66] RESTATEMENT (SECOND) OF TORTS § 217 (1965). A dispossession would include a wrongful acquisition of the chattel, wrongful transfer, wrongful detention, substantially changing the chattel, severely damaging or destroying the chattel, or misusing the chattel.
[67] RESTATEMENT (SECOND) OF TORTS § 218 (1965).
[68] *Jones,* 132 S.Ct. at 957 n. 2 (Alito, J., concurring).
[69] *Id.* (Alito, J. concurring).
[70] *Id.* at 958 (Alito, J. concurring).
[71] *Id.* at 958 n. 3 (Alito, J. concurring).

Alito, as technology advanced and physical intrusion was no longer at issue trespass no longer applied.[72]

The issue in Justice Alito's mind was the government's long-term monitoring of Jones' movements in his car and whether this long term monitoring "involved a degree of intrusion that a reasonable person would not have anticipated."[73] Alito argued "the use of longer term GPS monitoring in investigations of most offenses[74] impinges on expectations of privacy."[75] Justice Alito applied the *Katz* analysis, rather than trespass law, in his concurrence and arrived at the same result as Justice Scalia[76]. However, it is interesting to note that Alito questioned a reasonable person's set of privacy expectations in our advanced technological age. Noting:

> [T]echnology can change those expectations. Dramatic technological change may lead to periods in which popular expectations are in flux and may ultimately produce significant changes in popular attitudes. New technology may provide increased convenience or security at the expense of privacy, and many people may find the tradeoff worthwhile. And even if the public does not welcome the diminution of privacy that new technology entails, they

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[72] *Id.* at 960 ("The premise that property interests control the right of the Government to search and seize has been discredited." quoting Warden v. Hayden, 387 U.S. 294, 304 (1967)) (Alito, J. concurring). Citing *Oliver*, Justice Alito also pointed out that it is unclear how the placement of a tracking device constitutes a "search." *Id.* citing Oliver v. United States, 466 U.S. 170, 183 (1984).

[73] *Id.* at 964 (Alito, J. Concurring).

[74] It is unclear what offenses Justice Alito is speaking of – would long-term monitoring of a terrorist suspect be acceptable but not of a suspected drug trafficker?

[75] *Id.* (Alito, J. concurring)

[76] Jones, 132 S. Ct. at 962 (Alito, J. concurring).

> may eventually reconcile themselves to this new development as inevitable.[77]

Alito appeared to question in an age of advanced technology, where one's personal comments, preferences, and behavioral information can be so easily exploited by citizens, companies, and internet entities, whether a reasonable person can have any expectation to the right of privacy.

Justice Sotomayor took a different stance on the privacy issue. While agreeing with both Scalia's and Alito's reasoning and conclusions, she took the opportunity in her concurrence to express her concern that "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations."[78] In fact, Sotomayor warned "[a]wareness that the Government may be watching chills associational and expressive freedoms," and this relatively inexpensive, easy mechanism of monitoring is "susceptible to abuse."[79] Justice Sotomayor agreed with the appellate court's mosaic privacy theory where there is a reasonable "expectation of privacy in the sum of one's public movements."[80]

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[77] *Jones,* 132 S.Ct. at 962 (footnote omitted).

[78] *Id.* at 955 (Sotomayor, J.. concurring).

[79] *Id.* at 956. James Otis made a similar expression of abuse when British customs officials abused the writs of assistance granted by the King. When King George II died in 1760, Otis represented a group of colonists who opposed the writs, arguing in a Boston court that the writs were unconstitutional and violated the right to property protected by the British Constitution. Otis argued it infringed on colonists' liberty because the writs allowed government officials to enter any citizen's home without cause. UNITED STATES HISTORY: JAMES OTIS, http://www.u-s-history.com/pages/h1204.html (last visited July 26, 2012).

[80] *Jones*, 132 S. Ct. at 956.

While Sotomayor concurs with the majority, she disagrees with Alito's comments that citizens should come to terms with their diminishing right to privacy. In fact, Sotomayor asks in light of this new digital age where people now disclose a great deal of information about themselves in many different venues, if the Court should reconsider the third-party doctrine.[81] The third-party doctrine allows law enforcement to request bank records, company records, hotel records, electronic toll collection systems, email subscriber and address information, phone numbers dialed or received, and the like, on the premise that people have no reasonable expectation of privacy to information which is willingly provided to these third parties, thus transferring the information into the public domain.[82]

Law enforcement is required to submit a grand jury subpoena in order to receive this type of information. However, law enforcement need only demonstrate that the information is "relevant to the general subject of the grand jury investigation."[83] Thus, grand jury subpoenas are merely a tool to obtain evidentiary material that can be used without having to worry that the Fourth Amendment requirements of probable cause or reasonable suspicion will not be satisfied.

Sotomayor requested a reconsideration of the third-party doctrine which, in a sense, was not at issue in the *Jones* case. "I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection."[84] One thing is clear from the *Jones* decision: the Court is re-introducing the

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[81] *Id.* at 957.
[82] *Id.*
[83] United States v. R. Enterprises, Inc., 498 U.S. 292, 301 (1991). *See* FED. R. CRIM. PRO. 17(c).
[84] *Jones*, 132 S.Ct. at 957.

common-law tort of trespass as an argument to be made under the Fourth Amendment. The standard expectation of privacy is now under debate, and all technical investigatory tools currently not considered a "search" will more than likely be revisited.

The immediate impact of *Jones* on law enforcement activities was minimal, or at least should have been, since *Jones* only dealt with the narrow category of small, "slap-on" devices monitored in public areas. The majority of the GPS tracking devices already needed a warrant if installed or if the monitoring was to include private areas. The fact that so many GPS trackers needed to be pulled from vehicles post-*Jones* demonstrates that many agents felt that "slap-on" devices intended to monitor public areas were acceptable without a warrant.

Further, many agents followed their legal counsel's guidance, intending to remember to turn the device off when it appeared as though the target was traveling into a private area. It is certainly easier to slap on a tracking device in the field rather than travel to the U.S. Attorney's office and a judge's chamber to obtain a warrant in the off chance the vehicle may be monitored in a private area. Agents followed the *Karo* and *Knotts* case law to the letter rather than take the precaution of obtaining a warrant. This guidance was reflected when FBI General Counsel Andrew Weismann commented that in light of *Jones,* over 3,000 tracking devices had to be removed from various vehicles by the FBI.[85]

Certain aspects of the *Jones* decision will negatively impact law enforcement's ability to place a tracking device on a vehicle when exigent circumstances arise. If agents need to monitor an informant or undercover agent during a

[85] Ariane de Vogue, *Supreme Court Ruling Prompts FBI to Turn Off 3,000 Tracking Devices*, ABC NEWS (Mar. 7, 2012), http://news.yahoo.com/supreme-court-ruling-prompts-fbi-turn-off-3-154046722--abc-news.html.

sting operation or drug buy bust, and an unexpected third party arrives on the scene, agents will no longer be able to follow these other unexpected targets via a tracking device without comprising the planned operation.

Similar circumstances arise in situations where law enforcement is listening to a target's phone conversations via a Title III court order[86] and learn that the target plans to drive to a location to pick up contraband. Unfortunately, if the target owns three different vehicles, and agents are unsure of which vehicle the target plans to take; the authorities are also unsure which vehicle they should mention in their request to the judge for placement and monitoring of a tracking device. In the previous scenario, post-*Jones*, law enforcement will be unable to place a tracking device on the three vehicles without a court order.

Will it be possible for law enforcement to receive an "anticipatory" tracking order to place tracking devices on all three cars and the monitoring of which depends upon whether the target decides to take that particular vehicle to his destination? Exigent circumstances will always exist for the quick placement of tracking devices during an investigatory operation and legislators should step forward and create a 24-hour waiver rule that would allow for these unplanned contingencies.[87] There should also be allowances made for the quick slap-on of the device and brief monitoring while in the field conducting surveillance, but which would require a court order for its subsequent monitoring hours later. This type of rule would allow law enforcement the freedom to make quick decisions in the field and prevent the type of long-term monitoring that concerned the Justices in *Jones*.

Jones' long-term impact on future case law is difficult to assess, since there are many unanswered

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[86] 18 U.S.C. §§ 2510-2522.

[87] This was alluded to by Justice Alito in his concurring opinion. *See Jones*, 132 S.Ct. at 964.

questions about technology and privacy issues. Is Justice Alito correct in his conclusion that as people embrace more technology, their expectation of privacy diminishes? Or is Justice Sotomayor correct in her argument that the increase of private information collected by third parties should not correlate to the government's ability to access this vast amount of private information without due process? Should different rules apply to the government and private entities in their collection of our electronic information?

Such an assumption creates a false dichotomy. Yes, government has a different motive for the analysis and review of collected electronic data than does a company such as Google. Since Google collects what users search for on the Internet, what websites users visit, and what news and blog posts users read, does this constitute an intrusion into a user's expectation of privacy? Should motive play a role in what constitutes trespass or expectation of privacy?

In some instances, private entities have similar motives to that of the government. Private investigators are similar to law enforcement when they conduct investigations in cases of infidelity, divorce, family, criminal, and civil concerns. Law enforcement and private entities should both be bound by the same constraints and legal limitations when it comes to their access to technical investigative techniques or third party data. Thus, civil law that limits the actions of the private investigator should be examined to determine how it differs from the criminal law that applies to government.

IV. Private Investigators, Trespass, and the Invasion of Privacy

Private investigators typically utilize surveillance either using photography or video to document, database searches, GPS tracking to locate people or assets, and perform crime scene reviews. Private investigators are

concerned with two things: licensing requirements and tort liability. The prerequisites to become a licensed private investigator are not difficult. For example, in Tennessee, an applicant must be twenty-one years of age, a United States' citizen, not been declared incompetent by reason of mental defect or disease, not be suffering from habitual drunkenness or narcotics addiction, be of good moral character, possess or employ at least one person who has at least 2,000 hours of "compensated verifiable investigatory experience,"[88] and score at least a seventy percent on a multiple choice exam consisting of fifty questions.[89]

The sparse licensing requirements do not pose serious obstacles to private investigators; however, potential tort liability is a problem. Not surprisingly, the torts of trespass and invasion of privacy are at the forefront of the investigators' concerns, invasion of privacy more so than trespass, since trespass requires actual damages to the land or chattel whereas invasion of privacy can be subjective. Often, private investigators have intruded on another's land or chattel but have not caused any actual damage; therefore, the plaintiff cannot recover. It is when the investigator intrudes upon a plaintiff's "seclusion, solitude, or private affairs,"[90] that the line is crossed, and investigators begin worry about being sued personally by the plaintiff seeking restitution.

In the civil context, many courts have defined a citizen's right to privacy and have followed the Second Restatement of Torts' definition of invasion of privacy.

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[88] Apprenticeships qualify under this requirement. TENN. COMP. R. & REGS. 1175-01-.19 (2012); TENN. CODE ANN. § 62-26-206 (2009); TENN. CODE ANN. § 62-26-207 (2009).

[89] Priometric, *Canidate Information Bulletin State of Tennessee Private Investigation and Polygraph Examinations*, https://www.prometric.com/en-us/clients/Tennessee/Documents/TN25PrivateInvestigationCIB_20120809.pdf. *See generally,* TENN. CODE ANN. § 62-26-205 (2012).

[90] RESTATEMENT (SECOND) OF TORTS § 652A (1977).

The Supreme Court of Georgia described the right to privacy as:

> [A] personal right, which is not without judicial recognition. It is the complement of the right to the immunity of one's person. The individual has always been entitled to be protected in the exclusive use and enjoyment of that which is his own. The common law regarded his person and property as inviolate, and he has the absolute right to be let alone. The principle is fundamental, and essential in organized society, that every one, in exercising a personal right and in the use of his property, shall respect the rights and properties of others.[91]

The intrusion upon one's seclusion, solitude, or private affairs is described in the Second Restatement as "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be *highly offensive to a reasonable person*."[92] In order to recover, the plaintiff must show that the defendant penetrated some zone of physical or sensory privacy surrounding, or obtained unwanted access to data about the plaintiff, and he or she had an objectively reasonable expectation of seclusion or solitude in the place, conversation or data source.[93]

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[91] Pavesich v. New England Life Ins. Co., 50 S.E. 68, 78 (1905) (Internal citations omitted).
[92] RESTATEMENT (SECOND) OF TORTS § 652B (1977) (emphasis added).
[93] Sanchez-Scott v. Alza Pharmaceuticals, 86 Cal. App. 4th 365, 372 (Cal. Ct. App. 2001)(citing Shulman v. Group W Productions, Inc., 955 P.2d 469 (Cal. 1998).

This interference into one's seclusion must also be substantial and result from conduct that would be offensive and objectionable to the ordinary person.[94] In determining the "offensiveness" of an invasion of a privacy interest, common law courts consider, among other things: "the degree of the intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder's motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded."[95] The Restatement further provides a few examples of invasion of privacy, such as: "(1) taking the photograph of a woman in the hospital with a rare disease that arouses public curiosity over her objection, and (2) using a telescope to look into someone's upstairs bedroom window for two weeks and taking intimate pictures with a telescopic lens."[96]

In *Villanova v. Innovative Investigations, Inc.*,[97] "a private investigator suggested that Mrs. Villanova place a GPS device in one of the family vehicles regularly driven by the plaintiff/husband in order to assist in tracking his whereabouts."[98] The husband could not sue the investigator for trespass because the investigator had obtained the wife's consent, and the vehicle was joint marital property.[99]

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[94] RESTATEMENT (SECOND) OF TORTS § 652B, comt. d (1977). "The thing into which there is intrusion or prying must be private . . . on the public street, or in any other public place, the plaintiff has no legal right to be alone; and it is no invasion of his privacy to do no more than follow him about and watch him there." PROSSER & KEETON ON THE LAW OF TORTS 808-09 (W. Page Keeton et al. eds., 4th ed. 1971).

[95] Hill v. Nat'l Collegiate Athletic Ass'n, 865 P.2d 633 (Cal. 1994) (quoting Miller v. Nat'l Broad. Co., 232 Cal. Rptr. 668, 678 (Cal. Ct. App. 1986)).

[96] RESTATEMENT (SECOND) OF TORTS § 652B, comment b (1977).

[97] Villanova v. Innovative Investigations, Inc. 21 A.3d 650 (N.J. Super. Ct. App. Div. 2011).

[98] *Id.* at 651.

[99] Mrs. Villanova paid the vehicle's insurance premiums out of a joint account held by her and plaintiff. *Id.* at 652.

However, installation was not at issue. Rather, the husband sued the investigator for invasion of privacy. The court learned that the GPS device had remained in the vehicle for about forty days.[100] After reviewing the investigator's invoice, which reflected that a total of twenty-seven hours were devoted to monitoring the plaintiff via GPS for six weeks, the court determined that the GPS device did not capture any movements in a secluded location that was not in public view.[101] Since the plaintiff's movements were not continuously monitored and no monitoring "extended into private or secluded locations that were out of public view and in which plaintiff had a legitimate expectation of privacy," no invasion of privacy occurred.[102]

Upon review of cases in which private investigators are sued for trespass and/or invasion of privacy, it appears as if the invasion of privacy must be substantial in order for the plaintiff to prevail. For example, the plaintiff prevailed when a private investigator gained admittance to the plaintiff's hospital room and, by deception, secured the address of the man who had accompanied the plaintiff on a shopping trip to Sears.[103] Plaintiffs also prevailed when an investigator peered through the plaintiff's bedroom and bathroom windows,[104] when a private investigator entered the home and installed a hidden videotape camera in the bedroom ceiling which recorded the plaintiff undressing,

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[100] *Id.*

[101] *Id.* at 653-55.

[102] *Id.* at 656. Interestingly, the court referred to *Knotts. Villanova,* 21 A.3d. at 657. "[T]he placement of a GPS device in plaintiff's vehicle without his knowledge, but in the absence of evidence that he drove the vehicle into a private or secluded location that was out of public view and in which he had a legitimate expectation of privacy, does not constitute the tort of invasion of privacy." *Id. at* 651-52.

[103] Noble v. Sears, Roebuck and Co., 33 Cal. App. 3d 654, 657 (Cal. Ct. App. 1973).

[104] Pappa v. Unum Life Insurance Company of America, No. 3:07-CV-0708, 2008 WL 744820, *2 (M.D. Pa. March 18, 2008).

showering, and going to bed,[105] and when a private investigator repeatedly followed a pregnant woman who was frequently alone or with her small children, photographing her at least 40 times, repeatedly causing her to become frightened, resulting in her fleeing her home and to call the police seeking help.[106]

However, courts did not find an invasion of privacy in instances where investigators placed a camera against a pharmacy window, used spotlights to illuminate the interior of the pharmacy, and videotaped the plaintiff talking on the telephone inside the store for approximately thirteen seconds,[107] where a private investigator was across the road from plaintiffs' property so that he could see the front and side of the house, including plaintiffs' bedroom windows which were not covered by curtains,[108] where private

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[105] Miller v. Brooks, 472 S.E.2d 350, 355 (N.C. Ct. App. 1996). "To prove trespass, a plaintiff must show that the defendants intentionally and without authorization entered real property actually or constructively possessed by him at the time of the entry." *Id.* There was sufficient evidence to show that defendants intentionally entered the premises and that plaintiff had possession at that time. As to the invasion of privacy claim, "[p]laintiff has every reasonable expectation of privacy in his mail and in his home and bedroom. A jury could conclude that these invasions would be highly offensive to a reasonable person." *Id.* at 354.

[106] Anderson v. Mergenhagen, 642 S.E.2d 105, 110 (Ga. App. Jan. 17, 2007).

[107] Mark v. Seattle Times, 635 P.2d 1081, 1085 (1981). The place from which the film was shot was open to the public and thus any passerby could have viewed the scene recorded by the camera. *Id.* at 1095. "Since the intrusion in the present case was a minimal one, publication lasted only 13 seconds, Mark was not shown in any embarrassing positions, his facial features were not recognizable, we hold there could be no actionable claim in these circumstances." *Id.* Compare to Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971), where the court found an actionable intrusion when the press gained entrance by subterfuge to the home of an accused and photographed him there.

[108] Hall v. InPhoto Surveillance, 649 N.E. 2d 83 (Ill. App. Ct. 1995) (finding that no trespass was committed). "In the absence of any evidence to support the claim of actual trespass or the taking of

investigators conducted visual surveillance while in a car parked on the street and the plaintiff was on the balcony and a videotape was made showing the plaintiff walking around her apartment without the use of crutches or a cane,[109] and when a private investigator drove to a yacht club, waited until a club member opened the gate, drove onto the grounds before the gate closed, parked his vehicle in a parking lot for guests and videotaped the plaintiffs without their consent.[110] In *Nunez v. S. Melgar investigations, Inc.*,[111] pretext telephone calls, pretext door knocks, and incidents of climbing the back yard fence to

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photographs, summary judgment was properly granted to defendants." *Id.* at 86.

[109] Digirolamo v. D.P. Anderson & Assocs., No. Civ. A. 97-3623, 1999 WL 345592, at *1 (Mass. Supp. May 26, 1999). "[C]ourts are expected to define the scope of the right to privacy 'on a case-by-case basis, by balancing relevant factors, . . . and by considering prevailing societal values and the ability to enter orders which are practical and capable of reasonable enforcement." *Id.* at *2 (quoting Schlesinger v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 567 N.E.2d 912, 915 (1991)). Visual surveillance which consists only of observing, photographing, or videotaping a person in a public place violates no right of privacy. *Id.* (citing Cefalu v. Globe Newspaper Co., 391 N.E.2d 939, Since plaintiff was in plain view of anyone on the street while on the balcony, she enjoyed no greater right to be free of enhanced viewing than she did while standing on the street. *Id.* at *5. Therefore, the observation and photographing of the plaintiff with enhanced vision while on that balcony did not by itself constitute an unreasonable and substantial or serious interference with privacy under G.L. c. 214, s 1B. *Id.* at *4.

[110] Furman v. Sheppard, 744 A.2d 583 (Md. Ct. Spec. App. 2000). "Not every trespass constitutes an unreasonable search or intrusion. A trespass 'becomes relevant only when it invades a defendant's reasonable expectation of privacy.'" *Id.* at 586 (quoting *McMilliam v. State*, 584 A.2d 88, 97 nt. 5(Md. Ct. Spec. App. 1991)). Business and commercial enterprises generally are not as private as a residence. Since the surveillance was nothing more than observations while they were on or near a yacht situated in a public waterway and in open view of the public, there was no invasion of privacy. *Id.* at 587.

[111] Nunez v. S. Investigations Inc., No. B162945, 2004 WL 1926794 at *9 (Cal. Ct. App. 2004),.

peer into her window created a triable issue as to whether the defendants intruded into a private place.

V. Applying Civil Tort Liability to Fourth Amendment Law

Much can be learned from the development of trespass and invasion of privacy in the civil context. First, trespass is infrequently proven as plaintiffs can rarely demonstrate actual damages. It is interesting to see how the Court's reliance on trespass in *Jones*, which now exacts the power of the exclusionary rule, is not as important in the civil arena. A civil action for trespass seeks compensation for damages to property.[112] An intrusion of privacy "is a claim that is 'broad enough to include recovery for economic injuries, as well as mental or physical injuries.'"[113] Trespass is no longer in fashion in the civil world as it is gearing up for prominence in the criminal context. If trespass is now in vogue, other investigatory tools may be in jeopardy.

The FBI General Counsel commented that they were considering the impact of *Jones* as it pertained to trash pulls.[114] If the lid of the trash can is considered an "effect" under the Fourth Amendment, an agent's act of touching the lid may be considered a trespass and would be a Fourth Amendment violation without first acquiring a warrant. In the civil context, documents which are placed in an outdoor trash barrel no longer retain their character as the plaintiff's personal property, the items discarded are considered abandoned.[115] Under the civil precedent, agents need not

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[112] Hawkes v. Commercial Union Ins. Co., 764 A.2d 258 (Me. 2001).
[113] *Id.* at 263.
[114] de Vogue, *supra* note 83 (Weissman is quoted as saying "there is not reason to think this is just going to end with GPS").
[115] Ananda Church of Self Realization v. Mass. Bay Ins. Co., 116 Cal. Rptr. 2d 370, 376 (Cal. Ct. App. 2002). *But See* Misseldine v. Corporate Investigative Servs., Inc., No. 1771, 2003 WL 21234928, at

worry about the retrieval of the abandoned items; however, they must wait until the trash is in a public area or face trespass issues on private property.

The open fields doctrine may also not withstand scrutiny under a trespass analysis. The open fields doctrine states that people do not have an expectation of privacy in activities occurring in open fields, even if the police drive past a locked gate, a no trespassing sign, and owners tell them it is private property; what a person knowingly exposes to the public is not protected.[116] In the civil context, a similar set of facts would clearly constitute a trespass if damages as a result of the physical invasion of the land were proven.[117] The majority in *Jones* provided a preview of how the court would rule on an open field question, stating in the opinion that "an open field, unlike the curtilage of a home is not one of those protected areas enumerated in the Fourth Amendment."[118] This comment is contrary to the idea that personal property is a "place" protected under the Fourth Amendment just as the vehicle in Jones was considered an "effect" protected under the Fourth as well. A trespass on the undercarriage of one's vehicle is just as much a trespass as entering one's personal property to conduct surveillance. Based on this premise, the open fields doctrine is in jeopardy.

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*4-5 (Ohio Ct. App. May 29, 2003) (holding that a trespass was committed when the private investigator stepped out of the car, took the garbage, and physically invaded the plaintiff's property without invitations). However, in Misseldine v. Corporate Investigative Servs., Inc., No. 81771, 2003 WL 21234928 (Ohio App. May 29, 2003), a trespass was committed when the private investigator stepped out of the car and took his garbage. *Id.* at *4. The investigator physically invaded the plaintiff's property without invitation or inducement. *Id.* at *5.

[116] Oliver v. United States, 466 U.S. 170 (1984) (citing Hester v. United States, 265 U.S. 57, 59 (1924)).

[117] Monsanto Co. v. Scruggs, 342 F.Supp.2d 602, 606 (N.D. Miss. 2004).

[118] *Jones*, 132 S. Ct. at 953Icitations omitted).

Some undercover law enforcement recordings of criminal suspects, currently legal under the one-party consent rule, may now be jeopardized under certain circumstances. The Court may adopt a civil invasion of privacy standard or consider capturing a party's words without their knowledge through the use of a recording device a "trespass." Federal law permits private citizens to record unknowing third parties except if the "communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State."[119] Various states have banned eavesdropping of confidential communications criminally and civilly under the invasion of privacy tort.[120] While some civil cases of

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[119] 18 U.S.C. §§ 2511(2)(d), 2520 (2012) (civil action).

[120] Kersis v. Capital Cities/ABC Inc., 1994 WL 774531 (Cal. App. Dep't Super. Ct. 1994). Ca. Penal Code § 632(a) regarding "confidential communications" states that "every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished . . ." The following is a list of eavesdropping laws by state: ALA. CODE § 13A-11-31 (2012); ALASKA STAT. ANN. §§ 42.20.300, 42.20.310 (West 2012); ARIZ. REV. STAT. ANN. § 13-3005 (2012); ARK. CODE ANN. § 5-60-120 (West 2012); CAL. PENAL CODE § 632 (West 2012); COLO. REV. STAT. ANN. § 18-9-304 (West 2012); CONN. GEN STAT. ANN. § 53a-189 (West 2012); DEL. CODE ANN. tit.11, § 1335 (West 2012); FLA. STAT. ANN. § 934.03 (West 2012); GA. CODE ANN. § 16-11-62 (West 2012); HAW. REV. STAT. § 803-42 (West 2012); IDAHO CODE ANN. § 18-6702 (West 2012); 720 ILL. COMP. STAT. ANN. 5/14-2 (West 2012); IND. CODE ANN. § 35-33.5-5-4 (West 2012); IOWA CODE ANN. § 727.8 (West 2012); KAN. STAT. ANN. § 21-6101 (West 2012); KY. REV. STAT. ANN. § 526.020 (West 2011); LA. REV. STAT. ANN.§ 15:1303 (2011); ME. REV. STAT. tit. 15, § 710 (2011); MD. CODE ANN., Interceptions, Procurements, Disclosures or use of Communication § 10-402 (West 2012); MASS. GEN. LAWS ANN. ch. 272, § 99 (West 2012); MICH. COMP. LAWS ANN. § 750.539 (West 2012); MINN. STAT. ANN. §

surreptitious recordings were found to contain a triable issue of fact for the jury whether the plaintiff had a reasonable expectation of privacy at the place of their employment or home,[121] most of the time, courts (despite the state ban on eavesdropping) determine that no invasion of privacy exists when one is videotaped or recorded even inside their own home by one party in the presence of another. The plaintiffs simply have no reasonable expectation that the conversation would be kept in

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626A.02 (West 2012); MISS. CODE ANN. § 41-29-533 (West 2011); MO. ANN. STAT. § 542.402 (West 2012); MONT. CODE ANN. § 45-8-213 (2011); NEB. REV. STAT. § 86-290 (2012); NEV. REV. STAT. ANN §§ 200.620, 200.650 (West 2011); N.H. REV. STAT. ANN. § 570-A:2 (2012); N.J. STAT. ANN. § 2A:156A-3 (West 2012); N.M. STAT. ANN. § 30-12-1 (West 2012); N.Y. PENAL LAW § 250.05 (McKinney 2012); N.C. GEN. STAT. ANN. § 15A-287 (West 2012); N.D. CENT. CODE ANN. § 12.1-15-02 (West 2011); OHIO REV. CODE ANN. § 2933.52 (West 2012); OKLA. STAT. tit. 21, § 1202 (West 2012); OR. REV. STAT. ANN. § 165.540 (West 2012); 18 PA. CONS. STAT. ANN. § 5703 (West 2012); R.I. GEN. LAWS ANN. § 12-5.1-13 (West 2012); S.C. CODE ANN. § 16-17-470 (2011); S.D. CODIFIED LAWS §§ 22-21-1, 23A-35A-20 (2012); TENN. CODE ANN. § 39-13-601 (West 2012); TEX. CODE CRIM. PROC. ANN. art 18.20 (West 2011); UTAH CODE ANN. § 76-9-402 (West 2012); VA. CODE ANN. § 19.2-62 (West 2012); WASH. REV. CODE ANN. § 9.73.030 (West 2011); W. VA. CODE ANN. § 62-1D-3 (West 2012); WIS. STAT. ANN. § 968.31 (West 2011); WYO. STAT. ANN. § 7-3-702 (West 2012). The only state that did not have an eavesdropping criminal or civil statute is Vermont. Vermont does reference the United States Code's prohibition on eavesdropping, but this is included only in the statute that prohibits disturbing the peace by use of telephones or electronic devices. VT. STAT. ANN. tit. 13, § 1027

[121] Capital Cities/ABC Inc., 1994 WL 774531 at *8 ; Hawkes v. Private Investigation Services of Maine and New England, Inc., 2000 WL 33721625 at *4 (Me. Super. 2000). Hawkes alleges that the private investigator twice gained access to his home under false pretenses and without identifying himself. *Id.* at *1. Summary judgment on the invasion of privacy claim was denied. *Id.* at*4. Summary judgment on the plaintiff's claim of trespass was also denied because consent for those entries was obtained by misrepresenting the identity of the visitor and the purpose of entry.

confidence or recorded to later share with others.[122] The invasion of privacy is found to be *de minimis*, especially if the recording was made in public view in a public place.[123]

It would be a significant blow to law enforcement if warrants were required to record conversations between informants/undercover agents and potential targets. As it currently stands in the criminal context, the Court in *Hoffa v. United States*, 385 U.S. 293, 303 (1966), decided that

> [t]he risk of being overheard by an eavesdropper or betrayed by an informer or deceived as to the identity of one with whom one deals is probably inherent in the conditions of human society. It is the kind of risk we necessarily assume whenever we speak . . . no right protected by the Fourth Amendment was violated in the present case.[124]

In 1971, the Court affirmed this decision in *United States v. White* and has never reverted back to the trespass theory when revisiting the issue.[125] Comparing the federal criminal stance to the civil stance on surreptitious recordings, and taking the state criminal eavesdropping statutes out of the mix, it is clear that most courts permit surreptitious recordings in the civil context as long as it does not rise to the level of an invasion of privacy an act

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[122] Deteresa v. Am. Broad. Co., Inc., 121 F.3d 460 (9th Cir. 1997) (holding that the plaintiff had no reasonable expectation that the conversation with the ABC reporter would not be divulged to anyone else) *Id* at 465.

[123] *Id* at 466.

[124] The Court clarified its decision in *Heffa v. United States*, 385 U.S. 293, 303(citing Lopez v. U.S. 373 U.S. 427, 465 (1963)) that surreptitious recordings by "false friends" were not a search in *United States v. White*, 401 U.S. 745 (1971).

[125] White, 401 U.S. 745.

which is highly offensive to the reasonable person.[126] The requirement that the intrusion be "highly offensive to a reasonable person" would be a welcome addition/supplement to the *Katz* analysis. Not only would there need to be an objective and subjective expectation of privacy, but law enforcement's actions would have to be highly offensive and objectionable to the ordinary person. This would make the *Katz* analysis more difficult to prove, but it would limit the types of tools and actions that would be considered a "search" requiring a warrant.

Lastly, third party database searches which are clearly of concern to Justice Sotomayor are not a concern in the civil context. Private investigators have access to a plethora of information while conducting background checks, financial and insurance fraud investigations, workers compensation investigations, and asset/property searches.[127] The searches range from residential history searches, area demographics, aliases/date of birth and other names used, federal litigation searches, motor vehicle ownership, watercraft ownership, aircraft ownership, real property ownership, corporation ownership, judgment and lien search, bankruptcy search, criminal history search, incarceration history search, employment search, UCC

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[126] *See* Med. Lab. Mgmt. Consultants v. Am. Broad. Companies, Inc., 306 F.3d 806 (9th Cir. 2002). Although the plaintiff argued that he had a subjective expectation of privacy in Medical Laboratory's administrative offices, he extended the invitation to the three ABC representatives who were strangers to him. *Id.* at 813 His willingness to invite strangers into the offices for a meeting and tour indicated that he did not have an objectively reasonable expectation of privacy. *Id.* The plaintiff did not reveal any information about his personal life, but rather his business operations. Thus, the plaintiff had no expectation of privacy in the contents of his conversations with ABC representatives. *Id.* at 814. Any intrusion by ABC representatives in secretly recording their meeting with the plaintiff was de minimis and not highly offensive to a reasonable person. *Id.* at 819.

[127] *See* CRISPIN SPECIAL INVESTIGATIONS, INC., www.crispininvestigations.com (last visited July 30, 2012).

filings, Internet domain ownership search, driver's licenses, FAA pilots, professional licenses, voter registration, concealed weapons permits, relative searches, hunting/fishing permits, sexual offender lists, etc.[128] The ability for private parties to retrieve personal information from other third parties has become relatively easy–if one pays for the database search.[129] As citizens use more technology and expose themselves to the collection of additional data, their expectation of privacy decreases. Therefore, the majority in *Jones* seems to identify that the *Katz* expectation of privacy analysis may soon no longer apply as citizens' privacy is lost. Technology has become a double-edged sword. However, if private investigators have the ability to sort through databases to collect a target's information, law enforcement should have the same ability.

The third party doctrine that Sotomayor wants to revisit should remain intact unless Congress intervenes and decides to enact a consumer "privacy bill of rights."[130] To

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[128] *Id.*

[129] Telephone Interview with Robert Crispin, CEO, Crispin Special Investigations, Inc. Very few records can be accessed by law enforcement via subpoena during the investigative phase that private investigators cannot access. Database search companies such as Avent and AutoTrack sweep millions of public records every day gathering all sorts of data on private individuals. Bank or financial (ie, money wire transfer) records, cell phone or cell tower records, and power bill records are some of the few records private investigators may have difficulty accessing (unless they conduct a series of trash pulls). However, once the investigative phase is complete and the defendant is charged, the defense also has subpoena power and can access those records as well. Oftentimes, those types of records can be found within a divorce case file in the public database, and the private investigator no longer needs any type of subpoena power to access this type of information.

[130] Alexei Alexis, *Consumer Protection – Privacy: White House Releases Report Urging New U.S. Privacy Framework*, BLOOMBERG BNA: THE UNITED STATES LAW WEEK, Feb. 28, 2012 (also found at 80 U.S.L.W. 1164). On February 23, 2012, the Obama administration requested that Congress pass a privacy plan which would require

the extent that private entities can access, collect and analyze sensitive third-party database information, then law enforcement should enjoy similar unfettered access without being subjected to scrutiny under the third party doctrine.

If some of these investigatory tools that are currently not considered a "search" soon become a search under the trespass analysis, this may pose a significant burden on law enforcement. These types of tools are utilized in order to develop sufficient probable cause in order to obtain a warrant. These tools may fall by the wayside as did thermal imaging devices after the *Kyllo* decision.[131] Agents simply did not have sufficient probable cause before using the device; it was merely an aid to ensure that the home indeed was a marijuana grow-house prior to requesting a search warrant.

VI. Conclusion

The role of trespass took precedence in *Jones,* a decision which diminishes, at least temporarily, the importance of *Katz* and the expectation of privacy doctrine for future decisions on what constitutes a violation of our Fourth Amendment rights. Until the 20th century, the

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businesses to be "transparent about their data-collection practices and giv[e] consumers the right to access and correct their personal information," "to exercise control over the collection of their personal data and how it is used," and to have the right "to 'reasonable' limits on the collection and retention of personal data." *Id.* at 1. "'While I look forward to working with President Obama and Secretary Bryson on this critically important issue, any rush-to-judgment could have a chilling effect on our economy and potentially damage, if not cripple, online innovation,' Rep. Mary Bono Mack (R-Calif.), leader of a House Energy and Commerce subcommittee that oversees privacy issues, said in a statement issued after the White House unveiled its report." *Id.* at 3.

[131] Kyllo, 533 U.S. 27 (holding that thermal imaging is an unlawful search as it could leave the homewowner at the mercy of advanced technology that could discern all human acitivities in the homes).

trespass doctrine was sufficient to determine what constituted an unlawful search and seizure, an invasion of our privacy. With the advance of technology, it became clear that "an actual trespass is neither necessary nor sufficient to establish a constitutional violation."[132] The *Katz* decision introduced the reasonable expectation of privacy doctrine which supplemented the trespass doctrine. The Supreme Court's decision on *Jones* upheld the D.C. Circuit finding that an attachment of a GPS device to the defendant's vehicle to monitor the vehicle's movements, constituted a search under the Fourth Amendment on different grounds. Since the *Jones* decision was so narrowly focused on one singular issue, future controversial cases involving law enforcement use of technology to monitoring citizens where trespass is not present remain unresolved. The potential for new intrusions of privacy absent trespass was a controversy addressed by Congress when it enacted 18 U.S.C. §§ 2510-2522, a comprehensive guide to wiretapping.[133]

Going forward in the post-Jones era, it is highly probable to foresee the outcome when both a trespass and a person's reasonable expectation of privacy is triggered. It is also highly probable to predict the outcome when a trespass does not occur but a person's reasonable expectation of privacy is triggered. What is most difficult to predict is the scenario in which a trespass occurs but a person's reasonable expectation of privacy is not triggered. Will the open fields doctrine suffer the same fate as tracking devices? And in the scenario in which a trespass does not occur but a person's reasonable expectation of privacy is triggered, will, in time, the Court surrender to the idea that citizens are giving up their expectation of privacy in the digital age or will the Court fight this uphill battle and

[132] *Jones*, 132 S. Ct. at 960 (Alito, J. concurring) (quoting United States v. Karo, 468 U.S. 705, 713 (1984)).
[133] *Id.* at 963 (Alito, J. concurring).

strike down the third party doctrine? As suggested by Justice Alito in his concurrence on *Jones,* the difficulties inherent in applying the Fourth Amendment's prohibition of unreasonable searches and seizures to a 21st century surveillance technique is problematic, and possibly best left to Congress which has the authority to write legislation on the topic.[134]

Hopefully, either the Court or Congress will also utilize the well-developed civil case law concerning trespass and invasion of privacy in the civil context as it pertains to private investigators, and close the gap between civil and criminal laws and the limitations placed on the actions of law enforcement and private investigators. The United States and its court system strive to uphold the rights of individuals but not at the expense of the republic. We strive for Lorenzetti's utopia, a city that is well-governed, orderly, bright, calm, joyful, hard-working, and safe – balancing law and order with civil liberties. Lorenzetti's depiction of a failed government wherein Tyranny defeats Lady Justice and the "Common Good" is allegorical and emblematic of this eternal struggle for balance. Finding the right balance between societal order and an individual's right to privacy is obviously difficult. When we sacrifice some of our privacy rights, we hope we are doing so for the "Common Good."

[134] *Id.* at 958, 964 (Alito, J. concurring).

ARTICLE

PRECEDENT, FAIRNESS, AND COMMON SENSE DICTATE THAT *PADILLA V. KENTUCKY* SHOULD APPLY RETROACTIVELY

William N. Conlow[*]

In 2010, the Supreme Court decided the landmark case of Padilla v. Kentucky. *The* Padilla *Court's holding was that failure of counsel to advise a non-citizen criminal defendant about the immigration consequences of a guilty plea constitutes ineffective assistance of counsel. This article addresses whether* Padilla *applies to convictions that occurred before* Padilla *was decided, in March 2010.*

First, this article provides background on relevant immigration law, Padilla v. Kentucky, *and the Supreme Court's retroactivity case law. Then, this article considers how lower courts have addressed the issue of retroactivity in the approximately twenty-seven months after the* Padilla *decision. This article also provides in-depth analysis of circuit courts and state supreme courts which have addressed the retroactivity issue. This article then critically analyzes the common arguments for and against applying* Padilla *retroactively. Finally, this article proposes that* Padilla *apply to all non-citizens who have been deported as a result of ineffective assistance of counsel.*

On April 30, 2012, the Supreme Court granted certiorari to decide the issue this article discusses.

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[*] Rutgers University School of Law—Camden, J.D. expected 2013. Special thanks to Justin T. Loughry, Esq. and Prof. Michael A. Carrier. I want to thank the former for being the model of what a good lawyer should be, and for inspiring this article, and the latter for being an extraordinary teacher. I am dedicating this article to my soon-to-be alma mater, Rutgers University School of Law—Camden. May it survive the sometimes-ugly machinations of New Jersey politics.

Although "confused and confusing," the Supreme Court's retroactivity case law supports a finding that Padilla *applies retroactively. Similarly, fairness dictates that non-citizens who have received ineffective assistance of counsel, and been deported as a result, should be afforded a remedy. Common sense also dictates that* Padilla *applies retroactively. A plain reading of the* Padilla *case clearly imagines the retroactive effect of the* Padilla *holding. Moreover, the Supreme Court's application of the* Padilla *rule to Jose Padilla was, in every sense, similar to those who would benefit from* Padilla *being retroactive. For these reasons, precedent, fairness and common sense dictate that* Padilla *should apply retroactively.*

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I. Introduction

In 2010, the Supreme Court handed down the landmark decision of *Padilla v. Kentucky*.[1] *Padilla* held that criminal defense attorneys have an affirmative obligation to advise their clients about immigration consequences of a plea bargain. The promise of *Padilla* is great: to provide a remedy for the injustice that occurs when an attorney falsely tells a non-citizen that he will not be deported as a result of a guilty plea. For the many non-citizens that have been deported after receiving ineffective assistance of counsel, successfully challenging a plea bargain may mean that they can return to their families in the United States.[2] However, courts have found ways of circumventing *Padilla*. For example, "one unanswered question left in *Padilla*'s wake[,] that could have the effect of seriously circumscribing the protection that *Padilla* provides,"[3] is whether *Padilla* applies retroactively or not.

This article addresses whether *Padilla* applies retroactively—in other words, to cases that are brought based on convictions that occurred before *Padilla* was decided, in March 2010.[4] On April 30, 2012, the Supreme Court granted certiorari to decide this issue.[5] If *Padilla*

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[1] 130 S. Ct. 1473 (2010).

[2] Determining the number of people who could potentially bring *Padilla* claims is extremely difficult. But, data suggests that *Padilla* will reach a large number of non-citizens. For example, "More than 128,000 noncitizens with criminal convictions were deported in 2009 [alone, and a]pproximately 95,000 noncitizens were incarcerated in state and federal prisons and jails as of June 30, 2009." Gary Proctor and Nancy King, *Post* Padilla: Padilla's *Puzzles for Review in State and Federal Courts*, Fed. Sentencing Rep., Vol. 23, No. 3, 239, 239 (Vera Inst. of Justice, Feb. 2011) (citation omitted).

[3] Danielle M. Lang, Padilla v. Kentucky*: The Effect of Plea Colloquy Warnings on Defendants' Ability to Bring Successful* Padilla *Claims*, 121 YALE L.J. 944, 947 (2012).

[4] Padilla, 130 S. Ct. at 1473.

[5] Chaidez v. United States, 132 S. Ct. 2101 (2012).

does not apply retroactively, then the constitutional holding of *Padilla v. Kentucky* applies to the pre-2010 conviction of only one individual—Jose Padilla.[6] This article argues that precedent, fairness and common sense dictate that *Padilla* should apply "retroactively" to all non-citizens that can show ineffective assistance of counsel.

This article will proceed in six sections. Following this introductory section, the second and third sections will briefly discuss relevant immigration law and "retroactivity" case law, respectively. The fourth section discusses how courts have decided the issue of *Padilla*'s retroactivity and analyzes the bases of those decisions. The fifth section of this article argues that courts have, generally, ignored the fact that governing case law, fundamental fairness and common sense dictate that *Padilla* should apply retroactively to *all* cases on collateral review. Finally, the sixth and last section concludes by summarizing why *Padilla* should apply retroactively.

II. Background – Immigration Law

Criminal law and immigration law, once separate entities, now overlap in many areas. One scholar has called the overlapping areas of criminal law and immigration law the "crimmigration system."[7] The history of the American "crimmigration system" has been defined by an "increasingly harsh treatment of criminals [which] is

[6] Arguably, the Supreme Court has applied the rule of *Padilla* a second time. *See infra* p. 25.

[7] Andrew Moore, *Criminal Deportation, Post-conviction Relief and the Lost Cause of Uniformity*, 22 GEO. IMMIGR. L.J. 665, 667 (2008); *see also* Daniel Kanstroom, *The Right to Deportation Counsel in* Padilla v. Kentucky*: the Challenging Construction of the Fifth-and-a-half Amendment*, 58 UCLA L. REV. 1461, 1467 (2011) (calling the Padilla decision a "recognition of the convergence between the deportation and criminal systems").

mirrored in the increasingly harsh treatment of non-citizens in the United States."[8]

The starting point for how immigration law informed the result in *Padilla*—and the effect that it has on our retroactivity analysis—is the *Padilla* decision itself. The Court found that over the last century there has been a "steady expansion of deportable offenses."[9] The Court also noted that, in 1990, Congress eliminated the "judicial recommendation against deportation" ("JRAD") procedure,[10] which had previously given judges the discretion to determine whether deportation was warranted "on a case-by-case basis."[11]

The Justices who decided *Padilla* seem to be in agreement that immigration law is "complex,"[12] and that there are "numerous situations in which the deportation consequences of a plea are unclear."[13] Whether an offense is deportable is often dictated by abstruse subcategories of federal law. Further complications exist because it is often difficult to determine whether a state law offense qualifies under one of these subcategories.[14] Therefore, when a non-

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[8] Andrew Moore, *Criminal Deportation, Post-conviction Relief and the Lost Cause of Uniformity*, 22 GEO. IMMIGR. L.J. 665, 667 (2008). Of particular important in this article is the fact that, "[I]n the 1980s and 1990s, [Congress] dramatically expanded the scope of criminal deportation grounds and, consequently, greatly expanded the number of non-citizens deported for criminal offenses." *Id.* at 670.

[9] Padilla, 130 S. Ct. at 1480.

[10] *Id.*

[11] *Id.* at 1479.

[12] *Id.* at 1483.

[13] *Id.* at 1477; *see also, id.* at 1490 (Alito, J., concurring) (finding that making "the determination whether immigration law . . . makes a particular offense removable" is often difficult).

[14] "Legal counsel, [Immigration and Customs Enforcement] attorneys, and immigration judges must determine whether the criminal conviction, often a state crime, qualifies as a deportable offense . . . [and t]his analysis often requires the mastery of both criminal and immigration law." Aarti Kohli, *Does the Crime Fit the Punishment?:*

citizen is convicted of a state-level offense it "raise[s] the challenge of determining [if that] state criminal conviction fits under a federal category that" requires deportation.[15] Adding to the uneven application of the law, the Constitution does not generally apply to non-citizens;[16] however, recent Supreme Court decisions, such as *Padilla*, have challenged this principle.

In the mid-nineties, Congress greatly expanded the number of crimes that resulted in deportation.[17] The result of these changes is that "non-violent offenders with minor criminal histories are often deported."[18] Further, federal

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Recent Judicial Actions Expanding the Rights of Noncitizens, 2 CAL. L. REV. CIRCUIT 1, 3 (2011).

[15] Andrew Moore, *Criminal Deportation, Post-conviction Relief and the Lost Cause of Uniformity*, 22 GEO. IMMIGR. L.J. 665, 672 (2008).

[16] Daniel Kanstroom, Padilla v. Kentucky *and the Evolving Right to Deportation Counsel: Watershed or Work-in-Progress?*, 45 NEW ENG. L. REV. 305, 311 (2011) ("If you think defending the rights of criminal defendants is difficult (and it surely is), try working without a constitution for a while—that is what a lot of immigration law is[.]").

[17] Put differently, Congress made lesser and non-violent crimes much more likely to result in deportation. "Harsh 1996 laws known by their acronyms—AEDPA and IIRIRA—reflected a rather broad-brush crime control justification for deportation and radically changed and expanded the system." Daniel Kanstroom, *The Right to Deportation Counsel in* Padilla v. Kentucky*: the Challenging Construction of the Fifth-and-a-half Amendment*, 58 UCLA L. Rev. 1461, 1477 (2011). "[T]he Anti-Terrorism and Effective Death Penalty Act [("AEDPA")]... expanded the aggravated felony category[, a provision that requires mandatory deportation,] to include crimes such as gambling and bribery." Aarti Kohli, *Does the Crime Fit the Punishment?: Recent Judicial Actions Expanding the Rights of Noncitizens*, 2 CAL. L. REV. CIRCUIT 1, 6 (2011). "[With the] 1996 law, the Illegal Immigrant Reform and Immigrant Responsibility Act [("IIRIRA")], Congress further broadened the definition of aggravated felony to include drug offenses, thefts, burglaries, and crimes of violence." *Id.*

[18] Aarti Kohli, *Does the Crime Fit the Punishment?: Recent Judicial Actions Expanding the Rights of Noncitizens*, 2 CAL. L. REV. CIRCUIT 1, 20 (2011).

policymakers and law enforcement officials have increasingly viewed the issue of immigration in the context of national security.[19] The "U.S. Department of Homeland Security [now] controls most of the [immigration] system through its subagencies[.]"[20] Also, "Counterintuitively, immigration judges are employees of the Attorney General, not the judicial branch."[21] Further, immigration laws, including those "that govern mandatory deportation," do not weigh aggravating or mitigating factors, such as how long a non-citizen has lived in the United States, or whether the non-citizen has family ties in the United States.[22]

Broadly, immigration policy places great weight on familial relationships.[23] Therefore, when the adjudications of criminal cases affect families, it is appropriate for courts to consider the effect upon families. The *Padilla* Court itself found that the "impact of deportation on families living lawfully in this country" weighed in favor of the rule that criminal defense attorneys must provide proper advice

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[19] For example, "During the 1996 debate on the Anti-Terrorism and Effective Death Penalty Act . . . some members of Congress equated noncitizens with terrorist aliens." *Id.* at 6. In addition, the enforcement of immigration laws has become the prerogative of the Department of Homeland Security, where its "personnel...investigate and detain non-citizens charged with being deportable . . . and represent the government in the deportation process before the immigration courts." Andrew Moore, *Criminal Deportation, Post-conviction Relief and the Lost Cause of Uniformity*, 22 GEO. IMMIGR. L.J. 665, 671 (2008).

[20] Daniel Kanstroom, *The Right to Deportation Counsel in* Padilla v. Kentucky*: the Challenging Construction of the Fifth-and-a-half Amendment*, 58 UCLA L. REV. 1461, 1465 (2011).

[21] Aarti Kohli, *Does the Crime Fit the Punishment?: Recent Judicial Actions Expanding the Rights of Noncitizens*, 2 CAL. L. REV. CIRCUIT 1, 14 (2011).

[22] *Id.* at 2.

[23] *See* Bridgette A. Carr, *Incorporating A "Best Interests of the Child" Approach into Immigration Law and Procedure*, 12 YALE HUM. RTS. & DEV. L.J. 120 (2009) (discussing the relationship between familial relationships and immigration law).

about the immigration consequences of a plea.[24] The immigration system, in its current form, "operates like a blunt instrument, and in the process wreaks havoc on the lives of noncitizens and their children, spouses, and parents."[25]

It follows logically that if the effect of a criminal sanction on families weighs in favor of the creation of the rule announced in *Padilla*, then it also weighs in favor of applying that rule retroactively. Families of criminal defendants will be no less harmed by deportations of their family members that resulted from plea agreements before *Padilla* than they will by deportations of their family members that occurred after *Padilla*. In fact, families are more likely to be harmed by pre-*Padilla* pleas, to the extent that non-citizens are more likely to have lived in the United States for longer and established deeper roots.

III. Background – *Padilla v. Kentucky*, and Governing Case Law

Padilla v. Kentucky was a landmark decision.[26]

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[24] Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010); *see also* McGregor Smyth, *From "Collateral" to "Integral": The Seismic Evolution of* Padilla v. Kentucky *and Its Impact on Penalties Beyond Deportation*, 54 HOW. L.J. 795, 823 (2011) (finding that "[a]ny analysis of the severity of a penalty . . . properly encompasses the impact both on clients and their families").

[25] Aarti Kohli, *Does the Crime Fit the Punishment?: Recent Judicial Actions Expanding the Rights of Noncitizens*, 2 CAL. L. REV. CIRCUIT 1, 20-21 (2011).

[26] *See* Danielle M. Lang, Padilla v. Kentucky*: The Effect of Plea Colloquy Warnings on Defendants' Ability to Bring Successful* Padilla *Claims*, 121 YALE L.J. 944, 947 (2012) (calling Padilla a "landmark decision[]"); *see also* McGregor Smyth, *From "Collateral" to "Integral": The Seismic Evolution of* Padilla v. Kentucky *and Its Impact on Penalties Beyond Deportation*, 54 HOW. L.J. 795, 798 (2011) (calling Padilla a "seismic event").

Padilla held that non-citizens who have been deported as a result of a guilty plea where they received incorrect advice about the deportation consequences of their plea can attack their plea under the existing standard for ineffective assistance of counsel[27]—i.e. *Strickland v. Washington*.[28] Those bringing "*Padilla* claims"[29] are not challenging their deportation. In fact, even a successful *Padilla* claim may still result in the original charges being re-filed.[30] In addition, to succeed on an ineffective assistance of counsel claim, *Strickland*'s "high bar" must be surmounted.[31]

Prior to *Padilla*, a deported non-citizen had no recourse if he relied on his lawyer's false counsel that he would not be deported as a result of his plea bargain.

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[27] *Padilla* was a 7-2 decision. Justice Alito, in concurrence, did not join the Court's opinion on the crucial issue of whether *Padilla* would extend to conduct beyond affirmative misadvice. *Padilla*, 130 S. Ct. at 1490 (Alito, J., concurring) ("I therefore cannot agree with the Court's apparent view that the Sixth Amendment requires criminal defense attorneys to provide immigration advice.").

[28] 466 U.S. 668 (1984).

[29] This article uses the term "*Padilla* claims" throughout as shorthand for a person who brings an ineffective assistance of counsel claim under *Padilla*. *See, e.g.*, Danielle M. Lang, Padilla v. Kentucky*: The Effect of Plea Colloquy Warnings on Defendants' Ability to Bring Successful* Padilla *Claims*, 121 YALE L.J. 944 (2012). Relatedly, this article uses the term "petitioner" to refer to the individual bringing the *Padilla* claim, unless doing so would be confusing or misleading.

[30] It is important to note that all *Padilla* claims are challenging plea bargains, which, by definition, contain a bargained-for benefit for the petitioner. In other words, one possible criticism of *Padilla* is that it opens the door for non-citizen defendants who would likely not have benefited from going to trial to argue that they would have gone to trial if they had been properly advised about the immigration consequences of their plea. However, as the Court noted, "There is no reason to doubt that lower courts—now quite experienced with applying *Strickland*—can effectively and efficiently use its framework to separate specious claims from those with substantial merit." Padilla, 130 S. Ct. at 1485.

[31] "Surmounting *Strickland*'s high bar is never an easy task." *Id.* at 1485.

Padilla came down in March, 2010.[32] Some courts have held that *Padilla* does not apply retroactively—that is, to guilty pleas[33] that occurred before that date.[34] In *Teague v. Lane*,[35] the Supreme Court explained when rules of constitutional procedure apply retroactively: "new rules" generally do not apply retroactively, to a case on collateral review;[36] "old rules," which merely announce what a rule has always been, always apply retroactively to cases on both direct and collateral review.[37]

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[32] *Id.* at 1473.

[33] *Padilla* only applies to criminal defendants who enter into a plea bargain. If a criminal defendant goes to trial and loses, then he could not have suffered prejudice under *Strickland*, because the result—deportation—would have been the same whether or not he had received effective assistance of counsel. *See e.g.* Maxwell v. United States, CIV.A. JKB-11-3190, 2011 WL 5870041, slip op. at 3 (D. Md. Nov. 21, 2011) (holding that "relief under a Sixth Amendment analysis...does not apply to [Petitioner's] case...[because u]nlike the defendant in *Padilla,* [the Petitioner] did not plead guilty; thus, his trial counsel was not remiss in failing to tell him a guilty plea could result in his deportation").

[34] The *Padilla* Court did not state explicitly whether their holding would apply retroactively. 130 S. Ct. at 1473.

[35] 489 U.S. 288 (1989).

[36] *Id.* at 307 (plurality opinion) (holding that, for new rules, the "general rule [is] nonretroactivity for cases on collateral review").

[37] Whorton v. Bockting, 549 U.S. 406, 416 (2007) ("Under the *Teague* framework, an old rule applies both on direct and collateral review, but a new rule is generally applicable only to cases that are still on direct review."). It is axiomatic that old rules apply "retroactively." If a case does not announce a new rule, there is no need for the court to "announce" what the old rule is or state that the case is an "old rule." Therefore, when courts are analyzing whether a case applies retroactively they usually say that the case is an application of an old rule to a new set of facts, as opposed to referring to the case as simply an "old rule." *See* Marroquin v. United States, CIV.A. M-10-156, 2011 WL 488985 (S.D. Tex. Feb. 4, 2011) (stating that "a majority of courts have found that *Padilla* is simply the application of an old rule"); *but see* Song v. United States, CV 09-5184 DOC, 2011 WL 2940316, slip op. at 2 (C.D. Cal. July 15, 2011) (concluding "that *Padilla* set forth on [sic] 'old rule'").

The "old rules" category includes when "a well-established rule of law [is applied] in a new way based on the specific facts of a particular case."[38] However, the fact that a case was "not dictated by precedent," weighs in favor of finding that a case announces a new rule.[39] Some courts have mistakenly found that a case was 'not dictated by precedent' if 'reasonable jurists' could have disagreed with the result of the case that announced or applied the rule.[40] The Supreme Court, however, stated that "the unlawfulness of [the petitioner's] *conviction* [being] apparent to all reasonable jurists"[41] weighs in favor of retroactivity, not whether all reasonable jurists would agree with the result of an appellate decision announcing the rule of constitutional criminal procedure.[42]

Courts debating retroactivity have reached different conclusions based on their interpretation of the above language. Every court that has held that *Padilla* applies retroactively, and stated how it reached that conclusion, found that *Padilla* was not "new."[43] While courts'

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[38] United States v. Hubenig, 6:03-MJ111-040, 2010 WL 2650625, slip op. at 5 (E.D. Cal. July 1, 2010) (citing Stringer v. Black, 503 U.S. 222, 228-29 (1992)).

[39] Teague, 489 U.S. at 301 (plurality opinion) (finding that "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final").

[40] *See infra* pp. 26-27 (noting that courts have placed undue weight on the split among the Justices in *Padilla*).

[41] Lambrix v. Singletary, 520 U.S. 518, 527-28 (1997) (emphasis added).

[42] This is a technical distinction; however, it is important to note that regardless of whether *Padilla* is applied retroactively, those who have valid *Padilla* claims nonetheless suffered a constitutional violation—and, therefore, their *conviction* was *unlawful*. *See* cases cited *infra* note 47. The only issue, then, that 'reasonable jurists' can debate, is whether their unlawful conviction can be remedied.

[43] There are two instances when a "new rule" will apply retroactively: 1) when the rule "places certain kinds of primary private individual conduct beyond the power of the criminal law-making authority to proscribe"; and 2) if the rule's existence is "implicit in the concept of

decisions have turned on their interpretations of Supreme Court precedent, critical language has gone largely overlooked. For example, the *Teague* Court admonished that:

> We [will] simply refuse to announce a new rule in a given case unless the rule would be applied retroactively to the defendant in the case and to all others similarly situated . . . We think this approach is a sound one. Not only does it eliminate any problems of rendering advisory opinions, it also avoids the inequity resulting from the uneven application of new rules to similarly situated defendants. We therefore hold that, implicit in the retroactivity approach we adopt today, is the principle that habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to all defendants on collateral review through one of the two exceptions we have articulated.[44]

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ordered liberty." Teague, 489 U.S. at 307 (plurality opinion) (internal citations omitted) (internal quotation marks omitted). However, no court has held that *Padilla* fits into either of these exceptions. *See* Mudahinyuka v. United States, 10 C 5812, 2011 WL 528804, slip op. at 4 (N.D. Ill. Feb. 7, 2011) ("This court is not aware of any decision by a state or federal court holding that the Supreme Court recognized a new right in *Padilla* that is also retroactively applicable to cases on collateral review.") In other words, the basis for applying *Padilla* retroactively or not has always turned on the old rule/new rule distinction.

[44] Teague, 489 U.S. at 316 (plurality opinion).

This language, and, more importantly, the underlying declaration, has largely been ignored by courts in deciding whether *Padilla* applies retroactively.[45]

The Supreme Court itself has noted that the case law governing retroactivity is "confused and confusing."[46] One possible source of the confusion is that retroactivity is a "misnomer."[47] In other words, as one court put it, "those

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[45] Research for this article uncovered only one reported decision which attributes significance to the Supreme Court's self-proscription against creating new rules that do not apply to all defendants on collateral review. *See* Santos-Sanchez v. United States, 5:06-CV-153, 2011 WL 3793691, slip op. at 3 (S.D. Tex. Aug. 24, 2011) ("[W]hen a case is on collateral review and the holding sought by the defendant would announce a new rule that does not fit a *Teague* exception, the Supreme Court will *refuse to apply or announce the rule in that case. Padilla* was before the Supreme Court *on collateral review* and the Supreme Court's *holding (rule) was applied* to Padilla.") (emphasis in original) (footnote omitted).

[46] Danforth v. Minnesota, 552 U.S. 264, 271 (2008).

[47] Santos-Sanchez v. United States, 5:06-CV-153, slip op. at 5 (referring to "retroactivity" as a "misnomer"); *see also* Danforth v. Minnesota, 552 U.S. 264, 271 (2008)

> (Not[ing] at the outset that the very word 'retroactivity' is misleading because it speaks in temporal terms. 'Retroactivity' suggests that when we declare that a new constitutional rule of criminal procedure is 'nonretroactive,' we are implying that the right at issue was not in existence prior to the date the 'new rule' was announced. But this is incorrect. As we have already explained, the source of a 'new rule' is the Constitution itself, not any judicial power to create new rules of law. Accordingly, the underlying right necessarily pre-exists our articulation of the new rule. What we are actually determining when we assess the 'retroactivity' of a new rule is not the temporal scope of a newly announced right, but whether a violation of the right that occurred prior to the announcement of the new rule will entitle a criminal defendant to the relief sought.)

who suffered violations of constitutional rules of criminal procedure that were articulated after their convictions became final, nevertheless, suffered constitutional violations. Therefore, the term 'retroactive' is a misnomer because the question is really one of 'redressability.'"[48] Perhaps because of the admittedly difficult nature of applying retroactivity case law, courts have varied widely in their retroactivity analysis. The result has been an inconsistent approach—both in terms of what statements of the Supreme Court lower courts have deemed are controlling, and in the results those lower courts have ultimately reached.

IV. Analyses of Courts' Decisions on *Padilla*'s retroactivity

A. Lower Courts

Whether *Padilla*'s holding applies retroactively is a "hot" topic in both federal and state courts. In the twenty-seven months since *Padilla* was decided, more than fifty courts have reached definitive conclusions regarding whether *Padilla* applies retroactively.[49] Four circuit courts

[48] Santos-Sanchez v. United States, 5:06-CV-153, slip op. at 5. While the author of this article agrees with this court's analysis, the term "retroactive" is still used throughout this article in conformity with the language of the Supreme Court. *See* Christopher N. Lasch, *The Future of Teague Retroactivity, or "Redressability," After* Danforth v. Minnesota*: Why Lower Courts Should Give Retroactive Effect to New Constitutional Rules of Criminal Procedure in Postconviction Proceedings*, 46 AM. CRIM. L. REV. 1, 35-36 (2009) (discussing the Supreme Court's use of the terms 'retroactivity' and 'redressabiltiy').

[49] This includes all reported decisions that have reached a substantive conclusion regarding *Padilla*'s retroactive application, including opinions that were later abrogated by a different case. Opinions that relegate discussion of retroactivity to a footnote, or otherwise mention the issue only briefly, were not counted. Unpublished opinions, and

have directly addressed the issue, with the Third Circuit[50] answering the retroactivity question affirmatively, and the Seventh,[51] Tenth,[52] and Fifth[53] Circuits reaching the opposite conclusion. Arguably, other circuits have addressed the issue—but only fleetingly,[54] or by implication.[55]

Among federal district courts that have considered the issue, courts in California,[56] Georgia,[57] Illinois,[58] Minnesota,[59] Mississippi,[60] Ohio,[61] and Texas[62] have found

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opinions that apply binding precedent, are not discussed in this article unless they are particularly illuminating on some relevant issue of law.

[50] United States v. Orocio, 645 F.3d 630 (3d Cir. 2011).

[51] Chaidez v. United States, 655 F.3d 684 (7th Cir. 2011).

[52] United States v. Chang Hong, No. 10–6294, 2011 WL 3805763 (10th Cir., Aug. 30, 2011), as amended (Sept. 1, 2011).

[53] United States v. Amer, 681 F.3d 211, 211 (2012).

[54] United States v. Hernandez–Monreal, 404 Fed.Appx. 714, 716 n.1 (4th Cir. 2010) (unpublished) (stating that "nothing in the *Padilla* decision indicates that it is retroactively applicable to cases on collateral review").

[55] Arguably, both the Fifth and Ninth Circuits have applied *Padilla* retroactively without explicitly stating so. In an unpublished opinion, on remand from the Supreme Court, the Fifth Circuit stated: "[w]e find that *Padilla* has abrogated our holding in *Santos-Sanchez*. We therefore vacate the district court's denial of Santos-Sanchez's petition for a writ of coram nobis and remand to the district court for further proceedings consistent with *Padilla*." Santos-Sanchez v. United States, 381 F. App'x 419, slip op. at 1 (5th Cir. 2010) (per curiam) (unpublished). Therefore, because the Fifth Circuit applied *Padilla* retroactively in *Santos-Sanchez*, it could be argued that, in the Fifth Circuit, *Padilla* applies retroactively by implication. Similarly, a California district court argued that the Ninth Circuit applied *Padilla* retroactively in another case. United States v. Krboyan, 1:02-CR-05438 OWW, 2011 WL 2117023, slip op. at 9 (E.D. Cal. May 27, 2011) ("Based on the Ninth Circuit's retroactive application of *Padilla* in [*United States v.*] *Bonilla*, [637 F.3d 980, 982 (9th Cir. 2011)], *Padilla* applies retroactively to Petitioner's writ of error coram nobis.").

[56] Four district courts in California have found that *Padilla* applies retroactively. *See* Jiminez v. Holder, 10-CV-1528-JAH NLS, 2011 WL 3667628, slip op. at 4 (S.D. Cal. Aug. 19, 2011); Luna v. United States, 10CV1659 JLS POR, 2010 WL 4868062, slip op. at 3 (S.D. Cal. Nov.

that *Padilla* applies retroactively to cases on collateral review. Similarly, state courts in Illinois,[63] Maryland,[64] Massachusetts,[65] Michigan,[66] Minnesota,[67] New York,[68] and Texas[69] have reached the conclusion that *Padilla* applies retroactively. Among the courts that reached the opposite conclusion, that *Padilla* does not apply

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23, 2010); United States v. Hubenig, 6:03-MJ-040, 2010 WL 2650625, slip op. at 7 (E.D. Cal. July 1, 2010); United States v. Krboyan, 1:02-CR-05438 OWW, slip op. at 9.

[57] *See* United States v. Chong, CR 101-078, 2011 WL 6046905, slip op. at 2 (S.D. Ga. Jan. 12, 2011).

[58] *See* United States v. Diaz-Palmerin, 08-CR-777-3, 2011 WL 1337326, slip op. at 4 (N.D. Ill. Apr. 5, 2011).

[59] *See* United States v. Dass, CRIM. 05-140 (3) JRT, 2011 WL 2746181, slip op. at 5 (D. Minn. July 14, 2011)

[60] *See* Amer v. United States, 1:06CR118-GHD, 2011 WL 2160553, slip op. at 3 (N.D. Miss. May 31, 2011)

[61] *See* United States v. Reid, 1:97-CR-94, 2011 WL 3417235, slip op. at 3 (S.D. Ohio Aug. 4, 2011).

[62] *See* Guadarrama-Melo v. United States, 1:08-CV-588, 2011 WL 2433619, slip op. at 3 (E.D. Tex. May 2, 2011); Marroquin v. United States, CIV.A. M-10-156, 2011 WL 488985, slip op. at 7 (S.D. Tex. Feb. 4, 2011); McNeill v. United States, No. A–11–CA–495 SS A-11-CA-495 SS, 2012 WL 369471, slip op. at 3 (W.D. Tex. Feb. 2, 2012) Santos-Sanchez v. United States, 5:06-CV-153, 2011 WL 3793691, slip op. at 3 (S.D. Tex. Aug. 24, 2011); Zapata-Banda v. United States, CIV. B:10-256, 2011 WL 1113586, slip op. at 5 (S.D. Tex. Mar. 7, 2011).

[63] *See* People v. Gutierrez, 954 N.E.2d 365, 377 (Ill. Ct. App. 2011).

[64] *See* Denisyuk v. State, 30 A.3d 914, 928 (Md. 2011).

[65] *See* Com. v. Clarke, 949 N.E.2d 892, 895 (Mass. 2011).

[66] *See* People v. Abbas, 794 N.W.2d 617, 617 (Mich. 2011).

[67] *See* Campos v. State, 798 N.W.2d 565, 571 (Minn. Ct. App. 2011).

[68] *See* People v. Bennett, 903 N.Y.S.2d 696, slip op. at 4 (Crim. Ct. 2010); People v. Garcia, 907 N.Y.S.2d 398, slip op. at 7 (Sup. Ct. 2010); People v. Nunez, 917 N.Y.S.2d 806, slip op. at 3 (App. Term 2010).

[69] *See* Ex parte De Los Reyes, 350 S.W.3d 723, 729 (Tex. App. 2011); *see also* Ex parte Tanklevskaya, 01-10-00627-CR, 2011 WL 2132722, slip op. at 7 (Tex. App. May 26, 2011).

retroactively, are federal courts in Alabama,[70] California,[71] the District of Columbia,[72] Florida,[73] Georgia,[74] Maryland,[75] Michigan,[76] New Jersey,[77] New York,[78] Rhode Island,[79] South Carolina,[80] and Virginia,[81] and state courts

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[70] *See* Emojevwe v. United States, 1:10CV229-MEF, 2011 WL 5118800, slip op. at 3 (M.D. Ala. Sept. 29, 2011).

[71] *See* United States v. Cervantes-Martinez, 10CR4776 JM, 2011 WL 4434861, slip op. at 3 (S.D. Cal. Sept. 23, 2011).

[72] *See* Ufele v. United States, CRIM. 86-143 RCL, 2011 WL 5830608, slip op. at 3. (D.D.C. Nov. 18, 2011).

[73] *See* United States v. Garcia, 2:88-CR-31-FTM-29DNF, 2011 WL 5024628, slip op. at 3 (M.D. Fla. Oct. 21, 2011); Llanes v. United States, 8:11-CV-682-T-23TBM, 2011 WL 2473233, slip op. at 2 (M.D. Fla. June 22, 2011); United States v. Macedo, 1:03-CR-00055-MP-AK, 2010 WL 5174342, slip op. at 1 (N.D. Fla. Dec. 15, 2010).

[74] *See* United States v. Chapa, 800 F.Supp. 2d 1216, 1225 (N.D. Ga. 2011).

[75] *See* Zoa v. United States, CIV. PJM 10-2823, 2011 WL 3417116, slip op. at 2 (D. Md. Aug. 1, 2011).

[76] *See* United States v. Shafeek, CRIM. 05-81129, 2010 WL 3789747 (E.D. Mich. Sept. 22, 2010). *See infra* note 98 (discussing the *Shafeek* opinion).

[77] *See* United States v. Gilbert, 2:03-CR-00349-WJM-1, 2010 WL 4134286, slip op. at 3 (D.N.J. Oct. 19, 2010);United States v. Hough, 2:02-CR-00649-WJM-1, 2010 WL 5250996, slip op. at 4 (D.N.J. Dec. 17, 2010).

[78] *See* Ellis v. United States, 806 F.Supp.2d 538, 550 (E.D.N.Y. June 3, 2011).

[79] *See* United States v. Agoro, CR 90-102 ML, 2011 WL 6029888, slip op. at 7 (D.R.I. Nov. 16, 2011).

[80] *See* Dennis v. United States, 787 F.Supp. 2d 425, 430 (D.S.C. 2011).

[81] *See* Doan v. United States, 760 F.Supp. 2d 602, 605 (E.D. Va. 2011); Mendoza v. United States, 774 F.Supp. 2d 791, 798 (E.D. Va. 2011).

in Arizona,[82] Florida,[83] Maryland,[84] Michigan,[85] New York,[86] and North Carolina.[87]

Among courts that discussed *Padilla*'s retroactivity, both the quality and quantity of analysis varies greatly. For example, some courts have summarily stated that *Padilla* does not apply retroactively, without stating a basis for that conclusion.[88] Additionally, many courts have noted the issue, but decided the case without reaching it. For example, many courts considering a collateral attack on a guilty plea under *Padilla*, have found that, even assuming *Padilla* applies retroactively, the petitioner could not surmount *Strickland's* "high bar"[89] to show ineffective assistance of counsel.[90]

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[82] *See* State v. Poblete, 260 P.3d 1102, 1106 (Ariz. Ct. App. 2011).

[83] *See* Barrios-Cruz v. State, 63 So.3d 868, 873 (Fla. Dist. Ct. App. 2011); Hernandez v. State, 61 So.3d 1144, 1151 (Fla. Dist. Ct. App. 2011); Smith v. State, 85 So.3d 551, 552 (Fla. Dist. Ct. App. 2012); State v. Shaikh, 65 So.3d 539, 540 (Fla. Dist. Ct. App. 2011).

[84] *See* Miller v. State, 196 Md. App. 658, 677 (2010).

[85] *See* People v. Gomez, 295 Mich.App. 411, 411 (2012).

[86] *See* People v. Kabre, 905 N.Y.S.2d 887, slip op. at 4 (Crim. Ct. 2010); *see also infra* note 159 (discussing *Kabre*).

[87] *See* State v. Alshaif, 724 S.E.2d 597, 604 (N.C. Ct. App. 2012).

[88] For example, one court simply stated that "the 2010 *Padilla* decision does not apply retroactively[,]" without providing any basis for that conclusion. United States v. Cervantes-Martinez 10CR4776 JM, 2011 WL 4434861, slip op. at 3 (S.D. Cal. Sept. 23, 2011).

[89] Padilla v. Kentucky, 130 S. Ct. 1473, 1485 (2010) (noting that "[s]urmounting *Strickland*'s high bar is never an easy task").

[90] *See, e.g.*, Masterman v. United States, 1:96-CR-05306-OWW, 2010 WL 4366156, slip op. at 2 (E.D. Cal. Oct. 27, 2010) (finding that even "[a]ssuming *arguendo* that Padilla applies retroactively and thus that Petitioner's claim is timely under section 2255(f)(3), Petitioner's claim lacks merit") (emphasis in original); Trujillo v. State, 71A03-1102-PC-73, 2011 WL 5909637, slip op. at 6 n.3 (Ind. Ct. App. Nov. 28, 2011) ("assum[ing] for the sake of argument, but explicitly []not decid[ing], that the case announcing th[e] rule, i.e., *Padilla v. Kentucky,* applies retroactively to the instant case[, the court determined that it] need not address these matters because [it could] resolve this issue on grounds of lack of a showing of prejudice") (citation omitted).

A number of courts have also considered whether *Padilla* applies retroactively to federal habeas corpus petitions.[91] To find that *Padilla* applies retroactively in this context, courts would be required to make the potentially contradictory determinations that *Padilla* is "newly recognized" under federal habeas corpus law[92] but not a "new rule" under *Teague*.[93] Put differently, these courts are not giving consideration to whether *Padilla* is the application of an "old rule" for *Teague* purposes.[94]

Unsurprisingly, courts that have assumed that *Padilla* is "new" for *Teague* purposes have determined that *Padilla* does not apply retroactively[95] to cases on collateral

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[91] 28 U.S.C. § 2255 (2008).

[92] *See id.* at § 2255(f)(3) (extending the 1-year statute of limitations in federal habeas corpus petitions when "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been *newly recognized* by the Supreme Court and made retroactively applicable to cases on collateral review") (emphasis added).

[93] *See* United States v. Estrada-Perez, CRIM. 02-403(3) DSD, 2011 WL 2965249, slip op. at n.1 (D. Minn. July 22, 2011) (stating that "[i]f *Padilla* did not announce a new rule, then it would be illogical to find a right 'newly recognized' in March 2010[, when *Padilla* was decided]"); Asif v. Comm'r of Correction, 32 A.3d 967, 969 (2011) (stating "we find somewhat inconsistent the petitioner's argument that *Padilla* represents a new fact but does not set forth a new rule").

[94] Often, these courts will say "assuming arguendo" or "assuming for Petitioner's benefit" that *Padilla* is new, it does not apply retroactively. *See, e.g.*, Rodriguez v. United States, 1:10-CV-23718-WKW, 2011 WL 3419614, slip op. at 6 (S.D. Fla. Aug. 4, 2011) ("Assuming for Ms. Rodriguez's benefit that the *Padilla* decision in fact announced a 'new rule,' Ms. Rodriguez must show that the right announced in *Padilla* was made retroactively applicable to cases on collateral review[.]") (footnote omitted) (citations omitted).

[95] As noted previously, the term "retroactivity" is a misnomer. *See supra*, p. 10. Its definition becomes even more abstruse when courts are applying a specific case to federal habeas petitions. Courts are, in effect, considering retroactivity under two separate and distinct areas of the law—federal statutory law governing habeas petitions and the "constitutional rule" case law under *Teague* and its progeny.

review.[96] In other words, these courts—regardless of whether they explicitly say so—are not analyzing whether *Padilla* applies retroactively under Supreme Court precedent, but, rather, whether *Padilla*'s holding is retroactive under a specific statutory provision.[97] In certain instances, the language of a court's opinion makes it unclear whether they are considering *Padilla*'s potential retroactivity under Supreme Court precedent or federal law.[98]

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[96] Under *Teague*, there are two narrow instances where a *new* rule of constitutional criminal procedure can apply retroactively. *See supra* note 43 (discussing the circumstances by which a "new" rule of constitutional criminal procedure can apply retroactively). *Cf.* Mudahinyuka v. United States, 10 C 5812, 2011 WL 528804, slip op. at 4 (N.D. Ill. Feb. 7, 2011) ("This court is not aware of any decision by a state or federal court holding that the Supreme Court recognized a new right in *Padilla* that is also retroactively applicable to cases on collateral review.") *and* Haddad v. United States, CIV. 07-12540, 2010 WL 2884645, slip op. at 6 (E.D. Mich. July 20, 2010) (assuming that *Padilla* is a new rule, and finding that "it is unlikely that *Padilla* will be made retroactive to convictions under collateral attack") *with* Masterman v. United States, 1:96-CR-05306-OWW, 2010 WL 4366156, slip op. at 2 (E.D. Cal. Oct. 27, 2010) (citing authority for the court's proposition that "*Padilla* applies retroactively [under] 2255(f)(3)," but ultimately finding that *Padilla* was not retroactive to the instant case because *Strickland*'s high bar could not be surmounted).

[97] It still may be possible that *Padilla* is a "newly recognized" rule under 28 U.S.C. § 2255(f)(3), but not a "new rule" under *Teague*. In that case, it would apply retroactively to habeas corpus petitions. However, no court has yet reached this conclusion explicitly. *Cf.* Carrasco v. United States, EP-11-CV-161-DB, 2011 WL 1743318, slip op. at 3 (W.D. Tex. Apr. 28, 2011) (assuming that *Padilla* applies retroactively and still considering a 28 U.S.C. § 2255(f)(3) motion, but ultimately concluding that the motion was untimely).

[98] For example, in *United States v. Shafeek*, it is unclear whether the court it is determining *Padilla*'s potential retroactivity under Supreme Court precedent (e.g. *Teague*) or habeas corpus law. CRIM. 05-81129, 2010 WL 3789747 (E.D. Mich. Sept. 22, 2010). To be sure, the petitioner in that case is proceeding under 28 U.S.C. § 2255, and the court is specifically considering "whether the *Padilla* decision was

The above information shows that state courts are more likely than federal courts to determine that *Padilla* applies retroactively. The fact that federal courts are less likely to find that *Padilla* applies retroactively is unsurprising, considering that federal habeas law has a strict statute of limitations.[99] By contrast, state courts are able to conduct their own retroactivity analysis under their state constitution;[100] moreover, there are a number of reasons why a state court would prefer to resolve the retroactivity issue under its state constitution.[101]

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meant to be applied retroactively" under 28 U.S.C. § 2255(f)(3). *Id.* at 2. Still, however, the court's retroactivity analysis mentions only how to apply *Teague*. *Id.* The court's ultimate conclusion is that "[b]ecause the *Padilla* opinion may not be considered a 'new rule,' Shafeek cannot show that the *Padilla* opinion should be applied retroactively." *Id.* at 3. The court's conclusion, to the extent that it says that opinions that are not "new rules" cannot be applied retroactively, gets a crucial portion of *Teague* backwards. *See* Teague v. Lane, 489 U.S. 288, 310 (1989) (plurality opinion) (holding that "*new* constitutional rules of criminal procedure will *not* be [retroactive] to those cases which have become final before the new rules are announced") (emphasis added). *But cf.* United States v. Bacchus, CR 93-083S, 2010 WL 5571730, slip op. at 1 (D.R.I. Dec. 8, 2010) (calling the *Shafeek* opinion, "a well-reasoned decision, [which] concluded that the Supreme Court did not announce a 'new rule' in *Padilla* and that retroactive application was not warranted under *Teague v. Lane*").

[99] 28 U.S.C. § 2255(f) (one-year statute of limitations).

[100] *See* Danforth v. Minnesota, 552 U.S. 264, 289 (2008) ("States that give broader retroactive effect to this Court's new rules of criminal procedure do not do so by misconstruing the federal *Teague* standard. Rather, they have developed *state* law to govern retroactivity in state postconviction proceedings.") (emphasis in original).

[101] For example: 1) if the issue of retroactivity is being raised pursuant to a state case (*see e.g.* State v. Gaitan, 206 N.J. 330 (2011) (accepting certiorari from State v. Gaitan, 419 N.J. Super. 365 (App. Div. 2011) to decide whether State v. Nunez-Valdez, 200 N.J. 129 (2009), applies retroactively)); 2) a state may have its own—possibly more favorable—case law regarding the retroactivity of constitutional rules of criminal procedures (*see e.g.* State v. Bonilla, 957 N.E.2d 682, 682 n.2 (Ind. Ct. App. 2011) ("We need not address the retroactive application of *Padilla,* as its holding was consistent with Indiana decisions that

Because cases on this issue are coming out so quickly, and because of the confusion over how to apply *Teague*, it is difficult to determine whether retroactive application is the majority position. Consequently, courts that have determined what the majority position is, have, unsurprisingly, found that their position is that of the majority.[102] Although the total number of courts that favor retroactivity is important, the opinions of appellate courts carry more weight because they create binding precedent in a larger number of jurisdictions.

B. Circuit Court and State Supreme Court Opinions

1. Third Circuit

In *United States v. Orocio*,[103] the Third Circuit, applying *Teague*, held that *Padilla* applied retroactively to cases on collateral review. The Third Circuit was the first circuit to address the issue.[104] Like every other court that

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predated *Padilla*[.]")); and 3) precedent (such as an unfavorable appellate decision) may preclude a state court from finding retroactivity under federal law.

[102] *Cf.* Marroquin v. United States, CIV.A. M-10-156, 2011 WL 488985, slip op. at 2 (S.D. Tex. Feb. 4, 2011) (finding that "a majority of courts have found that *Padilla* is simply the application of an old rule, concluding that *Padilla'* s holding applies retroactively") *with* United States v. Abraham, 8:09CR126, 2011 WL 3882290, slip op. at 2 (D. Neb. Sept. 1, 2011) ("The weight of authority appears to favor nonretroactivity."); *see also* United States v. Agoro. CR 90-102 ML, 2011 WL 6029888, slip op. at 6 (D.R.I. Nov. 16, 2011) (noting the disagreement over what the majority position is).

[103] 645 F.3d 630 (3d Cir. 2011).

[104] Orocio was decided on June 29, 2011. *Id.* The Seventh, Tenth, and Fifth Circuit opinions were decided on Aug. 23, 2011; August 30, 2011; and May 9, 2012, respectively. Chaidez v. United States, 655 F.3d 684, 684 (7th Cir. 2011); United States v. Chang Hong, 10-6294, 2011 WL 3805763 (10th Cir. Aug. 30, 2011); United States v. Amer 681 F.3d 211, 211 (2012).

has reached the conclusion that *Padilla* applies retroactively, the *Orocio* court found that *Padilla* was not a "new rule" under *Teague*.[105]

The Third Circuit's analysis was more comprehensive than that of the Seventh, Tenth, and Fifth Circuits—including considering the proper scope of *Wright v. West*,[106] *Strickland v. Washington*,[107] and *Hill v.*

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[105] Orocio, 645 F.3d at 641 ("We therefore hold that, because *Padilla* followed directly from *Strickland* and long-established professional norms, it is an 'old rule' for *Teague* purposes and is retroactively applicable on collateral review."); *see also* Mudahinyuka v. United States, 10 C 5812, 2011 WL 528804, slip op. at 4 (N.D. Ill. Feb. 7, 2011) ("This court is not aware of any decision by a state or federal court holding that the Supreme Court recognized a new right in *Padilla* that is also retroactively applicable to cases on collateral review.")

[106] *See* Orocio, 645 F.3d at 640-641 (interpreting *Wright v. West* for the proposition that "a court's disposition of each individual factual scenario arising under the long-established *Strickland* standard is not in each instance a 'new rule,' but rather a new application of an 'old rule' in a manner dictated by precedent" (citing 505 U.S. 277, 308-309 (1992) (Kennedy, J., concurring))). Notably, the *Chaidez* court also quotes the same language from *Wright* and draws the same conclusion that the Third Circuit does from that case, namely "that the application of *Strickland* to unique facts generally will not produce a new rule." Chaidez v. United States, 655 F.3d 684, 692 (7th Cir. 2011). The *Chang Hong* and *Amer* courts do not mention *Wright v. West*. United States v. Chang Hong, No. 10–6294, 2011 WL 3805763 (10th Cir. Aug. 30, 2011), as amended (Sept. 1, 2011); United States v. Amer, 681 F.3d 211, 211 (2012).

[107] *See* Orocio, 645 F.3d at 639 ("[T]he *Strickland* Court identified certain basic duties that criminal defense attorneys must carry out to perform competently within the meaning of the Sixth Amendment, including a duty to consult with the defendant on important decisions. When the Supreme Court decides a *Strickland* case with novel facts, we do not place emphasis on the *particular* duty identified by the Supreme Court as a basis for classifying the rule as 'new' for *Teague* purposes. We look instead to precedents and then-existing professional norms to determine whether the decision broke new ground.") (internal citations omitted) (emphasis in original). While the Seventh, Tenth, and Fifth Circuits acknowledge that "*Padilla* is a *Strickland* case[,]" those courts ultimately conclude that other factors lead it to conclude that *Padilla* is

Lockhart.[108] However, the Third Circuit omitted any language from *Teague* which explains why cases decided on collateral review must apply "retroactively" to other cases similarly decided on collateral review. The fact that the *Orocio* court was able to reach the conclusion that *Padilla* applies retroactively without considering the Supreme Court's self-proscription from issuing constitutional "advisory opinions,"[109] which weighs greatly in favor of retroactivity, shows the logical strength of the position that *Padilla* applies retroactively.

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a "new rule." Chang Hong, 10-6294, slip op. at 5; Chaidez, 655 F.3d at 687; Amer, 681 F.3d at 214 (2012).

[108] The Third Circuit considered *Hill* in a number of different contexts. *See* Orocio, 645 F.3d at 639 ("*Padilla* is set within the confines of *Strickland* and *Hill,* as it concerns what advice an attorney must give to a criminal defendant at the plea stage."); *see also id.*, at 638 (finding that the argument that *Padilla* is new is undercut by *Hill*'s language that *Strickland* claims are governed by the "range of competence demanded from attorneys" (citing Hill v. Lockart, 474 U.S. 52, 56 (1985))) (internal citations omitted). The Third Circuit also convincingly argues that the *Padilla*'s court "floodgates" discussion, which compares *Hill* with *Padilla*, assumes retroactive application of the Court's opinion in *Padilla*: "'[w]e confronted a similar 'floodgates' concern in *Hill,* but nevertheless applied *Strickland* to a claim that counsel had failed to advise the client regarding his parole eligibility before he pleaded guilty.... A flood did not follow in that decision's wake.'" *Id.* at 644 (quoting Padilla v. Kentucky, 130 S. Ct. 1473, 1484-1485 (2010). By contrast, the Seventh Circuit did not mention *Hill v. Lockart* in the context of the Court's "floodgates" argument in *Padilla*, although it did mention that *Hill* provides a similar basis for analyzing *Strickland* claims. Chaidez v. United States, 655 F.3d at 691 (citing Hill, 474 U.S. at 56)). Ultimately, the Seventh Circuit found that, "[In *Padilla*, t]he majority's characterization of *Hill*, suggests that it did not understand the rule set forth in *Padilla* to be dictated by precedent." Chaidez, 655 F.3d at 689-690. The *Amer* court also interprets the *Padilla* Court's discussion of *Hill* as evidence that *Padilla* does not apply retroactively. Amer, 681 F.3d at 214; *see also infra* p. 20 (discussing the *Amer* court's characterization of *Hill*). The *Chang Hong* court does not mention *Hill v. Lockart*. Chang Hong, No. 10–6294.

[109] Teague v. Lane, 489 US 288, 316 (1989) (plurality opinion).

2. Seventh Circuit

In *Chaidez v. United* States,[110] the Seventh Circuit held that *Padilla* did not apply retroactively. The Seventh Circuit offered a number of factors disfavoring retroactive application of *Padilla*. For example, the court found that "[l]ack of unanimity on the [Supreme] Court in deciding a particular case[, and in lower court's prior determinations of the issue,] support[] the conclusion that the case announced a new rule."[111] The *Chaidez* court also found that "to the extent that [it was able to] discern whether members of the Court understood *Padilla* to be a new rule, []the clearest indications [were found] in the concurrence and dissent, which [left the court with] no doubt that at least four Justices view *Padilla* as new."[112]

Along with the Third Circuit,[113] the Seventh Circuit correctly noted that the general rule is that a case applying *Strickland* to a new set of facts does not create a new rule for *Teague* purposes.[114] En route to finding that *Padilla* was a "rare exception"[115] to this rule, the Seventh Circuit placed undue weight on the disagreement between the Supreme Court and lower courts,[116] and among the Justices

[110] 655 F.3d 684 (7th Cir. 2011) *cert. granted* 132 S. Ct. 2101 (2012).
[111] *Id.* at 689.
[112] *Id.* at 694.
[113] United States v. Orocio, 645 F.3d 630, 639 (3d Cir. 2011) (noting that "it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent") (internal citations omitted).
[114] Chaidez, 655 F.3d at 692 ("recogniz[ing] that the application of *Strickland* to unique facts generally will not produce a new rule" (citing Williams v. Taylor, 529 U.S. 362, 382 (2000) (Stevens, J., concurring in relevant part))).
[115] Chaidez, 655 F.3d at 693.
[116] *Id.* at 692. (stating that the court was "persuaded by the weight of lower court authority").

themselves.[117] Disagreement, as the dissent in *Chaidez* noted, "does not alter the fact that prevailing professional norms at the time of [a petitioner's] plea required a lawyer to advise her client of the immigration consequences of a guilty plea...[and, t]he concurring and dissenting opinions do not alter the straightforward application of *Strickland*[,]" in *Padilla*.[118]

In giving too much weight to inferences from the concurrence and dissent, the Seventh Circuit ignored the intent of the majority in *Padilla*. While the *Chaidez* court acknowledged "indirect language" that supports the position that the Supreme Court meant *Padilla* to apply retroactively, it fails to identify that language or give it any weight in its determination of whether *Padilla* applies retroactively.[119] In short, the Seventh Circuit relied too heavily on its own inferences from the concurrence and dissenting opinions and the split among the lower courts.

The Supreme Court accepted certiorari in *Chaidez* to decide if *Padilla* applies retroactively.[120]

3. Tenth Circuit

In *United States v. Chang Hong*,[121] the Tenth Circuit held that *Padilla* does not apply retroactively. Among courts that have reached the retroactivity question in the negative, the *Chang Hong* court is one of the most ambitious in its analysis of whether *Padilla* qualifies as a

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[117] *Id.* at 689 (finding that "[l]ack of unanimity on the [Supreme] Court in deciding a particular case supports the conclusion that the case announced a new rule").
[118] *Id.* at 696-697 (dissent).
[119] *Id.* at 693.
[120] Chaidez v. United States, 132 S. Ct. 2101 (2012).
[121] United States v. Chang Hong, No. 10–6294, 2011 WL 3805763 (10th Cir., Aug. 30, 2011), as amended (Sept. 1, 2011).

"new rule" under *Teague*.[122] The basis for its conclusion that *Padilla* created a new rule is that "*Padilla* extended the Sixth Amendment right to effective counsel and applied it to an aspect of a plea bargain previously untouched by *Strickland*."[123] Under *Teague,* the holding of a case will not be deemed to have created a new rule—and it will, therefore, be retroactively applicable to cases on collateral review—if it applies an old rule to a new set of facts.[124] Therefore, the fact that the holding of a case reaches into an area "previously untouched" is not helpful for determining whether it is an application of an old rule to a new set of facts. By the *Chang Hong* court's reasoning, it would be difficult to imagine a holding that merely applied an old rule to a new set of facts.

The *Chang Hong* court also addressed the important language in *Padilla* that implies retroactive application[125]: "[Petitioner] argues there would be no need to discuss pleas 'already obtained' if the case did not apply retroactively."[126] In rejecting this argument the *Chang Hong* court said that it "interpret[ed] the Court's statement to simply recognize that past decisions enumerating the contours of *Strickland* have not led to a surfeit of collateral attacks on guilty pleas. The force of the Court's argument is that *Padilla* would have a similar (lack of) effect on guilty pleas."[127] The *Chang Hong* court, in other words, said that

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[122] *Cf. id.* at 8 (stating that "*Padilla* is a new rule of constitutional law not because of *what* it applies—*Strickland*—but because of *where* it applies—collateral immigration consequences of a plea bargain") *with* Chaidez, 655 F.3d at 693 (calling it a "rare exception" when a *Strickland* case produces a new rule).

[123] Chang Hong, No. 10–6294, slip op. at 8.

[124] *See* Chaidez, 655 F.3d at 688 ("Under *Teague,* a constitutional rule of criminal procedure applies to all cases on direct and collateral review if it is not a new rule, but rather an old rule applied to new facts.").

[125] Padilla v. Kentucky, 130 S. Ct. 1473, 1485 (2010).

[126] Chang Hong, No. 10–6294, slip op. at 9-10 (citing *Padilla*, 130 S. Ct. at 1485).

[127] *Id.* at 10.

the Supreme Court's use of the past tense, "already obtained," referred to "past decisions". However, the Supreme Court plainly used the phrase "*convictions* already obtained," not referring to past *decisions*.[128]

Perhaps recognizing that their interpretation of the Court's language in *Padilla* is unpersuasive, the *Chang Hong* court also stated that "it [would be] unwise to imply retroactivity based on dicta."[129] However, the *Chang Hong* court itself relies on the dicta of the concurring and dissenting opinions.[130] Adding to its seemingly uneven analysis, the Tenth Circuit also failed to cite any language from *Teague*, or *Teague's* progeny, that might indicate that *Padilla* should be applied retroactively.

4. Fifth Circuit

In May 2012, the Fifth Circuit became the fourth, and likely final, circuit to weigh in on *Padilla*'s retroactivity when it decided *United States v. Amer*.[131] The court noted at the outset that the "issue presently is pending before the Supreme Court."[132] The court ultimately agreed with the Seventh and Tenth Circuits, that *Padilla* was "new" within the meaning of *Teague*.[133] The *Amer* court found that the Supreme Court's decision in *Padilla* was not "*dictated* by precedent."[134] In making this determination the *Amer* court fashioned its own test which includes three factors:

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[128] *Padilla*, 130 S. Ct. at 1485 (emphasis added).
[129] Chang Hong, No. 10–6294, slip op. at 10.
[130] *Id.* at 6 ("We take the concurrence and dissent as support for our conclusion that reasonable jurists did not find the rule in *Padilla* compelled or dictated by the Court's prior precedent.")
[131] 681 F.3d 211 (2012).
[132] *Id.* (citing Chaidez v. United States, 132 S. Ct. 2101 (2012).
[133] Amer, 681 F.3d at 211.
[134] *Id.* (citing Teague, 489 U.S. at 301 (plurality opinion)).

1) whether the decision announcing the rule at issue purported to rely on "controlling precedent,"[135]
2) whether there was a "difference of opinion on the part of ... lower courts that had considered the question,"[136] and
3) whether the Justices expressed an "array of views.[137]

The court found that the *Padilla* Court did not "purport[] to" rely on controlling precedent because the *Padilla* Court stated in a footnote that, "the *Hill* [*v. Lockart*] Court did not resolve the particular question respecting misadvice that was before it."[138] However, the Supreme Court immediately followed that statement with the statement that, "[Hill's] import is nevertheless clear[, and w]hether *Strickland* applies to Padilla's claim follows from *Hill,* regardless of the fact that the *Hill* Court did not resolve the particular question respecting misadvice that was before it."[139] *Padilla* builds upon the precedents of *Hill* and *Strickland.* The *Padilla* Court's reliance on these prior cases is deep and unambiguous.

With regard to the difference of opinion among lower courts, the Fifth Circuit makes the same error of circular logic that the Seventh and Tenth Circuits make. The *Amer* court found that "the near-universal position of the lower state and federal courts," that failure to advise a non-citizen that deportation will result from a guilty plea does *not* constitute ineffective assistance of counsel, evinces that *Padilla* should not apply retroactively.[140]

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[135] Amer, 681 F.3d at 213 (citing Lambrix v. Singletary, 520 U.S. 518, 528 (1997)).
[136] Amer, 681 F.3d at 213 (citing Butler v. McKellar, 494 U.S. 407, 415 (1990)).
[137] Amer, 681 F.3d at 213 (citing O'Dell v. Netherland, 521 U.S. 151, 159 (1997)).
[138] 130 S.Ct. 1473, 1485 n. 12.
[139] *Id.*
[140] Amer, 681 F.3d at 214.

Relying on these lower courts' holdings, however, ignores the fact that the basis of these opinions was the direct-collateral consequences distinction, which was explicitly repudiated in *Padilla*.[141]

Finally, the Fifth Circuit argues that *Padilla* is not retroactive because the concurrence and dissent represent an "array of views," which shows that *Padilla* announced a new rule. Like the Seventh and Tenth Circuits before it, the Fifth Circuit gives undue weight to the dicta of a concurring and dissenting opinions. The *Amer* court's reliance on the concurring and dissenting opinions presents a stark contrast with its unwillingness to consider any reason why *Padilla* might apply retroactively.

The court states in a footnote that it will not consider the *Padilla* majority's suggestion that *Padilla* should apply retroactively—or any other reason why *Padilla* apply retroactively—because it does not want to "perceive a dictate from an inference."[142] However, the *Amer* court relies on its own inferences from the concurrence and dissent. It is illogical to ignore the opinion of the Court while defining the reach of a case through inferences from minority opinions.

5. State Supreme Courts

The opinions of state supreme courts are of great consequence, because, like circuit court opinions, they can be overturned only by the Supreme Court. Additionally, the vast majority of guilty pleas occur in state court proceedings.[143] As a result, it can be argued that state law

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[141] Padilla v. Kentucky, 130 S. Ct. 1473, 1482, (2010) ("The collateral versus direct distinction is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation.").

[142] Amer, 681 F.3d at 214, n. 2.

[143] In 2004, for example, more than five times as many guilty pleas occurred in state courts than occurred in their federal counterparts. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of

precedent has a greater practical impact than its federal counterpart.

It has been noted that *Padilla*—in holding that failure of counsel to advise a client about the immigration consequences of a guilty plea constitutes ineffective assistance of counsel—abrogated precedent in many state and federal jurisdictions.[144] Still, there are state supreme courts that have applied *Padilla* retroactively, including the highest courts in Maryland,[145] Massachusetts[146] and Michigan.[147] The New Jersey Supreme Court, by contrast, found that *Nunez-Valdez*, a case decided under New Jersey law that is substantially similar to *Padilla,* did not apply retroactively.[148] As noted above, it is within the purview of

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Criminal Justice Statistics Online, tbl.5.26.2004, http://www.albany.edu/sourcebook/pdf/t5242004.pdf (showing that 70,591 guilty pleas were entered in District Courts in 2004) (last visited July, 2012); Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics Online, tbl.5.46.2004, http://www.albany.edu/sourcebook/pdf/t5462004.pdf (showing that available data documents 553,356 guilty pleas obtained in state courts in 2004) (last visited July, 2012). The Department of Justice estimates that their data only shows approximately half of the actual number of convictions that occur in state courts. *Id.* Because we do not have data available for these convictions we cannot know how many were the result of guilty pleas or plea bargains. However, if these convictions follow the trend, then it is possible that state courts handled more than ten times as many guilty pleas as federal courts.

[144] *Cf.* Padilla v. Kentucky, 130 S. Ct. 1473, 1491 (2010) (Alito, J., concurring) (stating that "the majority does not cite a single case, from this or any other federal court, holding that criminal defense counsel's failure to provide advice concerning the removal consequences of a criminal conviction violates a defendant's Sixth Amendment right to counsel") *with* State v. Nunez-Valdez, 200 N.J. 129 (2009) (finding that, under the N.J. constitution, the right to effective assistance of counsel applied to the immigration consequences of a plea).

[145] *See* Denisyuk v. State, 30 A.3d 914, 923 (Md. 2011).

[146] *See* Com. v. Clarke, 949 N.E.2d 892, 895 (Mass. 2011).

[147] *See* People v. Abbas, 794 N.W.2d 617, 617 (Mich. 2011).

[148] State v. Gaitan, A-109 SEPT.TERM 2010, 2012 WL 612311, slip op. at 20 (N.J. Feb. 28, 2012) (*Padilla* is not entitled to retroactive

state courts to find that *Padilla*'s central holding is retroactive under their own case law.[149]

Many state supreme courts have made statements concerning *Padilla*'s retroactivity without deciding the issue. For example, the Delaware Supreme Court has addressed *Padilla*'s retroactivity only briefly—in the footnote of an unpublished opinion.[150] The Delaware Supreme Court found that "United States Supreme Court and Delaware Supreme Court precedents suggest that the rule in *Padilla* may not retroactively apply."[151] Similarly, the Georgia[152] and Maine[153] Supreme Courts chose not to address the issue. More important than the result of any one court is the quality of the analysis that supports that court's conclusion.

C. Evaluation of Common Arguments For Applying *Padilla* Retroactively

1. The *Padilla* Decision Itself Would Have Been Precluded By a Retroactivity Bar

Jose Padilla's guilty plea, from 2002, was itself on

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application, [and, therefore,] we find no attorney violation of *Padilla's* requirements in this matter. As for *Nuñez–Valdéz*, we find in this record no deficiency like what occurred in that matter[.]")

[149] *See* State v. Bonilla, 957 N.E.2d 682, 682 n.2 (Ind. Ct. App. 2011) (finding that the court "need not address the retroactive application of *Padilla,* as its holding was consistent with Indiana decisions that predated *Padilla*"); s*ee also supra* note 101 (explaining when a state may wish to find the rule of *Padilla* retroactive under its own case law).

[150] Ruiz v. State, 23 A.3d 866, slip op. at 3 n.19 (Del. July 6, 2011) (unpublished).

[151] *Id.*

[152] *See* Smith v. State, 287 Ga. 391, 404 (2010).

[153] *See* State v. Ali, 32 A.3d 1019, 1023 (Me. 2011).

collateral review;[154] research for this article uncovered only one published case[155] to attribute proper significance to that fact.[156] This fact is significant in understanding what "retroactivity" truly means for *Padilla.* Without a doubt, all of those bringing *Padilla* claims based on convictions that occurred after 2002 are in every way "similarly situated" to Jose Padilla.[157] Therefore, it is nonsensical to apply *Padilla* only prospectively, when that same retroactivity bar would have precluded the result in *Padilla* itself.[158] Another way of putting this, is that *Padilla* announced a rule on collateral review, and that when a rule is announced on collateral review, it *must* apply retroactively to "avoid the[]

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[154] "Final judgment was entered October 4, 2002." Com. v. Padilla, 253 S.W.3d 482, 483 (Ky. 2008) *rev'd and remanded sub nom.* Padilla v. Kentucky, 130 S. Ct. 1473 (2010).

[155] *See* Santos-Sanchez v. United States, 5:06-CV-153, 2011 WL 3793691, 3 (S.D. Tex. Aug. 24, 2011). The *Santos-Sanchez* court found that, because *Padilla* was itself decided on collateral review, "[i]t is incontrovertible that if *Padilla* is analyzed under *Teague*, it must be applied retroactively to [other] cases on collateral review." *Id.*

[156] For example, the Third Circuit opinion, holding that *Padilla* does apply retroactively, contains a section on "*Teague* and retroactivity," but does not mention that *Teague*'s statement that the Supreme Court will apply all decisions on collateral review retroactively in fairness to those "similarly situated". U.S. v. Orocio, 645 F.3d 630, 637 (3d Cir. 2011); *see* Teague v. Lane, 489 U.S. 288, 316 (1989) (plurality opinion).

[157] In other words, convictions that occurred before 2012, like Jose Padilla's 2002 conviction, occurred before the Court's *decision* in *Padilla.*

[158] Consider the case of *People v. Kabre.* 905 N.Y.S.2d 887, slip op. at 4 (Crim. Ct. 2010). The *Kabre* court held that, "Petitioner can prevail here only if a New York court in 2005 (when the last conviction at issue here became final) would have been required by controlling United States Supreme Court precedent to rule that failure to discuss the immigration consequences of a guilty plea was ineffective assistance of counsel." *Id.* The *Kabre* court does not explain why it is appropriate to apply the rule announced in *Padilla* retroactively to a conviction that occurred in 2002, but not apply that same rule in *Kabre*, when Kabre's conviction occurred in 2005.

problems of rendering advisory constitutional opinions and creating inequities resulting from the uneven application of constitutional rules."[159]

2. A *Teague* Analysis Necessarily Results in Retroactive Application of *Padilla*

Under a *Teague* analysis, a rule of constitutional criminal procedure always applies retroactively. The plurality in *Teague* said that the Supreme Court will "simply refuse to announce a new rule in a case unless the rule would be applied retroactively to the defendant in the case *and to all others similarly situated.*"[160] *Teague*'s statement is that the law will not allow the application of "retroactivity" principles to result in an uneven application of constitutional rules. Thus, the Supreme Court will apply all decisions on collateral review retroactively in fairness to those "similarly situated."[161] By itself, this is dispositive on the issue of whether *Padilla* should apply retroactively.[162]

In short, courts analyzing *Padilla* under *Teague* should always reach the conclusion that *Padilla* applies retroactively.[163] In other words, "*Teague* establishes that

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[159] People v. De Jesus, 30 Misc. 3d 1203(A), slip op. at 10 (N.Y. Sup. Ct. 2010) (unpublished disposition).

[160] Teague v. Lane, 489 U.S. 288, 316 (1989) (emphasis added).

[161] *Id.* See Christopher N. Lasch, *The Future of* Teague *Retroactivity, or "Redressability," After* Danforth v. Minnesota*: Why Lower Courts Should Give Retroactive Effect to New Constitutional Rules of Criminal Procedure in Postconviction Proceedings*, 46 AM. CRIM. L. REV. 1, 71 (2009) (concluding that "full retroactivity...serves the goals of according fairness to similarly situated litigants").

[162] We must remember that our analysis here is whether the Supreme Court intended for *Padilla* to be retroactive. Because the Supreme Court does not create new constitutional rules unless they will apply retroactively to all those similarly situated, *Padilla* should apply retroactively.

[163] That does not mean that a *Teague* analysis is never called for. *See supra* p. 13 (showing how the *Teague* analysis of "new rules" affects

where the Court does announce a 'new' rule of constitutional criminal procedure in the exercise of its collateral review powers, it will be doing so because the new rule fits within one of the two *Teague* exceptions, and, therefore, applies retroactively to all similarly situated cases."[164] Therefore, even in the unlikely event Supreme Court intended for *Padilla* to be considered a "new rule," one of the *Teague* exceptions necessarily applies, and the rule applies retroactively.

3. The Supreme Court Has Already Applied *Padilla* Retroactively

Less than a week after *Padilla* came down, the Supreme Court "remanded [a case back] to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Padilla*[.]"[165] The Supreme Court's remand undercuts the argument that *Padilla* should apply only prospectively. When the Supreme Court decided *Padilla*, it announced the rule that non-citizens who are deported as a result of the ineffective assistance of counsel can challenge their underlying conviction. Also, in addition to *announcing* the rule of *Padilla*, the *Padilla* Court also *applied* the rule of *Padilla* to Jose Padilla's 2002

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the analysis of "newly recognized" rights under federal habeas law). Moreover, it has been noted that "*Teague* does a poor job" of helping courts decide whether the rule of a case should apply retroactively. Santos-Sanchez v. United States, 5:06-CV-153, 2011 WL 3793691, slip op. at 3 (S.D. Tex. Aug. 24, 2011).

[164] People v. De Jesus, 30 Misc. 3d 1203(A), slip op. at 10-11 (N.Y. Sup. Ct. 2010) (unreported disposition).

[165] Santos-Sanchez v. United States, 130 S. Ct. 2340, 2340 (2010).

conviction.[166] This was the first instance of the Supreme Court applying the rule of *Padilla* retroactively.[167]

Less than a week later, the Supreme Court applied *Padilla* retroactively *for a second time*, to Jesus Santos-Sanchez's 2003 conviction.[168] In other words, the Supreme Court has itself applied *Padilla* retroactively on two separate occasions: once to Jose Padilla's 2002 conviction, and then again to Jesus Santos-Sanchez's 2003 conviction. Only a few courts have noted the significance of this fact.[169] Considering that one of the goals of the Supreme Court's retroactivity jurisprudence is to "avoid[] the inequity resulting from the uneven application" of the law,[170] courts that refuse to apply *Padilla* to convictions that occurred prior to the decision in *Padilla* do so in direct conflict with the Supreme Court.

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[166] "Final judgment was entered October 4, 2002." Com. v. Padilla, 253 S.W.3d 482, 483 (Ky. 2008) *rev'd and remanded sub nom.* Padilla v. Kentucky, 130 S. Ct. 1473 (2010).

[167] Sanchez v. United States, 5:06-CV-153, 2011 WL 3793691, slip op. at 3 (S.D. Tex. Aug. 24, 2011) (finding that "the Supreme Court's *holding (rule) was applied* to Padilla") (emphasis in original).

[168] Santos-Sanchez, 130 S. Ct. at 2340; *see also* Santos-Sanchez v. United States, 548 F.3d 327, 329 (5th Cir. 2008) ("[In September, 2003,] Santos-Sanchez appeared before a magistrate judge and pleaded guilty.") *cert. granted and judgment vacated*, 130 S. Ct. at 2340 (2010).

[169] Research for this article uncovered only one published opinion that explicitly stated that the Supreme Court's remand of *Santos-Sanchez* was evidence that *Padilla* should apply retroactively. Com. v. Clarke, 949 N.E.2d 892, 904 (Mass. 2011) ("A few days after its decision in *Padilla,* the Supreme Court remanded [*Santos-Sanchez*, id.,] for further consideration in light of *Padilla*. That case, too, was on collateral review and the conviction had become final before the Court's decision in *Padilla.*") (citation omitted).

[170] Teague v. Lane, 489 U.S. 288, 316 (plurality opinion).

D. Evaluation of Common Arguments Against Applying Retroactively

1. The Language of the Concurrences and Dissenting Justices Makes Clear that They Think Padilla is New.

All three circuits that held that *Padilla* did not apply retroactively relied, at least in part, on the fact that the decision in *Padilla*[171] was not unanimous.[172] This argument gives undue weight to the concurring and dissenting justices, and more broadly, to the existence of dissenting opinions as evidence that a decision should not apply retroactively. Moreover, this argument ignores the majority's clear intention to apply *Padilla* retroactively.

Implicit throughout the majority's opinion in *Padilla* is that it will apply retroactively. For example, the *Padilla* Court stated that it was unlikely that *Padilla* would "have a significant effect on those convictions *already obtained* as the result of plea bargains. For at least the *past*

[171] In *Padilla*, Justice Alito wrote a concurring opinion, in which Chief Justice Roberts joined, stating that he would have limited the holding of *Padilla* to finding that a showing of ineffective assistance of counsel required "affirmative misadvice." Padilla v. Kentucky, 130 S. Ct. 1473, 1492 (2010) (Alito, J., concurring); Justice Scalia wrote a dissenting opinion, in which Justice Thomas joined, in which he argued that the Sixth Amendment's right to counsel did not cover the "collateral consequences" of a plea bargain. *Id.* at 1494 (Scalia, J., dissenting).

[172] *See* Chaidez v. United States, 655 F.3d 684, 689 (7th Cir. 2011) ("The majority opinion in *Padilla* drew a concurrence authored by Justice Alito and joined by Chief Justice Roberts, as well as a dissenting opinion authored by Justice Scalia and joined by Justice Thomas. That the members of the *Padilla* Court expressed such an 'array of views' indicates that *Padilla* was not dictated by precedent."); *see also* United States v. Chang Hong, No. 10–6294, 2011 WL 3805763, slip op. at 6 (10th Cir., Aug. 30, 2011), as amended (Sept. 1, 2011) ("We take the concurrence and dissent as support for our conclusion that reasonable jurists did not find the rule in *Padilla* compelled or dictated by the Court's prior precedent.").

15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea."[173] Generally, those who argue that *Padilla* should be applied retroactively have noted that the Court's language implies retroactive application.[174] Similarly, courts that found *Padilla* to apply retroactively have cited that same language.[175]

The main tool in determining whether *Padilla* applies retroactively is Supreme Court precedent. Therefore, it is beyond dispute that the Supreme Court has the power to determine whether cases, including *Padilla*, apply retroactively. Most courts that have considered whether *Padilla* applies retroactively believed that the majority's intent regarding retroactivity warranted discussion.[176] However, many courts that have held *Padilla* is not retroactive have seemed to give more weight to the concurring and dissenting justices.[177] At least some of these courts seem to think that the mere existence of concurring

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[173] Padilla v. Kentucky, 130 S.Ct. 1473, 1485 (2010) (emphasis added).

[174] Dan Kesselbrenner, *A Defending Immigrants Partnership Practice Advisory: Duty of Criminal Defense Counsel Representing an Immigrant Defendant After* Padilla v. Kentucky, *National Immigration Project*, 3 (June 24, 2010), available at http://nationalimmigrationproject.org/legalresources/cd_pa_padilla_retroactivity.pdf (last visited July, 2012).

[175] *See* United States v. Orocio, 645 F.3d 630, 639 (3d Cir. 2011).

[176] *See, e.g.*, United States v. Chang Hong, No. 10–6294, 2011 WL 3805763, slip op. at 10 (10th Cir., Aug. 30, 2011), as amended (Sept. 1, 2011) (holding that *Padilla* does not apply retroactively, but still discussing whether the majority intended for *Padilla* to apply retroactively).

[177] While courts do not generally reveal how much weight they are giving different considerations, some acknowledge that they find the language of the concurrence and dissent more instructive. *See* Chaidez v. United States, 655 F.3d 684, 694 (7th Cir. 2011) (finding that "to the extent that [it was able to] discern whether members of the Court understood *Padilla* to be a new rule, []the clearest indications [were found] in the concurrence and dissent, which [left the court with] no doubt that at least four Justices view *Padilla* as new").

and dissenting opinions evinces that *Padilla* is a new rule.[178] This ignores clear Supreme Court precedent "that the mere existence of a dissent [fails] to show that the rule is new."[179]

Courts holding that *Padilla* did not apply retroactively gave too much weight to their own inferences from the concurring and dissenting opinions, while ignoring the clear intent of the majority, which was to apply *Padilla* retroactively. For example, as the *Chaidez* court notes, the dissenting justices—and, to some extent, the concurring justices—clearly view *Padilla* as "new."[180] But, it is axiomatic that justices who disagree with a decision would regard that decision as new; otherwise, a dissenting justice would be required to argue that the result reached by the majority was dictated by precedent, but that they disagree with that controlling precedent.

2. The Pre-Padilla Split Among the Lower Federal Courts Evinces that the Padilla Decision Announces a "New" Rule.

The argument that the pre-*Padilla* split among lower federal courts demonstrates that *Padilla* is new ignores the basis for the Supreme Court's holding in *Padilla*. In holding that the direct-collateral consequences distinction was inappropriate under *Strickland*, the Court undermined the basis for the lower courts' holding; *Padilla* did not create a new constitutional rule. In fact, in *Padilla*, the Supreme Court noted that it had "never applied a distinction between direct and collateral consequences to

[178] *See id.* at 694 (finding that the concurrence and dissent "leave no doubt that at least four Justices view *Padilla* as new").
[179] Beard v. Banks, 542 U.S. 406, 416 n.5 (2004).
[180] Chaidez v. United States, 655 F.3d 684, 693 (7th Cir. 2011).

define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*."[181]

Because the lower courts' decisions not to apply the 6th Amendment/*Strickland* to immigration consequences of a guilty plea were based on the erroneous direct-collateral consequences distinction, courts' reliance on these earlier opinions was misplaced.[182] Even if we accept, *arguendo*, that the pre-*Padilla* split among lower federal courts was evidence that *Padilla* created a new rule, there is no precedent which gives that split any significant weight. Contrarily, for example, courts considering whether the holding of *Roe v. Flores-Ortega*[183] applied retroactively found that "[d]espite the existence of conflicting authority prior to the Court's decision, and the relative specificity of the rule that the Supreme Court laid out...*Flores–Ortega* did not announce a new rule[,]" and therefore applied retroactively.[184]

"[T]he mere existence of conflicting authority does not necessarily mean a rule is new."[185] In short, courts should not place any significant weight on the pre-*Padilla* split among lower federal courts in their retroactivity analyses because there is no precedent to do so.

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[181] Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010).

[182] *See* Chaidez, 655 F.3d at 697 (7th Cir. 2011) (dissent); *but see* United States v. Chang Hong, 10-6294, 2011 WL 3805763d, slip op. at 7 (10th Cir. Aug. 30, 2011), as amended (Sept. 1, 2011) ("lower courts had adhered to this direct versus collateral dichotomy. The departure from that longstanding legal distinction, and the application of *Strickland* to immigration consequences of a guilty plea, was an extension of *Strickland* into previously untread [sic] grounds"); Chaidezs, 655 F.3d at 689 (finding that "lower courts were split on the issue[, which is evidence that] the outcome of the case was susceptible to reasonable debate . . . [, and] that *Padilla* announced a new rule").

[183] Roe v. Flores-Ortega, 528 U.S. 470, 476 (2000) (obligations of counsel to inform their clients about their appellate rights).

[184] Com. v. Clarke, 949 N.E.2d 892, 901 (2011).

[185] Wright v. West, 505 U.S. 277, 304 (1992) (O'Connor, J., concurring in the judgment)).

3. Padilla is New Because Applying "Collateral Consequences" of a Plea to the 6th Amendment/Strickland Test Has Never Been Done Before

When considering retroactivity under *Teague*, the general rule is that application of an old rule to a new set of facts will not create a new rule.[186] However, some courts have found that the Supreme Court's expansion of *Strickland* into the area of "collateral consequences" of a guilty plea, which had previously been "outside the requirements of the Sixth Amendment," weighed against applying *Padilla* retroactively.[187] By contrast, courts in the past have considered other expansions of *Strickland* to new factual situations to have not created a new rule for *Teague* purposes.[188] Courts that have reached the conclusion that

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[186] Even the *Chiadez* court, which held that *Padilla* created a new rule, acknowledged the general rule that ordinarily new applications of an old rule does not create a new rule for *Teague* purposes. Chaidez, 655 F.3d at 692 (noting that "the application of *Strickland* to unique facts generally will not produce a new rule" citing Williams v. Taylor, 529 U.S. 362, 382 (2000) (Stevens, J., concurring in relevant part)).

[187] United States v. Chang Hong, 10-6294, 2011 WL 3805763, slip op. at 6 (10th Cir. Aug. 30, 2011), as amended (Sept. 1, 2011); *see also* Chaidez, 655 F.3d at 691 (finding that "prior to *Padilla,* the Court had not foreclosed the possibility that advice regarding collateral consequences of a guilty plea could be constitutionally required. But neither had the Court required defense counsel to provide advice regarding consequences collateral to the criminal prosecution at issue") (internal citation omitted).

[188] *See* Newland v. Hall, 527 F.3d 1162, 1197 (11th Cir. 2008) (finding that "[*Williams*] and *Rompilla* are not new law under *Teague.*" (citing Williams v. Taylor, 529 U.S. 362 (2000) and Rompilla v. Beard, 545 U.S. 374, (2005) (holding that there was an obligation of counsel to conduct reasonable investigation to determine mitigating factors to present at penalty phase of capital murder case))); Com. v. Clarke, 949 N.E.2d 892, 901 (2011) (finding that the Third, Fourth, and Ninth Circuits all found the *Flores-Ortega* expansion of *Strickland* not to be a

Padilla does not apply retroactively have not cited an example of a case that created a new rule under *Strickland.* In determining whether the application of *Strickland* to a new set of facts constituted a new rule for *Teague* purposes, many courts[189] cited Justice Kennedy's concurrence in *Wright v. West*: "[where, as with *Strickland*, you have] a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent."[190]

The Seventh Circuit found that *Padilla* was a "rare exception" to the rule that a case does not announce a new rule if it is merely applying a new set of facts to an old rule (*Strickland*).[191] In so holding, the *Chiadez* court said that *Padilla*'s holding "requir[ing] a criminal defense attorney to provide advice about matters not directly related to their client's criminal prosecution...was sufficiently novel as to qualify as a new rule."[192] However, the Supreme Court had "never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*[.]"[193] Additionally, the Supreme Court recognized, nearly a decade before *Padilla*, that "alien defendants considering whether to enter into a plea

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new rule, but that the Fifth Circuit assumed *Flores-Ortega* to be a new rule without explanation (citing Roe v. Flores–Ortega, 528 U.S. 470, 476 (2000) (obligations of counsel to inform their clients about their appellate rights)) (internal citations omitted)).

[189] *See, e.g.*, Chaidez, 655 F.3d at 692; United States v. Orocio, 645 F.3d 630, 639 (3d Cir. 2011); Tanner v. McDaniel, 493 F.3d 1135, 1144 (9th Cir. 2007); United States v. Hubenig, 6:03-MJ-040, 2010 WL 2650625, slip op. at 5 (E.D. Cal. July 1, 2010).

[190] 505 U.S. 277, 309 (1992) (Kennedy, J., concurring).

[191] Chaidez, 655 F.3d at 693.

[192] *Id.*

[193] Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010) (internal citations omitted).

agreement are acutely aware of the immigration consequences of their convictions."[194]

V. Proposal

Common sense and fundamental fairness dictate that *Padilla v. Kentucky* be applied retroactively. If Padilla is applied retroactively, the next question is should *Padilla* apply retroactively to only *some* categories of petitioners. For example, one court found that *Padilla* would apply to "guilty pleas obtained after the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996[.]"[195] There is indirect support for this proposition from *Padilla*: "[f]or at least *the past 15 years*, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea."[196] In other words, the Supreme Court's backward-looking language, which supports applying *Padilla* retroactively, can also be offered as support for limiting *Padilla* to only those whose convictions which occurred after, approximately, March, 1995.[197]

There are essentially three categories of *Padilla* petitioners:

1) Those who pled guilty prior to March, 1995
2) Those who pled guilty after March, 1995, but before the March, 2010 *Padilla* decision
3) Those who pled guilty after the March, 2010 *Padilla* decision

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[194] I.N.S. v. St. Cyr, 533 U.S. 289, 322 (2001) (citing Magana-Pizano v. INS, 200 F.3d 603, 612 (C.A.9 1999)).

[195] Com. v. Clarke, 949 N.E.2d at 895. The *Clarke* court does not rule out the possibility that *Padilla* applies to convictions obtained before the mid-1990s.

[196] Padilla v. Kentucky, 130 S. Ct. 1473, 1485 (2010) (emphasis added).

[197] It should also be noted that the Supreme Court says "*at least* 15 years." *Id.* (emphasis added).

No one disputes that *Padilla* applies, prospectively, to those in category 3). Similarly, for courts that have found that *Padilla* applies retroactively, *Padilla* will apply to pleas between 1995 and 2010. Therefore, the question, which courts have generally not considered, is, if *Padilla* does apply retroactively, does it apply to convictions that occurred before 1995. For the same reasons that *Padilla* applies to those that occurred after 1995—namely, that the result is dictated by the Court's opinion in *Teague*, and fundamental fairness—*Padilla* should apply to convictions that occurred before 1995.

Firstly, if, as courts applying *Padilla* retroactively have held, *Padilla* is merely an application of new facts to an old rule, then *Padilla* will apply retroactively to all cases.[198] In other words, *Padilla* merely holds that *Strickland*'s test for effective assistance of counsel applies to the deportation context. Courts are generally experienced in handling *Strickland* claims.[199] And, in doing so, courts are cautious in avoiding "hindsight bias."[200] With this in mind, the question becomes how can *Padilla/Strickland* apply to a conviction that occurred when, perhaps, "professional norms [did not]...impose[] an obligation on counsel to provide advice on the deportation consequences

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[198] *See, e.g.*, Com. v. Clarke, 949 N.E.2d at 903 (finding that *Padilla* "is the definitive application of an established constitutional standard on a case-by-case basis, incorporating evolving professional norms (on which the standard relies) to new facts. It is not the creation of a new constitutional rule").

[199] *See* Padilla, 130 S. Ct. at 1485 ("There is no reason to doubt that lower courts—now quite experienced with applying *Strickland*—can effectively and efficiently use its framework to separate specious claims from those with substantial merit.").

[200] *See* Rompilla v. Beard, 545 U.S. 374, 381 (2005) (finding that "hindsight is discounted by pegging adequacy to 'counsel's perspective at the time' investigative decisions are made, and by giving deference to counsel's judgments" (citing Strickland v. Washington, 466 US 668, 689 (1984))).

of a client's plea."[201] The answer is that pre-1995 *Padilla* claims will be limited.

Applying pre-1995 professional norms, *Padilla* claims may be limited to affirmative misadvice; Justice Alito's concurrence, highlighting his dispute with the majority in *Padilla*, said "that a criminal defense attorney who refrains from providing immigration advice does not violate prevailing professional norms."[202] In other words, the main difference between the majority and concurring Justices, in *Padilla*, is that the latter would have limited *Strickland* violations, in the immigration context, to when a lawyer gives his client affirmative misadvice.[203] In this context, the Court's statement that, "For at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea,"[204] exists as a justification for faulting attorneys who are silent about their client's inevitable deportation—as opposed to faulting only those attorneys who give affirmative misadvice—and does not exist to limit *Padilla* claims to those convictions that have occurred in the past fifteen years. Therefore, the Court's opinion should not be used to limit *Padilla*'s reach to pleas occurring within a certain timeframe.

Secondly, fundamental fairness dictates that *Padilla* apply to anyone who can surmount *Strickland*'s high bar. However, courts considering whether *Padilla* applies retroactively have not considered fundamental fairness—or even a balancing approach.[205] It is understandable that

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[201] *Padilla*, 130 S. Ct. at 1485.

[202] *Id.* at 1488 (2010) (Alito, J., concurring).

[203] Daniel Kanstroom, *The Right to Deportation Counsel in* Padilla v. Kentucky*: the Challenging Construction of the Fifth-and-a-half Amendment*, 58 UCLA L. Rev. 1461, 1480 (2011) ("Justice Alito and Chief Justice Roberts concurred, but only as to misadvice.").

[204] *Padilla*, 130 S. Ct. at 1485.

[205] While courts have failed to consider fundamental fairness, there is much scholarly literature devoted to considering how fairness affects

courts do not take into equitable considerations in their retroactivity analysis because nothing in *Teague* or its progeny permits such considerations. But the merits of *Teague* as a basis for determining retroactively is, at best, questionable; at worst, the admittedly "confused and confusing"[206] case law governing the retroactive application of constitutional rules creates an uneven, unfair and unjust basis for determining whether a rule applies retroactively.[207]

Consequently, as, perhaps, *Padilla* demonstrates, fairness should play more of a factor in whether a newly-recognized constitutional rule of criminal procedure applies to a class of petitioners. In determining whether *Padilla* applies retroactively, courts should follow the Supreme Court's lead in *Padilla*, and refrain from "engaging within the traditional frames of formalism [and] the institutional concerns of courts[;]"[208] instead, courts should consider fundamental fairness in their retroactivity analysis.

The Supreme Court does not *create* new constitutional rules of criminal procedure. Therefore, non-citizens who were not given appropriate advice regarding the immigration consequences of their plea have necessarily had their constitutional rights violated. As such,

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the plight of non-citizens within the criminal justice system. *See, e.g.*, Daniel Kanstroom, *The Right to Deportation Counsel in* Padilla v. Kentucky*: the Challenging Construction of the Fifth-and-a-half Amendment*, 58 UCLA L. Rev. 1461, 1465 (2011) (concluding that "[d]eportation...must comply with [the] constitutional requirements of fundamental fairness and due process").

[206] Danforth v. Minnesota, 552 U.S. 264, 271 (2008).

[207] *See* Santos-Sanchez v. United States, 5:06-CV-153, 2011 WL 3793691, slip op. at 3 (S.D. Tex. Aug. 24, 2011) (finding that "*Teague* does a poor job" of helping courts decide whether the rule of a case should apply retroactively).

[208] McGregor Smyth, *From "Collateral" to "Integral": The Seismic Evolution of* Padilla v. Kentucky *and Its Impact on Penalties Beyond Deportation*, 54 HOW. L.J. 795, 798 (2011).

courts should find that *Padilla* applies retroactively to all cases on collateral review, so that non-citizens who have had their rights violated, and have been deported as a result, have redress.

VI. Conclusion

The Supreme Court's "retroactivity" case law dictates that *Padilla v. Kentucky* apply retroactively. However, the courts that have considered whether *Padilla* applies retroactively have reached mixed results. Courts have generally failed to mention the Supreme Court's own statement that, to avoid issuing constitutional advisory opinions, it will not apply a rule to a case on collateral review unless that rule applies to *all others similarly situated.* Moreover, the Supreme Court itself applied *Padilla* retroactively. Therefore, properly considering the Supreme Court's "retroactivity" case law, *Padilla* should apply retroactively.

Absent from the Supreme Court's retroactivity case law is consideration of fundamental fairness. Fairness requires that the rule of *Padilla* be applied retroactively to any petitioner who can surmount *Strickland*'s high bar to show ineffective assistance of counsel. To bring successful *Padilla* claims, petitioners must show that they received ineffective assistance of counsel, and that they were deported as a result. Petitioners who can make such a showing have necessarily suffered a constitutional violation. The question then is whether they will have redress. Fundamental fairness requires that *Padilla* apply retroactively so that those who were deported as a result of their constitutionally ineffective assistance of counsel have a remedy. In short, *Padilla v. Kentucky* should apply retroactively.[209]

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[209] Just weeks before this article was published, the Supreme Court of the United States decided *Chaidez v. United States.* In a 7-2 decision,

the Supreme Court decided that *Padilla* did not apply retroactively. Both the Opinion of the Court and the dissent provide a comprehensive "*Teague*" analysis. However, the Court did not distinguish Jose Padilla's 2002 conviction and Roselva Chaidez's 2004 conviction. Nor did the Court explain why the former warranted retroactive application but the latter did not. In short, the Court's analysis ignored fairness and common sense. Although *Padilla*'s retroactivity is now settled, the approach to retroactivity offered in this Article can be applied, by analogy, to future retroactivity cases.

ARTICLE

THE NECESSARY OPPORTUNISM OF THE COMMON LAW FIRST AMENDMENT

Chris Stangl[*]

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ABSTRACT

The First Amendment historically has been interpreted to provide greater and greater protection to more and more forms of expression. The notion of an originalist First Amendment has never commanded a majority of the Supreme Court and is unlikely to do so. Instead the development of the First Amendment has followed a common law trajectory. As the reach of its protections expands, so to do its attractiveness for arguments that may be more accurately located elsewhere in the Constitution's text. Such opportunism is a predictable, even necessary consequence of the First Amendment's common law development, and the Supreme Court tacitly endorses such opportunism by consistently declining to issue saving constructions to laws that implicate the First Amendment. While both Justice Thomas and Justice Alito have recently offered anti-opportunism readings of the First Amendment, neither is likely to garner a majority. The common law First Amendment—and the opportunistic use of it—will continue apace.

The common law approach that focuses on the evolution of precedent over time has much to recommend as a critique of originalism and a defense of interpreting the U.S. Constitution as an evolving document.[1] This approach argues against the possibility of a completely faithful

[1] This essay draws mostly on the common law approach developed by David A. Strauss. *See* DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010) [hereinafter STRAUSS, LIVING CONSTITUTION]; David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996) [hereinafter Strauss, *Common Law*]; David A. Strauss, *Freedom of Speech and the Common-Law Constitution*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) [hereinafter Strauss, *Freedom of Speech*].

originalist approach.[2] This is especially true regarding the development of the Free Speech Clause of the First Amendment over time, which, this approach claims, is marked by three central principles: recognition of the core importance of the right to criticize the government, the distinction between high-value and low-value speech, and distinguishing among differing regulations on speech.[3] Indeed, many of the arguments on behalf of the common law view are formidable.

However, even if agreed upon, these principles are not self-executing in their case-specific applications. While there does exist a widely shared general narrative of the First Amendment's development, it is not the product of only one perspective.[4] Instead, it is imperative to understand the presence of two competing traditions of First Amendment interpretation: one libertarian in orientation, the other egalitarian.[5] Thus, in spite of the

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[2] STRAUSS, LIVING CONSTITUTION, *supra* note 1, at 58 (noting that "the evidence we have of the original understandings of the First Amendment does not support the idea that the framers mean to establish protections of free expression comparable to those with which we are familiar today," and mentioning the specific categories of seditious libel, blasphemy, and defamation).

[3] *Id.* at 53-55.

[4] *See, e.g.*, Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 144-46 (2010).

[5] *Id.* at 144 ("In the first [egalitarian] vision[,] . . . free speech rights serve an overarching interest in political equality. Free speech as equality embraces first an antidiscrimination principle: in upholding the speech rights of anarchists, syndicalists, communists, civil rights marchers, Maoist flag burners, and other marginal, dissident, or unorthodox speakers, the Court protects members of ideological minorities who are likely to be the target of the majority's animus or selective indiffer-ence."). *See also id.* at 145 ("The second [libertarian] vision of free speech, by contrast, sees free speech as serving the interest of political liberty. On this view[,] . . . the First Amendment is a negative check on government tyranny, and treats with skepticism all government efforts as speech suppression that might skew the private ordering of ideas. And on this view, members of the public are trusted

desirability of a single overarching narrative, the common law approach must contain enough narrative richness to credit the contributions of each tradition.

Additionally, proponents of the common law approach must pay special attention to considerations of scope. The common law approach provides a more accurate reading of the significant expansion of free speech rights in the United States over time than does any originalist or textualist account. This fact, however, also raises questions of what limits should exist on what is covered by the Free Speech clause. Both the libertarian and egalitarian traditions can provide coherent responses. However, where these traditions agree, one may still argue that free speech arguments are being used opportunistically precisely because of the high success rate of speech-protecting arguments.[6]

Part I of this essay provides a brief overview of the common law approach. This overview will outline arguments for the common law approach and note the reasons why this approach is particularly useful in examining the First Amendment. These reasons are both prudential and philosophical.

Part II examines the differences between the libertarian and egalitarian visions of the First Amendment. Of special concern are the subtle differences in how each vision would characterize the classical narrative of development from World War I era cases to the Supreme Court's decision in *Brandenburg v. Ohio.*[7] While each perspective notes the important contributions of Justice Oliver Wendell Holmes and Judge Learned Hand, the libertarian vision tends to stress Hand's influence on

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to make their own individual evaluations of speech, and government is forbidden to intervene for paternalistic or redistributive reasons.").

[6] Frederick Schauer, *First Amendment Opportunism, in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA (Lee C. Bollinger & Geoffrey R. Stone eds. 2002).

[7] *See* Brandenburg v. Ohio, 395 U.S. 444 (1969).

Holmes' shift in perspective from his opinion for the Court in *Schenck v. United States*[8] to his dissent in *Abrams v. United States*[9] Further, the libertarian vision tends to focus more attention on pre-World War I "libertarian radicalism."[10] In each example, egalitarians hew more closely to Supreme Court decisions and prefer a more streamlined narrative generally.

Part III engages the notion of "First Amendment opportunism" and its compatibility with the common law approach.[11] Implicit in the opportunism argument – and explicit in other critiques – is the idea that a common law approach leads to an untethered First Amendment, one that can be utilized to bolster the prospects of positions whose more obvious defenses come from outside the parameters of the First Amendment.[12] This examination will focus on recent dissents where a majority of both the libertarian and egalitarian wings of the Court were in agreement.

Taken as a whole, the common law approach is superior practically and theoretically. The evolution of how the Supreme Court addresses free speech claims is testament to this superiority. A level of First Amendment opportunism does exist, but this need not be a problem so long as both the libertarian and egalitarian visions are given their due.

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[8] *See* Schenck v. United States, 249 U.S. 47 (1919).

[9] *See* Abrams v. United States, 250 U.S. 616 (1919).

[10] DAVID RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 15 (1997).

[11] Schauer, *supra* note 6, at 196-97 ("But if instead we see the First Amendment as intrinsically, fundamentally, or even just largely as an artifact of a constitution that is itself a common-law document, then it would be hard to make sense of the idea of the First Amendment, and arguably of the idea of free speech, apart from what the courts have made of it, and apart from the necessarily and nonproblematically opportunistic way of the common law.").

[12] *Id.* at 192 ("[T]he First Amendment appears to be, in the United States in the last thirty years, the argument of choice for those who find that their intrinsically preferred argument is unlikely to prevail.").

I. The Common Law Approach to Constitutional Interpretation

A. Practical Arguments for the Common Law Approach

One prudential argument on behalf of the common law approach is that it does a better job of explaining our actual practices than any other perspective.[13] No single judicial approach to constitutional interpretation has consistently held sway, and any accurate historical treatment must accommodate this reality. Even in a normative debate, room remains for differences of opinion within any broad interpretive approach over how to treat existing precedent.[14] The common law approach, by giving precedent its due, better explains how the Constitution is interpreted in actuality.

A related argument in favor of the common law understanding is that it is more workable in practice.[15] By emphasizing the process of interpreting and applying precedent, the common law approach stresses the skills most would expect judges to possess. This is preferable to approaches, such as originalism, that claim only to be humbly following the intentions of the framers of the text, but asks judges to perform complicated acts of historical

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[13] STRAUSS, LIVING CONSTITUTION, *supra* note 1, at 44 ("[T]he governing principles of constitutional law are the product of precedents, not of the text or the original understandings. And in actual practice of constitutional law, precedents and arguments about fairness and social policy are dominant.").

[14] This is true of originalism as well. For a recent example, see Justice Thomas's concurrence in *McDonald v. Chicago*, 130 S. Ct. 3020, 3059 (2010) (Thomas, J., concurring), where he argues that originalist incorporation of the Second Amendment should occur under the Fourteenth Amendment's Privileges and Immunities Clause, rather than under the Due Process Clause.

[15] *See* STRAUSS, LIVING CONSTITUTION, *supra* note 1, at 43.

interpretation for which they are not suitably trained.[16] The workability of the common law approach reinforces a further argument on its behalf: The common law approach is more justifiable.[17] The common law view provides the best justification for the existing and common practice for valuing precedent so highly.

A final argument on behalf of the common law approach is that, contrary to the views of originalists, it actually does a better job of restraining judges.[18] According to the common law approach, arguments linking non-originalist approaches to judicial activism fail to note that it is judicial review that is undemocratic, not any given interpretive approach.[19] Interpreting original intent (or meaning) is no less an interpretive enterprise than interpreting precedents. In fact, the plausibility of the former typically depends on established precedent serving as a boundary marking the limits of acceptable interpretation.[20]

The arguments for common law constitutionalism are particularly relevant regarding the First Amendment. Proponents of the common law approach point to the

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[16] *Id.* at 18-21.

[17] *Id.* at 43-44.

[18] Strauss, *Common Law, supra* note 1, at 879.

[19] STRAUSS, LIVING CONSTITUTION, *supra* note 1, at 47.

[20] Strauss, *Common Law, supra* note 1, at 926-27 ("The notion that the text of the Constitution is an effective limit on judges is plausible only if one assumes a background of highly developed precedent. Within the limits set by precedent, paying more attention to text might indeed limit judges' discretion. The appeal of textualism as a limit on judges – as the argument was made, most famously for example, by Justice Black – stems entirely from the assumption that the text will be used to resolve disputes within the gaps left by precedent. If we assume that the various clauses of the Constitution are to be interpreted in something like the current fashion, then judges may indeed be more 'restrained' if they insist on some relatively explicit textual source for any constitutional right. But that is primarily a demonstration of the restraining effect of precedent, not of text; the bulk of the restraint by far is provided by precedent").

practical impossibility of following any originalist understanding of the First Amendment.[21] For example, the approach of Justice Black, the most explicitly textualist understanding of the First Amendment, never garnered majority support in any Court holding.[22] The contemporary understanding of the First Amendment, including now non-controversial applications of the First Amendment, cannot be explained in an originalist manner.

B. Conceptual Arguments on Behalf of the Common Law Approach

Aside from noting the practical reasons why an originalist understanding of the First Amendment is problematic, proponents of the common law view also allude to its philosophical grounding. This is not to say that common law constitutionalism is presented as a self-contained system. However, the common law approach possesses elements of a philosophical architecture meant to indicate its adaptability and to parallel the prudential arguments made in support of it.

For example, one defense of the common law approach against the charge of indeterminacy is to note how well its account of the development of First Amendment law tracks with John Rawls' notion of "reflective equilibrium."[23] The introduction of this concept is intended as a description of the outcome of the accretion of precedent over time insofar as it accurately characterizes

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[21] STRAUSS, LIVING CONSTITUTION, *supra* note 1, at 8-9, 29-31.

[22] *See* Griswold v. Connecticut, 381 US 479, 519 (1965) (Black, J., dissenting) (arguing for a textualist reading of the First Amendment).

[23] Strauss, *Common Law supra* note 1, at 888 ("The common law approach captures the central features of our practices as a descriptive matter. At the same time, it justifies our current practices, in reflective equilibrium, to anyone who considers our current practices to be generally acceptable – either as an original matter or because they are the best practices that can be achieved for now in our society.").

cases where different perspectives on the First Amendment are in agreement. To the extent that the evolution of precedent has guided the understanding of relevant constitutional language, then this understanding is something that is arrived at, and a condition that may be changed by a future decision, much like how Rawls characterized reflective equilibrium.[24] In this manner, reflective equilibrium is a useful concept to describe the actual practices of constitutional interpretation.

Common law constitutionalism emphasizes that the current generation should not be beholden to previous ones, including the founding generation.[25] With adherence to precedent playing the reflective role, the evolution of First Amendment standards over time is not to be feared. Indeed, it is sensible to speak of an established tradition of expanding First Amendment standards and of the common law approach as marked by "rational traditionalism."[26]

This traditionalism limits overreach by stressing "humility about the power of individual human reason."[27] By acknowledging the limitation of abstract reasoning and focusing instead on the solid grounding provided by past precedent, the common law approach is a traditionalist account. This emphasis on previously established workable interpretations is consistent with what is called "bounded

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[24] JOHN RAWLS, A THEORY OF JUSTICE 20-21 (1971) ("But this equilibrium is not necessarily stable. It is liable to be upset by further examination of the conditions which should be imposed on the contractual situation and by particular cases which may lead us to revise our judgments."). *Id.* at 48 ("As we have seen, this state is one reached after a person has weighed various proposed conceptions and he has either revised his judgments to accord with one of them or held fast to his initial convictions (and the corresponding conception).").

[25] STRAUSS, LIVING CONSTITUTION, *supra* note 1, at 18 ("Most fundamental of all, originalists have yet to come to grips with the most obvious and famous issue, one raised by Thomas Jefferson among others. The world belongs to the living, Jefferson said.").

[26] Strauss, *Common Law, supra* note 1, at 891-94.

[27] STRAUSS, LIVING CONSTITUTION, *supra* note 1, at 41.

rationality,"–recognition that reliable outcomes are best reached by treating some elements of the present controversy as already settled.[28]

Another theoretical concept is used to explain the virtue of the common law approach's conventionalism–Rawls' notion of an overlapping consensus.[29] The notion of an overlapping consensus refers to the sort of agreement over basic political principles that are possible even among individuals who have different beliefs on notions of the good, or differing comprehensive moral views.[30] The common law approach is compatible with the idea of an overlapping consensus in that both imply a core area of agreement that is possible even given substantially different interpretive perspectives. This core provides stability that is not possible through a simple agreement to respect differences.[31] While disagreements inevitably arise over how to apply a given precedent, or even over whether or not a particular precedent applies, this should not distract from the role of precedent in constitutional interpretation, an essential component to the core of the constitutional approach.

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[28] *Id.* at 894 ("In modern terms one might say that traditionalism is a recognition of bounded rationality. Humans are not perfect computing machines. People do not have the resources, intellectual and otherwise, to consider every question anew with any hope of consistently reaching the right result.") (footnote omitted).

[29] Strauss, *Common Law*, *supra* note 1, at 907 ("Conventionalism is a generalization of the notion that it is more important that some things be settled than that they be settled right. The text of the Constitution is accepted (to adapt a term used in a related way by its originator) by an 'overlapping consensus': whatever their disagreements, people can agree that the text of the Constitution is to be respected."). For Rawls's usage, *see* JOHN RAWLS, POLITICAL LIBERALISM 133-72 (1993).

[30] RAWLS, POLITICAL LIBERALISM, *supra* note 29, at 134-40.

[31] *Id.* at 148 ("The test for this is whether the consensus is stable with respect to changes in the distribution of power among views. This feature of stability highlights a basic contrast between an overlapping consensus and a modus vivendi, the stability of which does depend on happenstance and a balance of relative forces.").

Further, in arguing on behalf of his notion of an overlapping consensus, Rawls stressed the need for "reasonable pluralism."[32] Reasonable pluralism is compatible with the notion of an overlapping consensus to the extent that the substance of the overlapping consensus is a set of commitments that are common to all reasonable comprehensive doctrines. Such a perspective is useful in making sense of fundamental aspects of the evolution of First Amendment law, such as the commitment to protecting core political speech. There is a clear line connecting the reasonable baseline assertion that the First Amendment protects core political speech with the reality that the boundaries of that commitment have been marked differently at various times.

In short, the common law approach makes two important contributions. First, it provides a historically grounded way of understanding how the First Amendment has been interpreted. Second, it offers a theoretically rooted basis justifying such a precedent-heavy method of determining its meaning.

At the same time, each contribution is open to challenge. The historical development of First Amendment law may feature a settled general narrative but also possesses room for important differences in which details – as in whose contributions – are emphasized. Even the broad historical narrative will be related differently depending on whether it is related by one who sees the First Amendment through a libertarian or egalitarian lens.[33]

The theoretical argument for the common law approach draws heavily on the historical reality but also notes inherent benefits to seeing the First Amendment as properly understood as the consequences of decades of precedent. However, this view is open to the frequently made critique that this developed precedent has warped the

[32] *Id.* at xviii-xix.
[33] Sullivan, *supra* note 4, at 144-46.

actual meaning of the First Amendment. Of particular potency is the argument that the First Amendment has become a repository for arguments that are likely to fail if rooted in other parts of the Constitution that more naturally match the controversy at hand and thus, grabbing at the heightened reputation of the First Amendment, are framed as First Amendment controversies.[34] Each of these critiques will be taken up in turn.

II. Competing Narratives of the Development of the Common Law First Amendment

The common law approach rightly notes that the First Amendment, as presently understood, is exceedingly difficult, if not impossible, to reconcile with a textualist understanding of the First Amendment.[35] However, this alone does not vindicate the common law description. A careful reading of the common law approach shows that it permits differing narrative characterizations of how the First Amendment has evolved.

At one level, judgments regarding the extent to which a particular case (*Abrams*, *Masses*,[36] or *Whitney*[37]) or Justice/judge (Holmes, Hand, or Brandeis) is stressed affect how the overall narrative is constructed. Additional important questions that color and shade the emerging narrative of the evolutionary process by which the First Amendment developed exist within this framework. For example, when considering Justice Holmes' sizable role, how should the relationship of his *Schenck* opinion to his *Abrams* dissent be characterized?

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[34] Schauer, *supra* note 6, at 191 ("The arguments selected, however, are less likely under these circumstances to be selected for their intrinsic merit than for the likelihood that they will succeed.").

[35] STRAUSS, LIVING CONSTITUTION, *supra* note 1, at 8-10.

[36] *See* Masses Pub. Co. v. Patten, 244 F. 535 (S.D.N.Y. 1917), *rev'd*, 264 F. 24 (2d Cir. 1917).

[37] *See* Whitney v. California, 274 U.S. 357 (1927).

Further, should the common law narrative focus solely on Supreme Court decisions, or ought it take account of lower-court decisions such as Learned Hand's opinion in *Masses*? Emphasizing *Masses* opens the door to considering pre-WWI activity in a way that most proponents of the libertarian view find favorable. In a similar vein, should the narrative include the contributions of important legal scholars? For example, an analysis of Zechariah Chafee's influence on Justice Holmes might bolster the egalitarian argument on behalf of Holmes' contributions.

Questions such as these counsel caution in accepting a given narrative as settled; they do not prove the futility of the common law approach. In fact, a common law narrative that wrestles with such questions in good faith serves as the best reminder that the common law approach is justified roughly to the extent that it avoids the originalist assumption that a single, unimpeachable characterization exists.[38] A proper common law narrative requires a balance between putting forth a shared history that can shoulder the weight of serving as precedent and noting the joints that lead different groups (libertarians and egalitarians in this telling) to emphasize different aspects of the narrative. Several specific examples will help to make this clear.

A. The Importance of Pre-World War I Activity to the Libertarian Narrative

A typical version of the common law approach focuses on the twentieth century and almost exclusively on the Supreme Court.[39] It combines the core political speech narrative that began with *Schenck* and *Abrams* and culminated with *Brandenburg* with other key decisions

[38] STRAUSS, LIVING CONSTITUTION, *supra* note 1, at 7-31.
[39] *Id.* at 62-76.

roughly contemporary with *Brandenburg* such as *New York Times Co. v. Sullivan*[40] and *New York Times Co. v. United States*[41] that expanded the reach of the clause's protections.[42] Nothing that happened prior to World War I is examined in any detail.[43]

While the common law historical narrative can plausibly begin with the World War I era, libertarians view this narrative of the First Amendment's development as historically truncated in its failure to acknowledge other actors who sought to begin the historical narrative earlier. By limiting itself only to a few important Supreme Court cases that advanced the understanding of the First Amendment, it erroneously treats the Supreme Court as the sole source of this evolutionary process. While contemporary understandings of the First Amendment's development justifiably focus on the Supreme Court as a leading protector of free speech rights, the Court's role is the culmination of the evolutionary process that the common law approach stresses and is neither a permanent nor an exclusive feature of it. The common law narrative tends to evince little skepticism of the Supreme Court's role, even though the Court, pre-WWI, showed little interest in hearing from those who sought to expand the reach and understanding of the Free Speech Clause.[44] Thus, both on their own terms, and for the influence that they had on subsequent arguments centering around more

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[40] *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[41] *See* New York Times Co. v. United States, 403 U.S. 713 (1971).

[42] STRAUSS, LIVING CONSTITUTION, *supra* note 1, at 53-56.

[43] Strauss, *Freedom of Speech*, *supra* note 1, at 44 ("The American system of freedom of expression, as we know it, did not begin to emerge as a coherent body of legal principles until well into the twentieth century – in opinions written in a series of cases decided just after World War I.").

[44] RABBAN, *supra* note 10, at 15 ("Most dramatically, no group of Americans was more hostile to free speech claims before World War I than the judiciary, and no judges were more hostile than the justices on the United States Supreme Court.").

mainstream First Amendment disputes, the contributions of so-called "libertarian radicalism" of the late-nineteenth and early-twentieth century should receive greater attention in the common law narrative.[45]

For example, while the Comstock Act finds few defenders today, at the time of its implementation, the most vociferous opposition came from libertarian radical thinkers such as Theodore Schroeder and Gilbert Roe, whose arguments were focused less on a framework of core political speech than on opposing obscenity prosecutions.[46] The libertarian radical perspective was heavily influenced by the abolitionist movement and was thus less inclined to understand the Free Speech Clause as limited by a notion of the public good.[47] In this sense, libertarian radicals treated the First Amendment "opportunistically."[48] This desire to expand the scope of the First Amendment, and the refusal to defer to any established notion of the public interest, ran counter to the Court's own preferences at the time. In short, libertarian radicals presented a vision of the value of the First Amendment different from the standard common law account of the time, yet one that ultimately came to be viewed as largely conventional.

Additionally, while Schroeder and Roe were outside the mainstream that appealed to influential Justices such as Holmes and Brandeis, the scholars who influenced these Justices were, in fact, influenced by strains of the libertarian radical perspective.[49] Furthermore, Schroeder

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[45] *Id.* at 23.

[46] *Id.* at 27-74.

[47] *Id.* at 28 ("For some social purists, including Anthony Comstock, expressions of libertarian radical views about religion and sex were examples of blasphemy and obscenity that should be suppressed in the public interest.").

[48] Schauer, *supra* note 6, at 191-93.

[49] As Rabban demonstrates, Ernst Freund called Zechariah Chafee's attention to Schroeder's work in a personal letter. *See* RABBAN, *supra* note 10, at 303 n.13.

and Roe helped advance what evolved to become a core principle of free speech that seems not to have received much attention from the common law perspective: protection for free speech as a fundamental principle and not just for specific parties, content areas, or manners of expression.[50] This commitment found fullest expression in Schroeder and Roe's work with the Free Speech League, a forerunner to, and influence on, the American Civil Liberties Union.[51] This advocacy included challenging the era's standards for criminal libel through the *Masses* case, well in advance of *Sullivan*, the case stressed by the common law approach.[52]

These early stirrings helped shape the direction of subsequent debates, both by expanding the range of pro-free speech arguments offered and by influencing the generation of scholars who most influenced Justices Holmes and Brandeis, Justices who are central to the more standard common law narrative. An accounting of the development of the First Amendment that fails to note these contributions is one that risks misconstruing the evolutionary process.

B. Holmes, Hand, and Getting to *Abrams*

Just as the common law narrative can be too limited when it excludes early work such as the contributions of libertarian radicals, it can also be too confined when

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[50] It should go without saying that the common law approach should be read to endorse this view, and the reason it goes unmentioned may well be because it is so uncontroversial at the present. However, the point remains that well before the Court came to enshrine this view, it was being advanced by these libertarian radicals and that departures from this broad principle are usually justified in egalitarian language.

[51] RABBAN, *supra* note 10, at 57-76.

[52] For a discussion on *Masses*, *see id.* at 71. For a discussion on *Sullivan*, *see* STRAUSS, LIVING CONSTITUTION, *supra* note 1, at 53-54, 73-75.

providing a reading of its own standard narrative, which starts with *Schenck* and *Abrams* and ends with *Brandenburg* and *New York Times Co. v. United States.* Most specifically, by seeing the decisions in these latter two cases as featuring a version of the clear and present danger test, the common law perspective risks oversimplifying what happened in between the former two.[53] Even when the common law approach steps back from too clean of a narrative, such as when it acknowledges that there exists no single moment of inspiration for defining what is protected free expression, it quickly qualifies that claim by noting that this is true only because Holmes' *Abrams* opinion was in dissent.[54] However, the reality is more contingent than this. Even if Holmes had been writing for the Court, other moments, such as Brandeis' subtly different celebration of First Amendment values, might be favored from another narrative direction.[55]

Furthermore, even if one were to accede to the necessity of finding a single statement of free speech's value to anchor the narrative account, and even if one were to agree that Holmes' *Abrams* dissent is that statement, the common law approach still must confront what appears to be a significant shift in Holmes' own position, from writing

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[53] STRAUSS, LIVING CONSTITUTION, *supra* note 1, at 64 ("Holmes's opinion asserted that the clear-and-present-danger test required the government to show a high-probability risk of harm that is both immediate and serious . . . . Versions of this test appear in the Pentagon Papers case and in *Brandenburg*.").

[54] *Id.* at 64-65.

[55] Vincent Blasi, *Free Speech and Good Character*, ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA, 73 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) ("Notwithstanding the magisterial articulations of Justices Holmes, Roberts, Jackson, Black, Harlan, and Brennan among others, if there is a single passage in the United States Reports that best captures why the freedom of speech might be considered the linchpin of the American constitutional regime, it is the following paragraph from Justice Brandeis's concurring opinion in *Whitney v. California*") (footnotes omitted).

for the Court in *Schenck* to his dissent in *Abrams*.[56] In *Schenck*, Holmes was troubled enough by the anti-war, anti-conscription pamphlet that the defendants had been handing out to invoke his famous example of "falsely shouting fire in a theatre, and causing a panic . . . .";[57] whereas in *Abrams* – mere months later – Holmes was minimizing the threat posed by "the surreptitious publishing of a silly leaflet by an unknown man."[58] The common law narrative may note the incongruity between Holmes' statements, but it still tends to treat each as a step in a logical progression.[59]

This retrospective view rationalizes Holmes' statements, but it misses an opportunity to fully examine the influences that may have led him to reconsider what he wrote for the Court in *Schenck*.[60] While the common law perspective never claims that *Schenck* and *Abrams* are continuous, it minimizes the extent to which *Schenck* represents a false start.[61] It also ignores the extent to which

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[56] *See, e.g.*, GEOFFREY STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 192-211 (2004).

[57] *See* Schenck v. United States, 249 U.S. 47, 52 (1919).

[58] *See* Abrams v. United States, 250 U.S. 616, 628 (1919).

[59] Strauss, *Freedom of Speech*, *supra* note 1, at 49 ("But as it happens, the principle Holmes called for in the *Abrams* dissent is essentially impossible to square with *Schenck*[,]" and "[i]n retrospect, it is possible to understand what Holmes and Brandeis were doing, even though they were not explicit about it at the time, nor even, probably, fully conscious of it.").

[60] STONE, PERILOUS TIMES, *supra* note 56, at 208 (2004) ("Although the explanation for Holmes's sudden passion for the freedom of speech remains a wonderful mystery, there can be little doubt that his reading in the summer of 1919 and his discussions with [Learned] Hand, [Zechariah] Chafee, and [Harold] Laski sparked a change in his thinking.").

[61] HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 138 (1988) ("We confront therefore a benign conspiracy. With the advent of the Holmes eloquence in *Abrams*, *Schenck* is infused with new vitality and *Debs* is conveniently forgotten. The

Holmes' views announced in *Schenck* were consistent with what Holmes had previously written, especially his opinion in *Patterson v. Colorado.*[62] *Patterson* is notable for how narrowly it read the First Amendment, closely adhering to Blackstone's view that the only significant restriction on the government was a prohibition on prior restraints.[63]

Thus, a less constrained narrative reveals that Holmes, while still a major figure in the evolution of our understanding of the First Amendment, was viewed as advocating a cramped understanding of the First Amendment by libertarian radical activists, numerous scholars influenced by these activists, lower court judges such as Learned Hand, and fellow members of the Supreme Court, such as Justice Harlan in *Patterson.*[64] Hand's opinion in *Masses* is of particular relevance, both because it offers a well-developed alternative to Holmes' viewpoint, and, insofar as contemporary free speech standards are viewed, as somewhat of a Holmes-Hand hybrid.

Just as Holmes would two years later in *Schenck*, Hand was dealing with a prosecution under the Espionage Act of 1917. However, Hand chose to focus more directly and explicitly on what the illustrations and language in question stated and not on any bad tendency that could be imputed to the challenged expression. Hand combined this emphasis on actual assertion – rather than estimating consequences – with a careful construction of the statutory language and reached an "extraordinarily speech-

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tradition is read as though the *Abrams* dissent had in fact been the opinion for the unanimous Court in *Schenck.*").

[62] *See* Patterson v. Colorado, 205 U.S. 454 (1907).

[63] RABBAN, *supra* note 10, at 130-34.

[64] *Id.* at 134 ("Justice Harlan's dissent in *Patterson* contained a vigorous, if undeveloped, defense of free speech under the First Amendment. Harlan explicitly opposed Holmes's conclusion that the First Amendment prevents only prior restraints."). *See Patterson* , 205 U.S. at 465.

protective" interpretation of the 1917 law.[65] Hand's decision distinguished between speech that could be viewed as disloyal or unpatriotic but nonetheless constitutional, and speech that expressly advocated illegal activity which was not:

> Yet to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government. The distinction is not a scholastic subterfuge, but a hard-bought acquisition in the fight for freedom, and the purpose to disregard it must be evident when the power exists. If one stops short of urging upon others that it is their duty or their interest to resist the law, it seems to me one should not be held to have attempted to cause its violation.[66]

Hand chose such a speech-protective approach at great potential risk to his own career.[67] Unlike Holmes, who was firmly ensconced on the highest court in the land, Hand was hoping for a promotion to the court of appeals but was passed over shortly after his *Masses* opinion was reversed by the Second Circuit.[68] It is easy to conclude that the

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[65] GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 128 (1994) [hereinafter GUNTHER , LEARNED HAND: THE MAN].

[66] *See* Masses Pub. Co. v. Patten, 244 F. 535, 540 (S.D.N.Y. 1917), *rev'd*, 264 F. 24 (2d Cir. 1917).

[67] STONE, PERILOUS TIMES, *supra* note 56, at 165-66.

[68] GUNTHER, LEARNED HAND: THE MAN, *supra* note 65, at 161; STONE, PERILOUS TIMES, *supra* note 56, at 169. *See* Masses Pub. Co. v. Patten, 246 F. 24 (2d Cir. 1917).

progress of free speech was slowed both by the reversal of *Masses* and by Hand's being passed over.[69]

Also worth noting is that this emphasis on Hand's *Masses* decision is not a recent phenomenon. Hand's importance, and the distinctiveness of his approach compared to that of Holmes, has been noted for some time.[70] Indeed, in correspondence with and about Holmes, Hand himself sought to articulate the specific differences he saw between his and Holmes' approaches.[71]

Hand feared that more context-dependent tests would lead to an interpretive morass born of the challenge of offering precise boundaries to terms such as bad tendency or clear and present danger. From this perspective, the debate over whether Holmes announced a new, stricter reading of clear and present danger in *Abrams*, or whether the context of the fact pattern in *Abrams* explain Holmes' decision to switch and vote to strike down a conviction, is beside the point.[72] What mattered to Hand was that reliance on such standards permitted such confusion. Instead, in his *Masses* opinion, Hand offered up a clearer and more strongly speech-protective standard, one

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[69] The open judgeship went instead to Martin T. Manton, who viewed *Ulysses* as obscene and was ultimately convicted of accepting bribes. *See* GUNTHER, LEARNED HAND: THE MAN, *supra* note 65, at 335-43, 503-13.

[70] *See, e.g.*, Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719 (1975) [hereinafter Gunther, *Learned Hand and the Origins*].

[71] *See* RABBAN, *supra* note 10, at 293-97; STONE, PERILOUS TIMES, *supra* note 56, at 198-203; Gunther, *Learned Hand and the Origins, supra* note 70, at 732-50.

[72] *See* STONE, PERILOUS TIMES, *supra* note 56, at 192-95; GUNTHER, *supra* note 65, at 140-41. As noted, such an argument also meshes well with the similarities between Holmes' opinions in *Schenck* and *Patterson*.

that has been widely hailed, even if it is muted in standard common law accounts.[73]

C. The Common Law First Amendment is Both Egalitarian and Libertarian

The current First Amendment standard – *Brandenburg's* requirement of both the intent and likelihood of producing "imminent lawless action" – combines elements of both Hand and Holmes in a way that is more speech-protective than the standards announced by either individually. In this way, the culmination of the common law evolution of the First Amendment contains both egalitarian and libertarian components.

Even taken on its own, Holmes' perspective combines egalitarian and libertarian elements. Insofar as his *Abrams* dissent was consistent with the view of First Amendment as "a negative check on government tyranny,"[74] it sought libertarian consequences. Thus, viewed retrospectively, it is narrowly accurate to see in Holmes a commitment to the libertarian vision.

However, Holmes' emphasis on the "competition of the market" as the "best test of truth" is paired with his understanding of the Constitution as "an experiment."[75] This view, consistent with the pragmatic strain of progressive thought, treats free speech as crucial insofar as a fair competition is crucial to societal advancement, and not as a fundamental liberty possessed by individuals.

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[73] For accounts that acknowledge the importance of *Masses*, *see* GUNTHER, LEARNED HAND: THE MAN, *supra* note 65, at 151-163; KALVEN, *supra* note 61, at 126-30; RABBAN, *supra* note 10, at 261-66;WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 175-178 (1998); STONE, PERILOUS TIMES, *supra* note 56, at 165-70.

[74] Sullivan, *supra* note 4, at 145.

[75] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

Compared to the libertarian radicals of the time, or even to Hand's more absolute First Amendment standard, it is hard to view Holmes' position as libertarian in any broader sense of the term.[76] Holmes' focus on the societal over the individual is consistent with the general deference to legislative enactments that marked his jurisprudence.[77] When combined with the contingencies implicit in his more contextual clear and present danger standard, it is clear that in a broader historical context, Holmes' approach was more egalitarian than available alternatives.

Thus, while *Brandenburg* is among the most absolute, speech-protective, libertarian statements of the purpose of the First Amendment, it can still be placed in notably different contexts depending on how its place in the overall narrative is presented. Consider two different statements of *Brandenburg's* importance. The first implies that Hand's *Masses* opinion is an equal partner to Holmes' clear and present danger standard and proclaims *Brandenburg* to be:

> [The] clearest and most protective standard under the [F]irst [A]mendment . . . . In one sense, *Brandenburg* combines the most protective ingredients of the *Masses* incitement emphasis with the most useful elements of the clear and present danger

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[76] LOUIS MENAND, THE METAPHYSICAL CLUB: A STORY OF IDEAS IN AMERICA 65 (2001) ("The key to Holmes's civil liberties opinions is the key to all his jurisprudence: it is that he thought only in terms of aggregate social forces; he had no concern for the individual.").

[77] *Id.* ("It is easy to see Holmes's concern for allowing democracy to work its way, without peremptory restriction by courts, in his opinions in cases involving economic issues....But that concern is also at the bottom of his opinions in the civil liberties cases . . . . Those were ostensibly First Amendment disputes; but their real grounds were economic. For in every case, the defendant was some kind of socialist.").

> heritage . . . . *Brandenburg* is the most speech-protective standard yet evolved by the Supreme Court.[78]

The second opts not to mention Hand or *Masses* by name and paints a picture of the core of clear and present danger remaining, but being augmented by later decisions with the following result:

> *Brandenburg* was the product of two strands of well-developed twentieth-century legal evolution . . . . In *Brandenburg*, the Court concluded that, although the Holmes-Brandeis test captured something important about the First Amendment, that test was not sufficient by itself . . . . So in *Brandenburg*, the Court combined the Holmes-Brandeis line of precedents with *Chaplinsky* and *Yates*–cases that emphasized the distinction between high- and low-value speech.[79]

There is a broad commonality in these accounts, but also significant differences. While the former attributes the incitement element in *Brandenburg* to Hand's *Masses* opinion, the latter derives it from later Supreme Court cases and characterizes it as a distinction regarding the inherent value of the speech. Thus, the first statement portrays *Brandenburg* as a robust, maximally speech-protective standard, whereas the latter presents *Brandenburg* as substituting a better context-based consideration – high- versus low-value speech – for Holmes' somewhat outdated version.[80] For a number of reasons – the relative dormancy

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[78] Gunther, *Learned Hand and the Origins, supra* note 70, at 754-55.
[79] STRAUSS, LIVING CONSTITUTION, *supra* note 1, at 72-73.
[80] *Id.* at 73 ("The evidence for that conclusion [that clear and present danger was insufficient] was the product of trial and error: specifically,

of *Chaplinsky's* "fighting words" standard,[81] the expansion of libel protections beyond *Sullivan* (another case stressed by the common law approach[82]), and the historical importance of Hand's contributions[83]--there is, at least, a compelling case to be made that the first account does a better job of communicating the range covered by the evolution of First Amendment doctrine in all of its fits and starts.[84]

Thus, while there is a shared core to varying accounts of the First Amendment's common law development, it can be presented with significant degrees of libertarian—or egalitarian—directed emphasis. This is also true with respect to free speech controversies outside the range of core political speech. In their advocacy against the Comstock Act, libertarian radicals invoked the First Amendment in appealing obscenity convictions.[85] However, from a more egalitarian direction, obscenity is low-value speech.[86] Of course, what was held to be obscene under the Comstock Act is a far cry from the Warren Court's line of obscenity cases. The common law account needs to be augmented with a consideration of the necessary opportunism of the First Amendment.

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the use to which the test had been put in *Dennis*. In the crucible of common law testing, clear and present danger collapsed too easily into simple balancing of costs and benefits.").

[81] *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[82] STRAUSS, LIVING CONSTITUTION, *supra* note 1, at 53-54, 73-75.

[83] *See* Gunther, *Learned Hand and the Origins, supra* note 70; Geoffrey R. Stone, *Judge Learned Hand and the Espionage Act of 1917: A Mystery Unraveled*, 70 U. CHI. L. REV. 335 (2003). *See also* KALVEN, *supra* note 61, at 125-30.

[84] STRAUSS, LIVING CONSTITUTION, *supra* note 1, at 53 ("The story of the emergence of the American constitutional law of free speech is a story of evolution and precedent, trial and error—a demonstration of how the living Constitution works.").

[85] RABBAN, *supra* note 10, at 28-44.

[86] STRAUSS, LIVING CONSTITUTION, *supra* note 1, at 54, 69.

III. The Necessary Opportunism of the Common Law First Amendment

An oft-made criticism of the common law approach is that it can wind up, by intended outcome or as the consequence of rigid adherence to precedent, justifying outcomes that never were intended by the original drafters of the relevant text. While this taps into a much larger, well-worn debate over constitutional interpretation, there is a specific critique that is of particular relevance here. The charge of First Amendment opportunism consists in the claim that, likely owing to the reverence with which it is held and its high likelihood of success, the First Amendment has come to serve as a convenient lifeline for arguments that may be more accurately anchored in other legal theories, though likely with a lowered chance of victory.[87]

This charge is made with some ambivalence.[88] On the one hand, opportunistic use of the First Amendment raises several concerns, notably: potential negative repercussions for the First Amendment as present,[89] misunderstandings of the First Amendment's intended

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[87] Schauer, *supra* note 6, at 175 ("In many respects, the culture of First Amendment discourse and argument, both in the courtroom and in the larger culture, exhibits many of the same features as being faced with driving a nail with a pipe wrench. With surprising frequency, people and organizations with a wide array of political goals find that society has not given them the doctrinally or rhetorically effective argumentative tools they need to advance their goals . . . . And in looking for these imperfect but usable tools, they often find that the leading candidate is the First Amendment. Like the pipe wrench, the First Amendment is frequently called on to do a job for which it is poorly designed.").

[88] *Id.* at 176 ("When people make do with whatever happens to be available to them we call them 'opportunistic,' a word that hovers precariously between the pejorative and the complimentary.").

[89] *Id.* at 175 ([Under such opportunistic usage,] "the job gets done poorly and the tool is damaged in the process.").

purpose,[90] and weaknesses with the common law approach.[91] On the other hand, such concerns would prove ill-founded if no agreed upon understanding of the First Amendment's intended purpose exists[92] and, thus, the common law approach offers an accurate description.[93]

When specific examples of First Amendment opportunism are offered, the potential ambiguity is only compounded. For instance, the example of campaign finance reform may be opportunistic,[94] but it may also be a logical implication of the libertarian vision of the First Amendment.[95] Or, more likely, it may be both.

As a strictly logical matter, one might temporarily concede that there is an intended purpose of the First Amendment. At the very least, this means that either the libertarian or the egalitarian vision of the First Amendment is opportunistic in a damaging way. In fact, such a concession would likely imply that both visions are

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[90] *Id.* at 195 ("If First Amendment opportunism is as widespread as I suspect, and as some of the documentation here may suggest, then the First Amendment, precisely because of its cultural salience and consequent empirical persuasiveness, may be especially vulnerable to the kind of misuse and consequent distortion that I am suggesting . . . . [It] may over time lose its ability to perform the function for which it was originally designed.").

[91] *Id.* at 192 ("All of this is of course the armchair sociology of doctrinal evolution.").

[92] *Id.* at 195 ("It may turn out that in the final analysis none of the justifications for a distinct free-speech principle is sound, and the that the First Amendment is revealed to be merely the raw material of opportunism and nothing else.") (footnote omitted).

[93] *Id.* at 196-97 ("[I]f instead we see the First Amendment as intrinsically, fundamentally, or even just largely as an artifact of a constitution that is itself a common-law document, then it would be hard to make sense of the idea of the First Amendment, and arguably of the idea of free speech, apart from what the courts have made of it, and apart from the necessarily and nonproblematically opportunistic way of common law.").

[94] *Id.* at 188-90.

[95] *See* Sullivan, *supra* note 4, at 157-58, 161-63, 167-77.

negatively opportunistic. For example, one who believes the First Amendment has an intended purpose is likely to be suspicious of attempts to expand it to the realm of sexual expression, whether it be in the service of libertarian arguments on behalf of nude dancing,[96] or egalitarian arguments against First Amendment protection of exploitive, objectifying pornography.

A narrower evaluation of opportunism in its negative connotation should steer clear of controversies that can better be described divided along libertarian versus egalitarian lines. Such disputes are often framed by both sides as arguments over which vision is truer to the intended purpose of the First Amendment. To declare a pox on both houses in such situations is to declare the necessity of First Amendment opportunism on the cheap. There are more sustained arguments against First Amendment opportunism that must be addressed on a deeper level, ones that are made against both visions of the First Amendment and expressly in situations where those visions appear to converge.[97]

In recent years, two different anti-opportunism arguments have been put forth by members of the Supreme Court. One, Justice Thomas' concurrence in *Morse v. Frederick*,[98] fits comfortably within the view that opportunism leads to the First Amendment being extended beyond its intended purpose. The other, Justice Alito's dissent in *United States v. Stevens*,[99] is less direct in citing an original intended purpose of the First Amendment. However, he still provides a considered argument against

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[96] *Id.* at 180-83, 191.

[97] *See id.* at 163-67 (providing examples of points of convergence between the libertarian and egalitarian visions).

[98] *See* Morse v. Frederick, 551 U.S. 393, 410-22 (2007) (Thomas, J., concurring).

[99] *See* United States v. Stevens, 130 S. Ct. 1577, 1592-1602 (2010) (Alito, J., dissenting).

the opportunism, or, frankly, the meta-opportunism he sees in the Court's usage of the overbreadth doctrine.

While Alito's *Stevens* dissent is not the first instance of such an argument, it merits specific attention for two different reasons. First, Alito's critique of a too lenient application of the overbreadth doctrine is a part of his general uneasiness over what he sees as the ever-expanding scope of the First Amendment. In this way, his more recent dissent in *Snyder v. Phelps*[100] further announces a developing anti-opportunism distinct from either the libertarian or egalitarian vision. Second, the logic of Alito's *Stevens* dissent played a conspicuous role in Justice Breyer's dissent in *Brown v. Entertainment Merchants Association*,[101] suggesting that there exists an anti-opportunism argument that could potentially appeal to justices otherwise associated with competing First Amendment visions. Each anti-opportunism argument will be examined in turn.

A. Justice Thomas' anti-opportunism

Justice Thomas' anti-opportunistic view of the First Amendment develops out of his interpretive methodology, which stresses the original public understanding of a document.[102] This view is consistent with his overall

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[100] *See* Snyder v. Phelps, 131 S. Ct. 1207, 1222-29 (2011) (Alito, J., dissenting).

[101] *See* Brown v. Entm't Merch. Assn., 131 S. Ct. 2729, 2761-71 (2011) (Breyer, J., dissenting).

[102] *See Morse,* 551 U.S. at 410-11, 418-19 (Thomas, J., concurring) ("In my view, the history of public education suggests that the First Amendment, as originally understood, does not protect student speech in public schools . . . . In my view, petitioners could prevail for a much simpler reason: As originally understood, the Constitution does not afford students a right to free speech in public schools."). *See also Brown*, 131 S. Ct. at 2751, 2759 (Thomas, J., dissenting) ("The Court's decision today does not comport with the original public understanding of the First Amendment . . . . Admittedly, the original public

constitutional jurisprudence and not limited to First Amendment considerations.[103] Thomas' approach leads him to view appeals to *stare decisis* with considerable skepticism and to express a readiness to overturn even long-standing precedent if he believes it to be poorly grounded.[104]

Such was the case in *Morse v. Frederick*, where Thomas, in concurrence, announced his view that he would go further than the Court's opinion and vote to overturn the precedent set in *Tinker v. Des Moines Independent Community School District.*[105] To Thomas, *Tinker* conflicted with the original understanding of the First Amendment, which simply could not have been conceived to protect free speech rights in a public education setting given what the historical record reveals.[106] Thomas' opinion applies the common law doctrine of *in loco parentis,* concluding that free speech rights in a public school setting are virtually nonexistent.[107]

Though rather brief by contemporary standards, Thomas' opinion has far-reaching implications. The fact that respondent Frederick was not a minor at the time of the controversy was "inconsequential" to Thomas because

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understanding of a constitutional provision does not always comport with modern sensibilities.").

[103] *See* McDonald v. Chicago, 130 S. Ct. 3020, 3072 (2010) (Thomas, J., concurring in part and in the judgment) ("When interpreting constitutional text, the goal is to discern the most likely public understanding of a particular provision at the time it was adopted.").

[104] *Id.* at 3062-63 ("I acknowledge the volume of precedents that have been built upon the substantive due process framework, and I further acknowledge the importance of *stare decisis* to the stability of the Nation's legal system. But *stare decisis* is only an 'adjunct' of our duty as judges to decide by our best lights what the Constitution means.") (citation omitted).

[105] *Morse*, 551 U.S. at 417-19 (Thomas, J., dissenting) (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969)).

[106] *Id.* at 416-19.

[107] *Id.* at 413-19.

"courts have applied the doctrine of *in loco parentis* regardless of the student's age."[108] Further, though not directly implicated by the case at hand, Thomas' interpretation would potentially uphold denial of free speech rights at the college level,[109] imposition of corporal punishment in public school settings,[110] and compelled speech in public school settings.[111] Because of the absence of constitutional protection for such speech, courts would have less of a basis to scrutinize the rationale behind any actions taken against students, and school administrators would be free to punish students based on their readings on the intent behind the speech.[112]

Concurrent with the specific elaboration of Thomas' *in loco parentis*-based understanding, of the original public understanding of the First Amendment in a public education setting, is his view of the proper avenue for relief should one find his opinion overly restrictive of free speech rights in such a setting. In announcing that overly-restrictive rules "can be challenged by parents in the political process," Thomas is drawing a contrast with the common law approach evidenced in *Tinker*, which "substituted judicial oversight of the day-to-day affairs of public schools."[113] Clearly, regardless of how described, whether as opportunism or adherence to common law development, Justice Thomas forcefully opposes such an approach. He believes the First Amendment has a "function

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[108] *See id,* at 413 n.3.
[109] *Id.* at 412 n.2.
[110] *Id.* at 414 n.4.
[111] *Id.* at 415 n.5.
[112] *Id.* at 415, 419. (discussing *Wooster v. Sunderland*, 27 Cal. App. 51 (Cal. Dist. Ct. App. 1915)).
[113] *Id.* at 420. *See also id.* at 421 ("Historically, courts reasoned that only local school districts were entitled to make those calls. The *Tinker* Court usurped that traditional authority for the judiciary.").

for which it was originally designed"[114] and he is prepared to limit its application accordingly.

Indeed, Thomas continues to apply his in *loco parentis*-based reading outside of a public education setting. In *Brown v. Entertainment Merchants Association*, Thomas declares that the First Amendment does not include "a right to speak to minors (or a right of minors to access speech) without going through the minors' parents or guardians."[115] Going into more detail than he does in *Morse*, Thomas lays out a detailed analysis of the historical evidence regarding "the founding generation's views on children and the parent-child relationship."[116] This survey leads Thomas to reiterate the conclusion he reached in *Morse*, namely that "the Framers could not possibly have understood 'the freedom of speech' to include an unqualified right to speak to minors."[117]

Consequently, as applied to the California ban on video games sales to minors, Thomas would uphold the law as exactly the type of action through the political process that he believes to be the appropriate way of navigating the contours of *in loco parentis*. The ban in question did not seek to completely prohibit minor possession of violent video games. Instead, it sought only to make sure that such possession occurred only if a parent or guardian purchased the game on the minor's behalf. Such a law, to Thomas, is consistent with *in loco parentis*, and therefore, cannot be a violation of the First Amendment.

Viewed together, one can see in Justice Thomas' *Morse* and *Brown* opinions a clearly drawn understanding of the original public understanding of the First Amendment. This understanding would significantly limit

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[114] Schauer, *supra* note 6, at 195.
[115] *See* Brown v. Entm't Merch. Ass'n, 131 S. Ct. 2729, 2751(2011) (Thomas, J., dissenting).
[116] *Id.* at 2752.
[117] *Id.* at 2759.

the current reach of the First Amendment in cases involving minors owing to the doctrine *in loco parentis*. However, in cases not involving minors, Justice Thomas can still support an expansive understanding of the First Amendment's scope, one that can accurately be referred to as libertarian when discussing *Citizens United*, for example. The point is not that Thomas favors a broader or narrower reading of the First Amendment, but rather that he has announced a specific principle that can be characterized as anti-opportunistic. His is not the only such principle, however; and if *Brown* is any guide, it may well be Justice Alito's approach that would have the best chance of mustering a majority that counters the more typical common law view.

B. Justice Alito's Anti-opportunism

Justice Alito's approach is less rooted in the original public understanding of the Framers.[118] Rather, Alito's view, though anti-opportunistic in application, proceeds from a distinction critical to the common law approach, the distinction between high- and low-value speech.[119] While not a tacit endorsement of an egalitarian approach, Alito's dissents in *United States v. Stevens* and *Snyder v. Phelps* are strong critiques of a libertarian vision that would almost

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[118] Indeed, Alito's concurrence in *Morse v. Frederick* endorsed the value of *Tinker* as precedent and drew a clear contrast with Thomas' concurrence. *See* Morse v. Frederick, 551 U.S. 393, 424 (2007) (Alito, J., concurring) ("When public school authorities regulate student speech, they act as agents of the State; they do not stand in the shoes of the students' parents. It is a dangerous fiction to pretend that parents simply delegate their authority – including their authority to determine what their children may say and hear – to public school authorities. It is even more dangerous to assume that such a delegation of authority somehow strips public school authorities of their status as agents of the State.").

[119] STRAUSS, LIVING CONSTITUTION, *supra* note 1, at 54.

reflexively strike down any enactment on First Amendment grounds.

In *Stevens*, Alito notes that the specific intent of the law in question was to prohibit "a form of depraved entertainment that has no social value."[120] He is particularly critical of the majority's use of the overbreadth doctrine in striking down a federal statute that prohibited the production, sale, or possession of depictions of animal cruelty. In his dissent, Alito makes a sustained criticism of using overbreadth to strike down laws that he believes would be upheld under an as-applied standard. In making this criticism, Alito relates an excerpt from *Board of Trustees of State Univ. of N.Y. v. Fox* that serves as a useful one-sentence distillation of the anti-opportunism viewpoint: "Ordinarily, the principal advantage of the overbreadth doctrine for a litigant is that it enables him to benefit from the statute's unlawful application *to someone else*."[121] Overbreadth has its applicability; it ought to be used as a last resort, only in cases of "substantial" overbreadth evidenced from "actual facts" showing a "realistic danger" of the First Amendment being compromised.[122]

To heighten his low-value argument, Alito draws most heavily on *New York v. Ferber*, the 1983 case in which the Court held that child pornography, regardless of whether the material is actually obscene, was of "exceedingly modest, if not *de minimis*" value and not entitled to any First Amendment protection.[123] Alito provides several arguments as to the low value of the depictions targeted by the statute and concludes that the logic of *Ferber* should extend to the case in question.

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[120] *See* United States v. Stevens, 130 S. Ct. 1577, 1592 (2010) (Alito, J., dissenting).
[121] *Id.* at 1593 (citing Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 483 (1989)).
[122] *Id.* at 1594.
[123] *Id.* at 1599 (citing New York v. Ferber, 458 U.S. 747, 762-63 (1982)).

Alito extends this argument in *Snyder v. Phelps*. Alone among the Justices, Alito believes the intentional infliction of emotional distress (IIED) tort in question does not run afoul of the First Amendment. Alito again emphasizes the distinction between high- and low-value speech, seeing no constitutional basis to protect speech that "intentionally inflict[s] severe emotional injury on a private person at a time of intense emotional sensitivity by launching vicious verbal attacks that make no contribution to public debate."[124]

Of particular note is Alito's contention that the majority picks and chooses which expressions of the Westboro Baptist Church to consider. He is chagrined that the majority declined to consider an online account of the church's picketing of Matthew Snyder's funeral.[125] While the Court claimed that is was a separate event from the picketing itself and, therefore, not part of the IIED tort, Alito countered by noting that the Court had considered previous protests by the church to further the majority's view that the church's activities merited First Amendment protection. Given that the online account "addressed the Snyder family directly,"[126] Alito notes that consideration of it significantly strengthens that argument that a claim of IIED is justifiable. Implicit in Alito's dissent is the assertion that the majority is being opportunistic in how it determines which statements to consider and that their opportunism is in service of extending First Amendment protection beyond its proper scope. In contrast, Alito states that he "fail[s] to see why actionable speech should be immunized simply because it is interspersed with speech that is protected."[127]

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[124] *See* Snyder v. Phelps, 131 S. Ct. 1207, 1222 (2011) (Breyer, J., concurring).
[125] *Id.* at 1225-26 n.15.
[126] *Id.* at 1226.
[127] *Id.* at 1227.

Contrary to Thomas' anti-opportunism, Alito does not attempt in either of his solitary dissents to announce just what the original expectation of the First Amendment was with respect to the particular controversy under consideration. However, each dissent makes clear his displeasure with the majority for inappropriately stretching the First Amdendment–whether through application of the overbreadth doctrine or through selective consideration of statements–beyond its logically necessary range of application. Perhaps because his criticism is not tethered to an exact reading of the First Amendment's original function, it has been subsequently adopted by another justice in a way that Thomas' has not.

In his dissent in *Brown v. Entertainment Merchants Association.* Justice Breyer favorably cites Alito's *Stevens* dissent when arguing that the Court has over-expansively applied the First Amendment in striking down a California prohibition on the sale of violent video games to minors.[128] As noted previously, Justice Thomas also filed a dissenting opinion in this case; one rooted in his *in loco parentis* view of the original understanding of the First Amendment's application with respect to minors. When Justice Breyer announces that "the special First Amendment category I find relevant is not (as the Court claims) the category of 'depictions of violence,' but rather the category of 'protection of children'"[129] he appears to concur with Thomas' understanding of the specific issue. However, by citing Alito's *Stevens* dissent, he is declining to endorse the specific logic of Thomas' approach.

Also noteworthy about Breyer's dissent, however, is that it directly responds to Justice Alito's concurrence.

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[128] Brown v. Entm't Merch. Ass'n, 131 S. Ct. 2729, 2762 (Breyer, J., dissenting) ("A facial challenge to this statute based on the First Amendment can succeed only if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'") (citing *Stevens*, 130 S. Ct. at 1587)).

[129] *Id.* (citations omitted).

Thus, we are faced a situation where Breyer is tacitly arguing that Justice Alito is not being faithful to his own views. Certainly, this could be attributed to gamesmanship on Breyer's part. However, Alito's concurrence also indicates discomfort with the more expansive approach taken by the Justice Scalia's opinion for the Court and is at pains to stress that "[a]lthough the California statute is well intentioned, its terms are not framed with the precision that the Constitution demands, and I therefore agree with the Court that this particular law cannot be sustained."[130] Alito shares Breyer's view that the majority is too quick to rely on an expansive application of the First Amendment. Rather than the "broad ground adopted by the Court," Justice Alito relies on the "narrower ground that the law's definition of 'violent video game' is impermissibly vague."[131]

Nonetheless, the fact remains that Alito felt required to concur, albeit on narrower grounds. While Breyer argued that the California legislature acted appropriately in using the *Miller v. California*[132] obscenity test as a guide in crafting its law, Alito disagreed. The California law is a regulation of "expression related to violence," a type of prohibition with no long-standing history behind it. On the other hand, Alito argues that "obscenity had long been prohibited" by the time the Court turned its attention to it in the 1960's.[133] In other words, Alito's distinction is predicated on there existing a *common law understanding* of obscenity being outside the scope of First Amendment protection in a way that violent expression is not.

Alito may introduce an anti-opportunism argument in *Stevens*, but he does not believe it can override a settled

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[130] *Id.* at 2742.
[131] *Id.* (citations omitted).
[132] *See generally* Miller v. California, 413 U.S. 15 (1973).
[133] *Brown*, 131 S. Ct. at 2746 (citing Roth v. United States, 354 U.S. at 484-85).

common law understanding in the present case. Breyer declined to join Alito's dissent in *Stevens*, joining instead the majority's application of the overbreadth doctrine. Thus, while barely a year old, Alito's anti-opportunism argument in Stevens is already susceptible to the claim that it is open to being used opportunistically. The problem of First Amendment opportunism may be compared to using a pipe wrench to drive a nail, but in reality it is not so simple to identify.[134] Less a matter of using the wrong tool because it is the only tool present, the various criticisms of the Court's approach in *Morse*, *Stevens*, *Snyder*, *Phelps*, and *Brown* is more akin to the claim that the Court used a paring knife when it had a scalpel at its disposal. The consequence is less that the First Amendment is misshapen than that its boundaries are imprecise. However, under a common law understanding, this is necessarily so, and not a significant cause for despair.

Conclusion

The common law understanding of the First Amendment is firmly entrenched. *Brandenburg* casts a tall shadow and virtually any remotely controversial free speech case turns on whether the contact is or is not located within a proscribed category of speech and therefore regulable. In other words, there exists a well-accepted framework for talking about what free speech is. This is appropriate.

Within this agreed upon framework, however, more than one compelling narrative can operate. Egalitarian and libertarian accounts will reach different conclusions about when a category threshold has been breached. *Citizens United v. Federal Election Commission*,[135] *Christian Legal*

[134] Schauer. *supra* note 6.
[135] *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

Society v. Martinez,[136] *United States v. Williams*,[137] and *United States v. Alvarez*[138] are recent examples where these accounts have led to a closely and strongly divided Court. It is entirely likely that the common law First Amendment will continue to evolve. However, there is little reason to expect that evolution to alter the fundamental post-*Brandenburg* understanding of the Free Speech Clause.

This is true in large part because the most contemporary understandings of the First Amendment are welcoming of opportunistic arguments that seek to add to the range of communication and conduct that fit within its protection. Where a case does not cut along explicit libertarian/egalitarian lines, the Court has shown a clear tendency to find in favor of the speaker. Put differently, questions of whether the First Amendment has become too opportunistic are judge-refereed and there is scant evidence of a critical mass existing that would call into question the present consensus as announced in cases such as *Stevens*, *Snyder*, and *Brown*.

[136] *See* Hastings Christian Fellowship v. Martinez, 130 S. Ct. 2971 (2010).
[137] *See* United States v. Williams, 553 U.S. 285 (2008).
[138] *See* United States v. Alvarez, 132 S. Ct. 2537 (2012).

STUDENT POLICY NOTE

VIEWING TENNESSEE'S NEW PHOTO IDENTIFICATION REQUIREMENTS FOR VOTERS THROUGH HISTORICAL AND NATIONAL LENS

Daniel Sullivan

I. Introduction

In 2011, Tennessee became only the fifth U.S. state to strictly require photograph identification as a prerequisite to voting.[1] Over the past decade, a nationwide battle has been brewing over voter identification laws. In fact, "[s]ince 2001, nearly 1,000 bills have been introduced in a total of 46 states," with 21 states passing "major [voter identification] legislation between 2003 and 2011."[2] In 2011 alone, 34 states took up the issue, either "proposals for new voter ID laws in states that didn't already require voter ID at the polls (considered in 20 states), [or] proposals to strengthen existing voter ID requirements in order to require photo ID at the polls (considered in 14 states)."[3] Despite its prevalence in state legislatures last year, the debate shows no signs of slowing down, as

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[1] Michael Lollar, *Law Requiring Photo ID Puts Some Tennessee Voters in a Tizzy*, THE COMMERCIAL APPEAL, July 29, 2011, http://www.commercialappeal.com/news/2011/jul/29/identity-crisis/. *See* 2011 Tenn. Pub. Ch. 323; 2011 Tenn. SB 16. Governor Bill Haslam signed the 107th General Assembly's Senate Bill No. 16 into law on May 30, 2011.

[2] *Voter Identification Requirements*, NATIONAL CONFERENCE OF STATE LEGISLATURES http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx (last visited July 17, 2012).

[3] *Id.*

legislation is pending in 32 states this year.[4]

Despite the majority of states taking on voter identification laws, only 14 states have passed strict photo identification measures,[5] with five blocked by governor veto.[6] Georgia, Indiana, Kansas, and Pennsylvania currently join Tennessee in requiring strict voter identification.[7] Meanwhile, Mississippi, South Carolina, and Texas are awaiting preclearance from the Department of Justice and/or the Federal District Court of Washington, D.C. under Section 5 of the Voting Rights Act of 1965,[8]

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[4] *Id.* These new proposals include "new voter ID proposals in 14 states, proposals to strengthen existing voter ID laws in ten states, and bills in nine states to amend the new voter ID laws passed in 2011."

[5] "Strict" voter identification laws refer to provisions that state a ballot cannot be cast by a voter without first showing photo identification. "Voters who are unable to show ID at the polls are given a provisional ballot. Those provisional ballots are kept separate from the regular ballots. If the voter returns to election officials within a short period of time after the election (generally a few days [Three days in Tennessee]) and presents acceptable ID, the provisional ballot is counted. If the voter does not come back to show ID, that provisional ballot is never counted." Non-strict voter identification laws allow voters to cast a regular ballot with a signed affidavit of identity or having a poll worker vouch for their identity due to a personal and previous relationship. *Voter Identification Requirements*, NATIONAL CONFERENCE OF STATE LEGISLATURES http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx (last visited July 17, 2012) .

[6] *Id* (Minnesota, Missouri, Montana, New Hampshire, and North Carolina).

[7] *Id.*

[8] Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006). Section 5 is codified as amended at 42 U.S.C. § 1973c, outlining the procedures when voting qualification standards have been altered, particularly the preclearance procedure from the Department of Justice, and the subsequent appeal process, including the initial hearing by a three judge panel and the final appeal to the Supreme Court of the United States.

before their voter identification laws can go into effect.[9] Lastly, Alabama passed a law requiring strict photo identification starting in 2014 and will also have to receive preclearance under the Voting Rights Act prior to the effective date. [10]

It is not merely state legislatures who are shaping voter identification requirements across the country, but also the executive branch, through the Department of Justice, and the judiciary. The Supreme Court recently provided guidance on the issue in *Crawford v. Marion County Election Board* when it held that an Indiana law requiring photo identification to vote was constitutional.[11] Consequently, most states, including South Carolina and Texas, carefully crafted the language of their laws to conform to Indiana's constitutional model.[12] Despite the deference to the Supreme Court's decision, the Department of Justice has denied preclearance to both South Carolina and Texas.[13] As Texas' appeal reaches the courts, as "part

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[9] Horace Cooper, *Justice Department Plays Fast and Loose with Facts and Constitution in Challenging Texas Voter ID Law*, THE NATIONAL CENTER FOR PUBLIC POLICY RESEARCH (2012), *available at http://www.nationalcenter.org/NPA633.html. See Also Voter Identification Requirements*, *supra* note 2 (Explaining South Carolina's and Texas' appeals following denial of preclearance from the Department of Justice).

[10] *Voter Identification Requirements*, *supra* note 2.

[11] Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008).

[12] Cooper, *supra* note 9.

[13] Letter from Thomas Perez, Assistant Attorney Gen., Dep't of Justice, to Keith Ingram, Dir. of Elections, Office of the Tex. Sec'y of State (Mar. 12, 2012) (available at http://brennan.3cdn.net/fe6a21493d7ec1aafc_vym6b91dt.pdf); Letter from Thomas Perez, Assistant Attorney Gen., Dep't of Justice, to C. Havird Jones, Jr., Assistant Deputy Attorney Gen., Office of the S.C. Attorney Gen. (Dec. 23, 2011) (available at http://brennan.3cdn.net/594b9cf4396be7ebc8_0pm6i2fx6.pdf). http://online.wsj.com/article/SB10001424052702304022004577516953618032404.html.

of a flurry of legal action in the past two years surrounding the Voting Rights Act,"[14] it is a real possibility that the Supreme Court may revisit the Voting Rights Act of 1965, particularly Section 5.[15]

The recent push for more stringent voter identification requirements has been widely debated, with strong convictions on both sides,[16] and not surprisingly, down party lines.[17] While voter fraud concerns may be valid, all citizens' right to vote must be fiercely protected,

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[14] Devlin Barrett, *U.S., Texas Clash Over Voter-ID Law*, WALL ST. J., July 9, 2012,

[15] *See generally* Barrett, *supra* note 14 (stating "The... cases represent part of a flurry of legal action in the past two years surrounding the Voting Rights Act, raising expectations among some experts the Supreme Court will review the law after the November election."); Charles P. Pierce, *A National Campaign vs. Voting Rights... Goes National*, ESQUIRE, The Politics Blog (July 9, 2012, 10:00 AM), http://www.esquire.com/blogs/politics/voting-rights-act-dc-circuit-court-10487202?hootPostID=2f4807f10b2b65f6c70beb69aa71bddb ("Texas is challenging Section 5 and, through it, *de facto*, the entire enforcement mechanism of the VRA...."); Drew Singer, *Texas Says Voter ID Law Needed to Combat Election Fraud*, CHI. TRIB., July 9, 2012, http://articles.chicagotribune.com/2012-07-09/news/sns-rt-us-usa-texas-voterbre8681h7-20120709_1_voter-id-law-texas-voters-voter-fraud (stating "Texas hopes the case will eventually lead to a U.S. Supreme Court ruling that the Voting Rights Act, passed in 1965 amid civil rights protests to protect minority voters, has outlived its usefulness.").

[16] Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 HARV. L. REV. 1737, 1738-39 (2008) ("When critics point to the lack of prosecutions or reported incidences of voter impersonation fraud, defenders of such laws reply, in part, that successful fraud goes undetected. When defenders of voter ID argue that such laws lead to very few people being turned away from the polls or having their votes uncounted, critics respond that even a violation of the voting rights of a few is constitutionally impermissible....").

[17] WENDY R. WEISER AND LAWRENCE NORDEN, BRENNAN CENTER FOR JUSTICE, VOTING LAW CHANGES IN 2012 8-9 (2011).

especially in light of voting rights' evolution in America. Most states that have enacted new voter identification laws have included provisions in their laws to alleviate opponents' concerns of disenfranchising voters and to maintain constitutionality.[18] However, these protections often do not go far enough, or are omitted from some states' laws. On its face, the requirement to show photo identification before voting should not be controversial. Yet the United States has struggled to provide voting equality since its inception, often having to overcome overt racism and fluid barriers to voting. With political undertones, disproportionate disenfranchisement, and a statistically weak justification, the new photo identification laws are not sound policy.

II. Historical Development of Voting Rights

A. Voting Rights Expansion

With identification widely required in every day transactions of the American citizen and the legitimate state interest to assure authentic elections of public officials,[19] the fears present during the voter identification debate cannot be truly understood without a historical understanding of the United States voting rights evolution. When the United States' Constitution was adopted and ratified in 1787, it remained silent on voter qualifications and rights.[20] Instead, those decisions were left to the states, with the predominant qualifications being a white male with property. With all remaining Colonial religion-

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[18] *See Voter Identification Requirements*

[19] Crawford v. Marion Cnty. Election Bd., 553 U.S. 181,191 (2008) ("The State has a valid interest in participating in a nationwide effort to improve and modernize election procedures that have been criticized as antiquated and inefficient.").

[20] *See* U.S. CONST.

based voting requirements eliminated by 1790, "60 to 70 [%] of adult white men could vote," and in six states freed African Americans were allowed to vote as well.[21] It would take over 60 years for the next progression of voting rights to conclude, as North Carolina eliminated property requirements for white male voters in 1856, "effectively extending the right to vote to all white men within the United States."[22]

As this tremendous expansion of white male voting occurred, African Americans were being denied the right to vote consistently as "[e]very new state that joined the Union after 1819 explicitly denied blacks the right to vote."[23] Even as North Carolina ended property restrictions for white males, only Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont freely allowed African Americans the right to vote without "significant restrictions."[24] Often overshadowed by the struggle by later Jim Crow laws, it was not only African Americans who were disenfranchised at the time; Mexican Americans living in western states were given U.S. citizenship in 1848 as the Mexican American War ended, but their newly acquired voting rights were effectively barred with property and literacy restrictions.[25]

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[21] Steven Mintz, *Winning the Vote: A History of Voting Rights*, THE GILDER LEHRMAN INSTITUTE OF AMERICAN HISTORY, http://www.gilderlehrman.org/history-by-era/government-and-civics/essays/winning-vote-history-voting-rights (last accessed July 10, 2012) (Maryland, Massachusetts, New York, North Carolina, Pennsylvania, and Vermont).

[22] *Voting Rights Act Timeline,* AMERICAN CIVIL LIBERTIES UNION 1 (Mar. 4, 2005), http://www.aclu.org/files/assets/voting_rights_act_timeline20111222.pdf.

[23] Mintz, *supra* note 21.

[24] *Id.*

[25] *See Voting Rights Act Timeline*, *supra* note 22 ("The Treaty of

Despite the expansion of citizenship and voting rights that occurred in the early 19th century, a larger battle was brewing in the country, and it was not until the Civil War ended that the United States began to truly assimilate minority groups into the voter pool. A year after the war concluded, the Civil Rights Act of 1866 was enacted,[26] granting citizenship to "all persons born in the United States,"[27] regardless of race or color,[28] and "without regard to any previous condition of involuntary servitude...."[29] This language provided the basis for the citizenship clause of the Fourteenth Amendment, included, in part, to quell fears that the Civil Rights Act of 1866 would be repealed or limited.[30] Despite this vast expansion of rights for African Americans and other minorities in the wake of the Civil War, the right to vote was not included. Hence, in 1869 Congress passed the last of the Reconstruction amendments, the Fifteenth Amendment, which states: "The right of citizens of the United States to vote shall not be denied or abridged by the United States *or by any State* on

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Guadalupe-Hidalgo end[ed] the Mexican American War, giving Mexicans in Arizona, California, New Mexico and Texas U.S. citizenship... Property and literacy requirements are imposed to keep them from voting, along with violence and intimidation.").

[26] Law Library of Congress, *Fourteenth Amendment and Citizenship*, LIBRARY OF CONGRESS (Apr. 30, 2012), http://www.loc.gov/law/help/citizenship/fourteenth_amendment_citizenship.php. The Civil Rights Act of 1866 was originally passed in 1865 but was defeated by presidential veto.

[27] Civil Rights Acts of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (current version at 42 U.S.C.S. § 1982 (2012)). This did not include persons "subject to any foreign power, excluding Indians not taxed."

[28] *Id.*

[29] *Id.*

[30] Law Library of Congress, *supra* note 26. *See also* U.S. CONST. amend. XIV § 1.

account of race, color or previous condition of servitude."[31]

Nearly a hundred years after the birth of the United States of America, men of all races were constitutionally guaranteed the right to vote. It would be another fifty years before women, of all races, were given the right to vote.[32] However, as time would tell, there is a vast difference between the right to vote and being able to vote; following a wave of expanded voting rights through Reconstruction, a coming contraction of voting rights, capped by the infamous Jim Crow laws, threatened to nullify the progress made in the century after the birth of America.

B. Contraction of Voting Rights and the Rise of Disenfranchisement

As opponents argue strict photo identification will do, the events of the late 19th and early 20th centuries did not rescind voting rights per se,[33] but instead restricted

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[31] U.S. CONST. amend. XV § 1 (emphasis added). The requisite number of states ratified the Fifteenth Amendment less than a year after passing, on February 3, 1870.

[32] *See* U.S. CONST. amend XIX § 1. *See also Voting Rights Act Timeline*, *supra* note 22 ("Voting rights for women were first proposed in July 1848, at the Seneca Falls Woman's Rights Convention .... It took 72 years of protest and activism for the Nineteenth Amendment to become law. The measure was ratified by a single vote margin in the Tennessee state legislature on August 18, 1920, and became national law eight days later.")

[33] *See Voting Rights Act Timeline*, *supra* note 22. While most of the efforts only placed restrictions and encumbrances on the voting process, some citizens did lose their right to vote. In 1882, the Chinese Exclusion Act denied citizenship, and therefore voting rights, to Chinese Americans. Meanwhile, Native Americans faced their own challenges to voting. *Elk v. Wilkins,* 112 U.S. 94 (1984), held that Native Americans were not citizens without approval by the United States, and that the Fifteenth Amendment was not applicable to Native Americans. The Dawes General Allotment Act of 1887 went as far to

them to the point of de facto rescission.[34] It began with the the "election" of Rutherford B. Hayes in 1876,[35] when the Hayes-Tilden compromise ended Reconstruction and "thus guarantee[d] home rule – meaning white control – in the South."[36] With the end of Reconstruction, state legislatures in the South began to employ various measures to disenfranchise African American voters, including "district gerrymandering, purposeful closing of black polling places, poll taxes, literacy tests, grandfather clauses, and above all else, waves of Ku Klux Klan terrorism in the form of lynchings and vigilante violence against blacks and white

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demand that Native Americans renounce their tribes to gain citizenship and the right to vote. Even after the Indian Naturalization Act of 1890, creating a process for Native Americans to gain United States citizenship, Native Americans were restricted from voting in state and local elections, thanks to rulings such as *Opsahl v Johnson*, 163 N.W. 988 (1917), which held that the Native Americans had not sufficiently adopted the language, customs, and habits of civilization.

[34] *See, e.g.*, Karyn L. Bass, *Are We Really Over the Hill Yet? The Voting Rights Act at Forty Years: Actual and Constructive Disenfranchisement in the Wake of Election 2000 and Bush v. Gore,* 54 DEPAUL L. REV. 111, 116-17 (2004).

[35] *See* Richard Wormser, *Hayes-Tilden Election (1876),* Jim Crow Stories, PUBLIC BROADCASTING SERVICE (2002), http://www.pbs.org/wnet/jimcrow/stories_events_election.html (Democrat candidate Samuel J. Tilden received 184 electoral votes, one shy of the majority, and Republican candidate Rutherford B. Hayes received 165 electoral votes in 1866. Twenty electoral votes were still in dispute, with 19 of those coming from southern states controlled by Democrats, although Republicans maintained control of the election boards in all three states. The election was marred with fraud, violence, and intimdation, particularly in the southern states. Enough votes were thrown out to guarantee a Hayes victory, however Southern Democrats would not accept the result until a compromise was struck.)

[36] *Id. Accord* Bass, *supra* note 34, at 116 ("In direct response to the post-Civil War amendments, the South enacted a number of 'legal and extralegal' reforms to limit the political power of freed black men and to enable the Southern Caste system to continue.").

civil rights activists in the South."[37] While each of these hindered the ability of African Americans to exercise their newly acquired right to vote, this paper will only discuss the most analogous to the photograph identification requirement now required in Tennessee, poll taxes, despite other "Jim Crow Laws" present in the South, such as literacy tests, and new registration systems,[38] and those alike in northern and western states.[39]

The most infamous form of historical disenfranchisement may be the poll tax,[40] as there would eventually be a constitutional amendment ratified in 1964 to prohibit its use in federal elections.[41] The use of poll taxes as a form of disenfranchisement began in Georgia in 1871.[42] An even more severe form of the tax, the cumulative poll tax, was introduced in Georgia in 1877, forcing "white and black men between 21 and 60 years of age [to] pay a sum of money for every year since their twenty-first birthday, or since the law took effect."[43] The effects of the poll tax were sudden and immediate, with overall voter turnout reduced by 16-28%. Within the African American community turnout was nearly cut in

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[37] Bass, *supra* note 34, at 116 (citing Alexander Keyssar, THE RIGHT TO VOTE 105-27 (2000)).

[38] *White Only: Jim Crow in America*, SMITHSONIAN NATIONAL MUSEUM OF AMERICAN HISTORY 1, http://americanhistory.si.edu/brown/history/1-segregated/white-only-1.html (last visited July 14, 2012).

[39] Mintz, *supra* note 21.

[40] A poll tax required prospective voters to pay a tax in return for the ability to vote.

[41] U.S. CONST. amend. XXIV § 1.

[42] Elizabeth Anderson & Jeffrey Jones, *Race, Voting Rights, and Segregation: Direct Disenfranchisement* (Sept. 2002), http://www.umich.edu/~lawrace/.

[43] Clarissa Myrick-Harris & Norman Harris, *Atlanta in the Civil Rights Movement*, ATLANTA REGIONAL COUNCIL FOR HIGHER EDUCATION (2005),

half.[44] The poll tax spread quickly as an effective way to disenfranchise African American voters and by 1904 every former confederate state had adopted either the poll tax or the cumulative poll tax.[45] The continued use of the poll tax was not solely the work of southern legislatures, as the Supreme Court upheld the constitutionality of the poll tax as a "legitimate device for raising revenue"[46] in *Breedlove v. Suttles.*[47] However, following the ratification of the Twenty-Fourth Amendment, the Supreme Court protected voters from the same tax, declaring unconstitutional a Virginia law that forced voters to choose between a poll tax or a "burdensome"[48] certificate of residency six months before the election.[49] It would not be until the Voting Rights Act of 1965, and an independent declaration of unconstitutionality by the Supreme Court in 1966,[50] that the poll tax would finally meet its demise.[51]

C. The Voting Rights Act of 1965

Despite all the advances made in the voting rights movement by constitutional amendment, perhaps the most tangible protections came through the Voting Rights Act of 1965, President Lyndon B. Johnson's uncompromising

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http://www.atlantahighered.org/civilrights/essay_detail.asp?phase=1.

[44] Anderson, *supra* note 42 (citing J. Morgan Kousser, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880-1910 67-68 (1974)).

[45] Anderson, *supra* note 42.

[46] *Id.*

[47] Breedlove v. Suttles, 302 U.S. 277 (1937).

[48] Anderson, *supra* note 42.

[49] Harman v. Forssenius, 380 U.S. 528 (1965).

[50] *See* Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966).

[51] Anderson, *supra* note 42.

initiative.[52] The bill was the culmination of over 100 years of struggle for equality, and the landmark legislation helped to wind down the Civil Rights movement, legislatively and practically.[53] Upon signing, President Johnson delivered a powerful speech and foreshadowed the fight over voter identification requirements today: "This law covers many pages. But the heart of the act is plain. Wherever, by clear and objective standards, States and counties are using regulations, or laws, or tests to deny the right to vote, then they will be struck down."[54] The Voting Rights Act has been amended and renewed four times since its passage,[55] most recently in 2006 when it was extended through 2031.[56]

The Voting Rights Act of 1965 was primarily passed as an extension of the 1957, 1960, and 1964 Civil Rights Acts[57]and as an enforcement tool for the Twenty--Fourth amendment.[58] The previous ten years provided new enforcement powers for the executive branch, judicial oversight of voter rights implementation, and the limitation

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[52] *See* Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 NW. U. L. REV. 63, 87-88 (2009).

[53] *See Generally, Voting Rights Act Timeline, supra* note 22 (*Brown v. Board of Education,* 347 U.S. 483 (1954), ending racial segregation in schools, was decided in 1954. Congress passed Civil Rights Acts in 1957, 1960, and 1964 to further reduce race based discrimination in the country.)

[54] Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act, 1 PUB. PAPERS 409 (August 6, 1965).

[55] *History of Federal Voting Rights Laws: The Voting Rights Act of 1965,* DEPT. OF JUSTICE, http://www.justice.gov/crt/about/vot/intro/intro_b.php (last accessed July 14, 2012).

[56] *Bush signs Voting Rights Act extension,* ASSOCIATED PRESS (July 27, 2006, 11:27 PM), http://www.msnbc.msn.com/id/14059113/#.UARrq44yHww.

[57] *The Voting Rights Act of 1965, supra* note 55.

[58] Ackerman, *supra* note 52, at 87.

of both the poll tax and literary tests.[59] However, the latest example of terror and violence,[60] the fiercest of disenfranchisement tools available to those opposed to voting equality that underlies the whole evolution of civil rights,[61] provided the catalyst needed for President Johnson and the legislative body he previously ran to produce a bill that marks the pinnacle of voting rights expansion.

While the Act of 1965 was ambitious in all respects, Section 2 and Section 5 enabled the pivot towards true voting equality. Section 2 barred any "voting qualification or prerequisite to voting, or standard, practice or procedure" that denied or abridged the right to vote due to race or color.[62] This proclamation is so integral that it does not require reauthorization.[63] Section 5, however, was originally enacted for only five years and applied only to certain states according to a formula laid out in Section 4.[64] At the time of enactment, six states were subject to Section 5, all former Confederate states.[65] Three additional states

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[59] U.S. CONST. XXIV § 1. *See Introduction To Federal Voting Rights Laws: Before the Voting Rights Act,* DEPT. OF JUSTICE, http://www.justice.gov/crt/about/vot/intro/intro_a.php (last accessed July 14, 2012) (The Civil Rights Act of 1957 created the Department of Justice's Civil Rights Division and granted injunctive relief powers to the Attorney General. The 1960 Act "permitted federal courts to appoint voting referees to conduct voter registration following a judicial finding of voting discrimination.").

[60] *History of Federal Voting Rights Laws, supra* note 55.

[61] *See id.*

[62] Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006).

[63] *Section 2 of the Voting Rights Act*, DEPT. OF JUSTICE, http://www.justice.gov/crt/about/vot/sec_2/about_sec2.php (last accessed July 14, 2012) ("Section 2 is permanent and has no expiration date as do certain other provisions of the Voting Rights Act.").

[64] *About Section 5 of the Voting Rights Act,* DEPT. OF JUSTICE, http://www.justice.gov/crt/about/vot/sec_5/about.php (last accessed July 14, 2012).

[65] *Section 5 Covered Jurisdictions*, DEPT. OF JUSTICE,

were subjected in 1975, Alaska and Arizona as the first two outside of the South.[66] Currently, seven additional states have counties or towns subjected to Section 5 as well.[67] Section 5 barred changes to voting procedures and/or registration in the covered areas and suspended all practices in place in the states originally covered by the law until there was administrative review or a judicial decision.[68]

The Voting Rights Act of 1965 provided immediate results, both in voting and representation.[69] Most importantly, it withstood multiple legal challenges to its constitutionality.[70] In *South Carolina v. Katzenbach*, the expansion of voting rights came full circle, as the Court found that the Fifteenth Amendment granted Congress "full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting."[71] Additionally, it upheld Section 5 of the Act, stating: "Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting,"[72] and that Congress acted "in a permissibly decisive manner."[73]

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http://www.justice.gov/crt/about/vot/sec_5/covered.php (last accessed July 14, 2012). The states are Alabama, Georgia, Lousiana, Mississippi, South Carolina, and Virginia. Section 5 became applicable on November 1, 1964 in each of the states by 30 FR 9897.

[66] *Id.* Alaska and Arizona each have their own large minority voting bloc, Native Americans and Hispanics, respectively. Texas was also added in 1975.

[67] *Id.* California, Florida, New York, North Carolina, and South Dakota have multiple counties covered by Section 5. Michigan and New Hampshire have particular townships covered by Section 5.

[68] *About Section 5 of the Voting Rights Act*, *supra* note 64.

[69] *See Voting Rights Act Timeline, supra* note 22.

[70] *See id.*

[71] South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966); *Voting Rights Act Timeline*, *supra* note 22.

[72] *Katzenbach,* 383 U.S. at 328.

[73] *Id.* At 335. In full, the Court stated: "Congress knew that some of the States covered ... had resorted to the extraordinary stratagem of

The Supreme Court further expanded the scope of Section 5 in *Allen v. State Bd. Of Elections*,[74] when it read the Act broadly, finding "the legislative history on the whole supports the view that Congress intended to reach any state enactment which altered the election law of a covered State in even a minor way."[75]

However, the Court has limited the Act as well. In *Beer v. United States*, the Court held that changes affecting minority communities could receive preclearance under Section 5 when they do not "lead to retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."[76] Additionally, the Court held in *Mobile v. Bolden* that parties seeking relief under Section 2 of the Voting Rights Act must prove discriminatory intent instead of merely discriminatory results.[77] However this decision was invalidated in the 1982 amendment and reauthorization of the Voting Rights Act.[78] One of the more recent cases has provided the opening needed for the recent surge in voter identification law proposals; *Reno v. Bossier Parish School Board*, which held "that § 5 does not prohibit preclearance of a redistricting plan enacted with a discriminatory but

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contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees. Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself. Under the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner."

[74] *Allen v. State Bd. Of Elections,* 393 U.S. 544 (1969).

[75] *Id.* At 566.

[76] Beer v. United States, 425 U.S. 130, 141 (1976); *Voting Rights Act Timeline, supra* note 22.

[77] *Voting Rights Act Timeline, supra* note 22; *See Mobile v. Bolden*, 446 U.S. 55 (1980).

[78] *Voting Rights Act Timeline, supra* note 22.

nonretrogressive purpose."[79]

The past decade has seen many changes in voter identification requirements, as discussed in the introduction. Like Tennessee, many states decided to require strict photo identification to vote. Unlike Tennessee, some states are subject to Section 5 of the Voting Rights Act of 1965. One such states, Texas, has taken an aggressive approach and is currently challenging the continued constitutionality of Section 5 and the Voting Rights Act.[80] Texas maintains that Section 5 creates a "two-tracked system of sovereignty" for states subject to Section 5 and those that are not.[81] Meanwhile, the Department of Justice, through United States Attorney General Eric Holder Jr., challenges Texas' and other strict photo identification requirements as unconstitutional poll taxes in a different form.[82] Texas' suit is one of many recent challenges to the Voting Rights Act; in the past two years there have been more lawsuits filed than "in the previous

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[79] Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 341 (2000). The 2006 Reauthorization of the Voting Rights Act of 1965 redefined § 5's "purpose" as "any discriminatory purpose. *See also Voting Rights Act Timeline, supra* note 22

[80] Amended Complaint at 26, Texas v. Holder, No. 12-cv-00128 (D.D.C. argued July 10, 2012) ("The State of Texas is entitled to a declaratory judgment authorizing the immediate implementation of Senate Bill 14 because section 5 of the Voting Rights Act violates the Constitution.") (available at http://moritzlaw.osu.edu/electionlaw/litigation/documents/amendedcomplaint_006.pdf). *See, e.g.,* Drew Singer, *Texas to Test 1965 Voting Rights Law in Court,* REUTERS (July 8, 2012, 11:52 AM), http://www.reuters.com/article/2012/07/08/us-usa-texas-voter-idUSBRE86706W20120708.

[81] Amended Complaint, *supra* note 80, at 25.

[82] Eric Holder Jr., U.S. Attorney General, Department of Justice, Address at the NAACP 103rd Annual Convention (July 10, 2012); Bruce Ackerman & Jennifer Nou, *Texas' Poll Tax in Disguise*, L.A. TIMES, July 15, 2012,

45 years combined."[83] It is expected that the Supreme Court will hear arguments concerning the continued constitutionality of the Voting Rights Act as early as next term.[84]

III. Viewing Tennessee's New Law Through a National Lens

The courts will decide whether strict photo identification requirements are analogous to poll taxes. If they are, then the Twenty Fourth Amendment will bar the new laws. However, *Crawford v. Marion County Election Board* suggests that strict photo identification requirements like Indiana's will withstand constitutional challenges.[85] As in Indiana, Tennessee will provide photo identification for free, provided voters can show proof of citizenship and two proofs of Tennessee residency.[86] Tennessee's law also shows some leniency, allowing multiple forms of government issued photo identification, including expired driver licenses.[87] Furthermore, Tennessee retained an affidavit of identity as an avenue for indigent citizens to

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http://www.latimes.com/news/opinion/commentary/la-oe-ackerman-texas-poll-tax-20120715,0,6684651.story.

[83] Barrett, *supra* note 14.

[84] *See, e.g., id.;* Richard L. Hasen, *Holder's Voting Rights Gamble,* SLATE (Dec. 30, 2011, 1:09 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2011/12/the_obama_administration_s_risky_voter_id_move_threatens_the_voting_rights_act.html; Singer, *supra* note 80.

[85] *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008).

[86] *Voter Photo ID*, TENNESSEE DEPARTMENT OF SAFETY AND HOMELAND SECURITY, http://www.tn.gov/safety/photoids.shtml (last accessed July 17, 2012).

[87] *Id. See also Voter Identification Requirements, supra* note 2 (Other strict photo identification states do not allow expired documents. Kansas only accepts expired documents if the bearer is 65 or older.

vote.[88]

Tennessee's new law only recently became effective, making it difficult to measure the impact it has had in the state. Therefore, it is easier to view the law's effects through a national scope. It is estimated that nationwide roughly "11 percent of American citizens do not possess a government-issued photo ID; that is over 21 million citizens,"[89] and "up to 10 percent of registered voters nationwide lack valid photo ID cards."[90] Estimates for Tennessee specifically range anywhere from 126,000 to 675,000 citizens.[91] As of 2010, it was estimated that Tennessee has a voting-eligible population of 4,621,705.[92] At the end of 2011, only 3,882,129 of these eligible voters

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Pennsylvania only allows expired licenses if it has been less than 12 months since expiration. Rhode Island's law, effective in 2014, will not permit any expired documents. South Carolina does not accept expired documents. Texas' proposed identification laws only allow expired certificate of citizenship.).

[88] Tenn. Code Ann. 2-7-112(f) (2011).

[89] WENDY R. WEISER AND LAWRENCE NORDEN, BRENNAN CENTER FOR JUSTICE, VOTING LAW CHANGES IN 2012 2 (2011).

[90] Nick Wing, *Tennessee Voter ID Law Could Disenfranchise Thousands As State Program Fails to Reach Voters*, THE HUFFINGTON POST (July 12, 2012 6:38 PM), http://www.huffingtonpost.com/2012/07/12/tennessee-voter-id-law-program_n_1669323.html.

[91] Bill Dries, *Partisans Debate State Voter ID Law*, MEMPHIS DAILY NEWS, NOV. 2, 2011, http://www.memphisdailynews.com/editorial/Article.aspx?id=63369 (State Democrats estimate that more than 675,000 Tennesseans do not have a driver's license or have a license with no photo. Tennessee Elections Coordinator, Mark Goins, estimates there are only 126,000 citizens that are of voting age and don't have a driver's license with photo identification.). *See Also* Wing, *supra* note 90 (Mark Goins estimate is likely based on reports that 126,000 registered senior voters have received driver's licenses issued without photographs.)

[92] Dr. Michael McDonald, *2010 General Election Turnout Rates*, UNITED STATES ELECTIONS PROJECT, GEORGE MASON UNIVERSITY, Dec. 28, 2011, http://elections.gmu.edu/Turnout_2010G.html.

were registered.[93] Applying the ten percent national estimate and combining it with the average of state specific estimates, there could be roughly 421,000 Tennessee citizens,or approximately 10.8% of the electorate, directly affected by the new voter identification laws.[94] Assuming voter turnout is similar to that for the 2008 Presidential election,[95] 279,291 likely voters could be deterred from voting by the new law. Despite a Tennessee program designed to help eligible voters obtain the requisite voter identification, early returns show it has hardly made a dent in the affected populations, issuing only 20,923 photo identification cards.[96]

Subjecting approximately seven percent of likely voters to burdensome voting processes should never be accepted in a country that values the power of voting and treasures the constitutional right to vote so dearly.[97]

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[93] TENNESSEE DIVISION OF ELECTIONS, VOTER REGISTRATION: DECEMBER 1, 2011 SIX MONTH SUMMARY REPORT at 2 (available at http://www.tn.gov/sos/election/data/reg/2011-12.pdf).

[94] (126,000+675,000+462000 (roughly 10 percent of estimated eligible voters))/3= 421,000. 421,000/3,882,129 (figure from VOTER REGISTRATION: DECEMBER 1, 2011 SIX MONTH SUMMARY REPORT, *supra* note 93) = . 0.108445649 ≈ 10.8%.

[95] TENNESSEE DIVISION OF ELECTIONS, STATISTICAL ANALYSIS OF VOTER TURNOUT FOR THE NOVEMBER 4, 2008 ELECTION at 2 (available at http://www.tn.gov/sos/election/data/turnout/2008-11.pdf).

[96] Chris Kromm, *Tennessee Program to Provide Photo IDs Missing Most Voters Who Need It,* THE INSTITUTE FOR SOUTHERN STUDIES (July 12, 2012, 11:11 AM), http://www.southernstudies.org/2012/07/tennessee-program-to-provide-photo-ids-missing-most-voters-who-need-it.html (In an email to Facing South, Jennifer Donnals of the Tennessee Department of Safety and Homeland Security stated, "As of Monday, July 9 our department had issued 20,923 state IDs for voting purposes to citizens in Tennessee."). Based on the likely voter number calculated in the prior sentence, over 258,000 eligible, likely voters remain without proper identification.

[97] Show where 7% number comes from.

If there were a compelling reason to do so, however, it would be to deter fraud and ensure that no illegitimate votes dilute the value of legitimate ones.[98] Nationwide, though, there has been no significant data to indicate widespread voter fraud, particularly the kind of fraud that photo identification requirements address.[99] According to a former member of the Commission on Federal Election Reform, "a photo ID requirement would prevent over 1,000 legitimate votes (perhaps over 10,000 legitimate votes) for every single improper vote prevented."[100] More troubling, studies consistently show that the most likely to be disenfranchised by photo identification requirements are minorities, the elderly, the poor, and young adults.[101] While at least ten percent of eligible voters do not have valid photo identification for voting, "25 percent of African

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[98] *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008).

[99] *See Policy Brief on Voter Identification,* BRENNAN CENTER FOR JUSTICE, (Sept. 2006), http://www.brennancenter.org/content/resource/policy_brief_on_voter_identification/ (In Ohio there were "four instances of inelible persons voting or attempting to vote... a rate of .00004%. Georgia's Secretary of State "could not recall one documented case of voter fraud relating to the impersonation of a registered voter at the polls during her ten-year tenure." Finally, since 2002, there have only been "86 individuals...convicted of federal crimes relating to election fraud (including several offenses not remedied by identification requirements), while 196,139,871 ballots have been cast in federal general elections."); Judith Browne Dianis, *Five Myths About Voter Fraud,* WASH. POST, Oct. 7, 2011, http://www.washingtonpost.com/opinions/five-myths-about-voter-fraud/2011/10/04/gIQAkjoYTL_story.html ("An investigation of fraud allegations in Wisconsin in 2004 led to the prosecution of 0.0007 percent of voters. From 2002 to 2005, the Justice Department found, only five people were convicted for voting multiple times. In that same period, federal prosecutors convicted only 86 people for improper voting.").

[100] Dianis, *supra* note 99.

[101] *Id.*

Americans, 15 percent of those earning less than $35,000, 18 percent of citizens age 65 or older and 20 percent of voters age 18 to 29" do not.[102] Coincidentally, perhaps, these groups tend to vote Democrat.[103]

IV. Conclusion

The Tennessee law is not as restrictive as other states' similar measures. It retains the affidavit of identity

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[102] *Id. See also Policy Brief on Voter Identification*, *supra* note 99 ("The impact of ID requirements is even greater for the elderly, students, people with disabilities, low-income individuals, and people of color...Fewer than 3 percent of Wisconsin students have driver's licenses listing their current address. The same study found that African Americans have driver's licenses at half the rate of whites, and the disparity increases among younger voters; only 22% of black men aged 18-24 had a valid driver's license. Not only are minority voters less likely to possess photo ID, but they are also more likely than white voters to be selectively asked for ID at the polls."); Weiser, *supra* note 89 at 1 ("These new restrictions fall most heavily on young, minority, and low-income voters, as well as on voters with disabilities. This wave of changes may sharply tilt the political terrain for the 2012 election.")

[103] *See* Jonathan Chait, *2012 or Never,* N.Y. MAGAZINE, Feb. 26, 2012, http://nymag.com/news/features/gop-primary-chait-2012-3/ (Discussing the changing demographics in America that shows "[e]very year, the nonwhite proportion of the electorate grows by about half a percentage point—meaning that in every presidential election, the minority share of the vote increases by 2 percent, a huge amount in a closely divided country." Meanwhile, "The Republican Party had increasingly found itself confined to white voters, especially those lacking a college degree and rural whites...."); Mark Lopez & Paul Taylor, *Dissecting the 2008 Electorate: Most Diverse in U.S. History*, PEW RESEARCH CENTER (Apr. 30, 2009), http://pewresearch.org/assets/pdf/dissecting-2008-electorate.pdf (showing 95% of African-Americans, 67% of Latino voters, and 62% of Asian voters voted Democrat in the last election. Furthermore, whites made up the lowest percent of the electorate in history, while African Americans, Hispanics, and Asians each "accounted for unprecedented shares of the presidential vote in 2008." A combination

for those with religious objections or indigent citizens.[104] Additionally, it allows expired forms of identification to be used. Its trial run, the 2012 Republican primary, showed mixed results with 154 ballots being blocked.[105] Despite the relatively low number of blocked ballots, it may not be indicative of the effects in the 2012 Presidential election, as the demographics of the electorate will be entirely different.[106] Tennessee's law does provide some protections for two of the most affected groups most likely to be affected, the elderly, with the free conversion of non-photo driver's licenses, and the poor, through the identity affidavit.[107] Yet it does not address minority voters and expressly burdened young voters, recently a more active voting bloc, especially among minorities, by omitting a provision allowing university identification to serve as proper identification to vote.[108] Finally, it does not affect

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of two of the most affected groups, African Americans aged 18 to 29 "increased their voter turnout rate by 8.7[%]".)

[104] *Voter Photo ID, supra* note 86.

[105] Mike Baker, *Voter ID Laws Could Block Thousands From Voting*, ASSOCIATED PRESS, July 8, 2012, http://www.huffingtonpost.com/2012/07/08/voter-id-laws_n_1657027.html (Keesha Gaskins, senior counsel at the Brennan Center, stated, "These are still people who attempted to vote and who were unable to do so. When you compare that to the actual evidence of fraud, the difference is exponential.").

[106] *Tennessee Election Officials Optimistic About Voter ID Law, Despite Criticism,* FOX NEWS LATINO (Mar. 4, 2012), http://latino.foxnews.com/latino/politics/2012/03/04/tennessee-election-officials-optimistic-about-voter-id-law-despite-criticism/ ("How many Latinos and African Americans do you think are voting in the Republican presidential primary in Tennessee (on Tuesday)?" Vanderbilt University political science professor Bruce Oppenheimer asked. "How many poor people? The groups who are voting in the Republican primary ... are not the people who are expected to be particularly disenfranchised by the new voter ID law.").

[107] *Voter Photo ID, supra* note 86.

[108] *Id. See also* Emily Schultheis, *Students Hit by Voter ID Restrictions,*

absentee voting, the most likely form of voter fraud.[109]

In light of the changing electorate in 2008,[110] the success of the Republican Party with a much different electorate makeup in 2010,[111] and the pursuit of photo identification laws nearly exclusive to Republican led state governments,[112] the political undertones of the voting identification changes are troubling. With the disproportionate effect of the new laws on growing and increasingly active minority populations, the new push becomes questionable. When viewed in conjunction with the historical barriers to voting and the struggle for expanded voting rights, seemingly innocuous identification measures are easily tied to nefarious intentions. It is not until the statistics of fraud are added to the equation, especially the type that these laws address, that the new law becomes practically indefensible. While photo identification requirements are pervasive in America today, whether it is for bank transactions, airline travel, or even

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POLITICO (Nov. 30, 2011), http://www.politico.com/news/stories/1111/69465.html ("Many college students don't have a valid ID from the state where they're attending school. In order to vote on or near campus, those students would need to apply for and get new state-issued IDs well in advance of primary day or Election Day."); Lopez, *supra* note 103 at 6 (Showing that voter participation was 2.1% higher for all 18-29 year old. Of that age group, Black voter turnout rose 8.7%, Hispanic 5.2%, and Asian 10.5%).

[109] *See Weiser, supra* note 17.

[110] Lopez, *supra* note 103.

[111] Chait, *supra* note 103 ("During the last midterm elections, the strategy succeeded brilliantly. Republicans moved further right and won a gigantic victory. In the 2010 electorate, the proportion of voters under 30 fell by roughly a third, while the proportion of voters over 65 years old rose by a similar amount—the white share, too.").

[112] Weiser, *supra* note 17, at 9-10 ("This year, in every case but one, strict voter ID bills were introduced by Republican legislators... With the exception of Rhode Island, every state that enacted stricter voter ID requirements this session had both houses and the governor's office controlled by Republicans.").

conferences denouncing photo identification requirements for voters,[113] this country has a complicated past dealing with voting rights. When the small amount of voter fraud is balanced with the large population that may be disenfranchised by the new laws around the country, voter photo identification laws are unsound policy, like "trying to kill a fly with a bazooka."[114]

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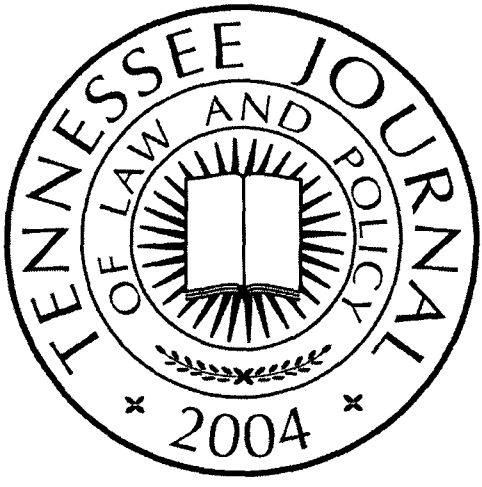
[113] Sean Higgins, *Hey, They Can't Let Just Anybody In: Proper ID Needed to See Eric Holder Speech Denouncing Voter ID Laws,* WASH. EXAMINER, July 10, 2012, http://washingtonexaminer.com/hey-they-cant-let-just-anybody-in-proper-id-needed-to-see-eric-holder-speech-denouncing-voter-id-laws/article/2501792.

[114] Amy Bingham, *Voter ID: Poll Tax or Common Sense?,* ABC NEWS (July 12, 2012), http://abcnews.go.com/Politics/OTUS/voter-id-poll-tax-common-sense/story?id=16758232#.UAY7HI4yHww (Quoting Nathaniel Persily, "a voting law expert at Columbia Law School," and co-author of *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements, supra* note 16.).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