"No Armed Bodies of Men" -- Montanans' Forgotten Constitutional Right (With Some Passing Notes on Recent Environmental Rights Cases)

Robert G. Natelson
University of Montana School of Law

Follow this and additional works at: http://scholarship.law.umt.edu/faculty_lawreviews

Part of the Constitutional Law Commons

Recommended Citation
Robert G. Natelson, "No Armed Bodies of Men" -- Montanans' Forgotten Constitutional Right (With Some Passing Notes on Recent Environmental Rights Cases), 63 Mont. L. Rev. 1 (2002), Available at: http://scholarship.law.umt.edu/faculty_lawreviews/20

This Article is brought to you for free and open access by the Faculty Publications at The Scholarly Forum @ Montana Law. It has been accepted for inclusion in Faculty Law Review Articles by an authorized administrator of The Scholarly Forum @ Montana Law.
ESSAY

"NO ARMED BODIES OF MEN" – MONTANANS’ FORGOTTEN CONSTITUTIONAL RIGHT

(With Some Passing Notes on Recent Environmental Rights Cases)

Robert G. Natelson*

I. INTRODUCTION

In July, 2000, the Police Department of the City of Missoula, Montana, imported approximately seventy-six outside police officers, many from other states, to assist with law enforcement during an anticipated visit by the Hell’s Angels Motorcycle Club. Trouble did arise when the Hell’s Angels were
in town. But it did not involve the Hell's Angels. To the surprise of many, clashes and confrontations, both verbal and violent, flared up between the police, including the out-of-state officers, and the local citizenry.¹

The mayor of Missoula appointed a review committee to investigate the incident. During the investigation, several citizens testifying before the committee questioned whether the importation of armed men from other states for peacekeeping purposes violated Article II, Section 33 of the Montana Constitution. That section reads as follows:

**Importation of armed persons.** No armed person or persons or armed body of men shall be brought into this state for the preservation of the peace, or the suppression of domestic violence, except upon the application of the legislature, or of the governor when the legislature cannot be convened.²

In its report, the review committee found no constitutional violation. The committee report asserted Article II, Section 33 applied only to importations by *private* parties—specifically mining companies' importation of strikebreakers—and not to "governmental law enforcement agencies dealing with legitimate emergencies." The report also averred that a state law, the Montana Interstate Law Enforcement Mutual Aid Act of 1983,³ provided the necessary legal authority for the importation.⁴

---

2. MONT. CONST. art. II, § 33.
4. The Citizens Review Committee stated its constitutional conclusions in rather strong terms:

   In the course of its review, the Committee heard several assertions that are demonstrably false and should be put to rest.

   Misconception No. 1: Importing police officers from out of state violated the Montana Constitution.

   Some in the community have stated that bringing in armed officers from other states violates Article II, section 33 of the Montana Constitution, which prohibits bringing "armed" persons into the state to preserve the peace without the approval of the legislature or governor. Although this Committee is not a judicial body charged with interpreting the Constitution, the three lawyers on the Committee firmly believe the Police Department’s reliance on out-of-state officers was not unconstitutional. The history of the provision in question, which was taken from Montana's 1889 Constitution by the members of the 1972 Constitutional Convention, shows it was intended to keep mining companies from importing private guards as strikebreakers. The law was not intended to apply to governmental law enforcement agencies dealing with legitimate emergencies. More importantly, the Legislature expressly
In this essay, I discuss the issue of whether Article II, Section 33 is targeted at importations of "armed bodies of men" by government, by private parties, or by both. I conclude:

- that the section certainly bans governmental importations not specifically approved by the legislature or governor, and that this is evident from facial analysis (the placement and text of the section) and from its history;

- that facial analysis suggests that private importation is not banned, although there is sufficient uncertainty to justify a court considering the underlying history of the section;

- that although the historical case is not compelling either way, the balance of the evidence is that private importations are banned; and

- that compliance with the Interstate Law Enforcement Mutual Aid Act without following the specific waiver procedures in Article II, Section 33 does not render such an importation constitutional.

Additionally, in Part II. C, I resort to the Montana Supreme Court's recent "environmental rights" cases to illustrate some problems in judicial review of a constitutional right against private parties.

II. THE IDENTITY OF IMPORTERS

A. Facial analysis

1. Reasons for facial analysis

No Montana case law specifically interprets Article II, Section 33. In the absence of controlling case law, the normal first step for interpreting a constitutional provision, as other written documents, is to determine whether the provision is authorized mutual aid agreements with out-of-state law enforcement agencies when it passed the Interstate Law Enforcement Mutual Aid Act in 1983. Report, supra note 2, at 14.

In preparing the memorandum that served as a starting point for this essay, I interviewed all three of the lawyer-members of the committee, but it remains unclear to me what could be the basis for the level of certainty expressed in the foregoing extract.
facially clear when read in its context in the document and in the language of the time of drafting. If the provision is facially clear, it is enforced as written. To the extent that Article II, Section 33 is clear, a court should not look behind it by utilizing historical analysis or other outside evidence.

Thus, clear language is not qualified or narrowed by the historical contingency that led to its adoption. By way of illustration, the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States was adopted primarily for the protection of African-Americans. But its clear language protects "any person." A court would not admit historical evidence as "proof" that the Clause denies protection to Asian-Americans. The words "any person" are too clear to deny that Asian-Americans enjoy the coverage of the Equal Protection Clause. On the other hand, if a constitutional provision is ambiguous or otherwise unclear, then a court may turn to historical and other interpretive methods.

Part of this essay is devoted to an examination of the history of the Section as a whole. However, the reader should be cautioned that to the extent the Section is clear on its face, that history may have no legal force.


The language of the time may have to be consulted because words change their meaning over long periods of time. For example, the phrase "more perfect union" in the Preamble of the Constitution of the United States means "more nearly complete union." No changes of meaning, however, are relevant to the issue discussed in this paper.

6. U.S. Const. amend. XIV ("nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws.").

7. For the broad reach of the Equal Protection Clause, see John E. Nowak & Ronald D. Rotunda, Constitutional Law 632-38 (West Publishing Co. 2000) (1981). On the other hand, evidence that the Amendment was triggered in part by southern states' Black Codes could be introduced to show the scope of the less clear term "equal protection of the laws." Moreover on other points, the term "any person" might require historical analysis: Is, for example, an unborn child a "person" within the meaning of the Clause?

8. Among these methods are the much-abused terms "strict construction" and "liberal construction." These are properly understood as merely different ways of resolving textual ambiguities. Courts applying strict construction resolve ambiguities against coverage, while courts applying liberal construction resolve ambiguities in accordance with the general intent of the legislator. See, e.g. Black's Law Dictionary 386 (4th ed. 1968) (discussing strict and liberal construction).

Outside of criminal law, liberal construction generally is preferred in Montana. E.g. Mont. Code Ann. §§ 1-2-102 to -103 (2001). The historical analysis in this essay sheds light on intent, and thus should further liberal construction of unclear matters.
2. Placement and context

Facial analysis must take into account both the placement and context of Article II, Section 33 and its wording. We first turn to placement and context.

The Section is found in the Montana Declaration of Rights. This suggests, of course, that it partakes of characteristics similar to other sections in the Declaration of Rights. Two of these characteristics are relevant to our inquiry. First, with one partial exception, all of the sections in the Declaration of Rights are citizen protections against governmental authority. In other words, they are not claims upon government nor proscriptions against private action. This is, indeed, rather typical of bills of rights in American constitutions. Although the Montana Constitution does contain some positive guarantees and protections against private parties, those provisions are not located in the Declaration of Rights.

The second relevant characteristic of provisions within the Declaration of Rights is that the state supreme court ascribes special attributes to them. They are "fundamental" rights that individuals may enforce in court and that government may infringe legitimately only if the government convinces the court


10. Traditionally, constitutions of government are limited to defining the organization of government agencies and scope of government powers, not the rights of private citizens inter se. Etymologically, the word constitution comes from the Latin verb, constituere, which in this context means "to arrange" or "to organize." CHARLES T. LEWIS, A LATIN DICTIONARY (reprint 1980) (1879). A constitution of government is an arrangement, organization, or, to use a common 18th century term, a "frame" of government. Cf. John Dickinson, Letters of Fabius No. 4, in PAUL LEICESTER FORD (Ed.), PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 181 (1888) ("... a constitution is the organization of the contributed rights in society. Government is the exercise of them.") (emphasis in original).

This is why, in the American constitutional tradition, individual rights usually are phrased as limitations on government powers. See, e.g., State v. Long, 216 Mont. 65, 70-71, 700 P.2d 153, 156-57 (1985):

Historically, constitutions have been means for people to address their government. ... . Certainly, there is nothing in the constitutional debate that clearly indicates we should depart from traditional constitutional notions. Therefore, in accordance with well-established constitutional principles, we hold that the privacy section of the Montana Constitution contemplates privacy invasion by state action only.

216 Mont. at 70, 700 P.2d at 157.

11. Thus, the environmental right within the Declaration of Rights, Article II, Section 3, protects against state action. The protection against private action is located in Article IX, Section 1. Similarly, the state educational guarantee is not found in Article II, but in Article X. MONT. CONST. art. X, § 1. See also id.; MONT. CONST. art. IX, § 4 (government provision of cultural resources).
that the infringing action is "narrowly tailored" to serve a "compelling state interest."\textsuperscript{12} This standard of review of government action is called "strict scrutiny."\textsuperscript{13} Strict scrutiny has the practical effect of reversing the presumption of constitutionality usually afforded governmental actions.

Thus, the placement of Article II, Section 33 implies that it is (1) a right against government, (2) a citizen right, analogous to the requirement of trial by jury,\textsuperscript{14} and (3) a fundamental right, so that government infringement is valid only if it serves a compelling state interest.

3. Text

The next step in our facial analysis is to examine the wording of Article II, Section 33. Once again, the text reads:

\begin{quote}
Importation of armed persons. No armed person or persons or armed body of men shall be brought into this state for the preservation of the peace, or the suppression of domestic violence, except upon the application of the legislature, or of the governor when the legislature cannot be convened.\textsuperscript{15}
\end{quote}

The drafters phrased the text in the passive voice, without identification of particular importers or classes of importers. The natural reading, therefore, is that all importations of armed persons for peacekeeping purposes are banned, public or private, irrespective of who does the importing. Unfortunately for this natural reading, the interpretative convention is that rights in bills of rights, even if cast in the passive without a subject, apply only against government. The Montana supreme court's interpretation of the state right to privacy is an example.\textsuperscript{16} The argument is strengthened in that certain other rights in the state constitution do specify that they are effective against

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{13} \textit{Id.}
\item \textsuperscript{14} MONT. CONST. art. II, § 24.
\item \textsuperscript{15} MONT. CONST. art. II, § 33.
\item \textsuperscript{16} \textit{See} State v. Long, 216 Mont. 65, 70, 700 P.2d 153, 156 (1985) (interpreting MONT. CONST. art. II, § 10, which reads, "The right of individual privacy . . . shall not be infringed without the showing of a compelling state interest," as a right only against state, not private, action.) \textit{See also} U.S. CONST. amends. II, III, IV & IX.
\end{itemize}
\end{footnotesize}
private action.\textsuperscript{17}

Moreover, this text is materially different from laws and constitutional provisions targeted against private arms and private armies. The latter category includes (1) sections in other state constitutions that carve exceptions from the right to keep and bear arms so the legislature may regulate or prohibit private armies,\textsuperscript{18} and (2) statutes that prohibit importations of armed personnel for criminal purposes.\textsuperscript{19} The goal of such provisions is to prevent disturbances of the peace, and the means is to suppress private armies. But the goal of Article II, Section 33 does not seem to be, or at least is not limited to, preventing disturbances of the peace. It prohibits importations “for the preservation of the peace.” Different goals often imply different means – especially here, since public, not private, actors are the usual preservers of the peace.

4. Conclusions from facial analysis

Facial analysis shows clearly that Article II, Section 33 bans government importations of armed men. To reach a definitive legal interpretation on that point, therefore, there is no need to examine the legislative history behind the section.

Facial analysis is less successful in determining whether

\textsuperscript{17} MONT. CONST. art. II, § 4 (part of the right of individual dignity), art. IX, § 3 (environmental right against private parties).

\textsuperscript{18} \textit{E.g.}, ARIZ. CONST. art. 2, § 26 (adopted 1912): “The right of the individual citizen to bear arms in defense of himself or the State shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men.” \textit{See also} WASH. CONST. art. 1, § 24 (adopted 1889): “The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men.” Some interpretative cases include Presser v. Illinois, 116 U.S. 252 (1886); State v. Gohl, 90 P. 259 (Wash. 1907); and Commonwealth v. Murphy, 44 N.E. 138 (Mass. 1896).

\textsuperscript{19} An example of the latter sort of enactment is MONT. CODE ANN. § 45-8-106(1) (2001):

A person commits the offense of bringing armed men into the state when he knowingly brings or aids in bringing into this state an armed person or armed body of men for the purpose of engaging in criminal or socially disruptive activities or to usurp the powers of law enforcement authorities. (emphasis added).

This section superseded former MONT. REV. CODE ANN. § 94-3524 (Smith 1947), which covered only importation for preserving the peace, as does Article II, Section 33:

Every person who brings into this state an armed person or armed body of men for the preservation of the peace or the suppression of domestic violence, except at the solicitation and by the permission of the legislative assembly or of the governor, is punishable by imprisonment in the state prison not exceeding ten years and by a fine not exceeding ten thousand dollars.
Article II, Section 33 interdicts purely private importations. The natural reading of the section in isolation suggests that it does. The legal context and various interpretative conventions suggest that it does not.

We turn, therefore, to the history of Article II, Section 33.

B. The history of Article II, Section 33

1. History before 1971

This section was first adopted as Article III, Section 31 of the 1889 Montana Constitution. It is one of four fraternal quadruplets: Similar sections were inserted almost immediately thereafter into the constitutions of Wyoming, Idaho, and Kentucky. The Wyoming and Idaho conventions also met in 1889, the Kentucky convention in 1890. Following is the Wyoming section:

No armed police force, or detective agency, or armed body, or unarmed body of men, shall ever be brought into this state, for the suppression of domestic violence, except upon the application of the legislature, or executive, when the legislature cannot be convened.21

Similarly, Idaho's constitution provides:

No armed police force, or detective agency, or armed body of men, shall ever be brought into this state for the suppression of domestic violence except upon the application of the legislature, or the executive, when the legislature can not be convened.22

And Kentucky's:

No armed person or bodies of men shall be brought into this State for the preservation of the peace or the suppression of domestic violence, except upon the application of the General Assembly, or of the Governor when the General Assembly may not be in

20. The 1889 section provided:

No armed person or persons or armed body of men shall be brought into this state for the preservation of the peace or the suppression of domestic violence, except upon application of the legislative assembly or of the governor when the legislature cannot be convened.

21. WYO. CONST. art. XIX, § 6 (effective 1890).

22. IDAHO CONST. art. XIV, § 6 (effective 1890).
All four quadruplets are formed in the passive voice, are targeted against importations for peacekeeping purposes, and provide for waiver by the legislature or, as a backup, by the governor. Although background information on the Kentucky provision is not available, the transcripts of the convention debates that led to the adoption of these provisions in the three neighboring states of Idaho, Montana, and Wyoming enable us to reconstruct the community of understanding existing at the time.

First, the history amply supports the findings of facial analysis as to government importations. Although there was talk of the practice of mining companies and other kinds of businesses bringing in armed men, there also was specific concern about public authorities such as local law enforcement agencies, state authorities, and the federal government. Moreover, the convention discussions reflect the fact that many – perhaps most – of the abusive cases had arisen when local sheriffs and marshals deputized out-of-staters. One Wyoming

23. KY. CONST. § 225 (effective 1891).
24. The first three provisions state that the governor may authorize the importation only if the legislature cannot be convened. The Kentucky provision is marginally looser, allowing the governor to act if the legislature is not actually in session.
25. E-mail from Carol J. Parris, Reference and Research Services Librarian at the University of Kentucky, to Varya Petrosyan, University of Montana School of Law, Class of 2003 (July 10, 2001) (on file with the author).
27. Id. at 129-130 (on the concern with deputization by local law enforcement agencies).
28. Thus, Montana Delegate Knowles doubted whether the governor should have the right to call for armed forces from other states. See Montana 1889 Convention at 131 (statement of Delegate Knowles). An earlier draft of the Wyoming provision stated that even with consent of the authorities the only outside agency permitted in the state should be the U.S. Army. WYO. CONST. CONVENTION 192 (1889) [hereinafter "Wyoming Convention"].
30. For a Montana example of deputizing company employees, see McCarthy v. Anaconda Copper Mining Co., 70 Mont. 309, 225 P. 391 (1924) (although in that case they appear to have local residents). While deputization is not mentioned specifically in the Montana transcripts, deputization was a widespread practice that occurred in Montana, and some delegates' remarks seem to assume it. See Montana 1889
delegate explained the thrust of the proposal in this way:

That is what this section is intended to prevent; that is that armed men shall be brought in from the slums of Chicago, and that they shall be clothed with authority of law.31 (emphasis added).

Another Wyoming delegate said his goal was a provision that would

keep out a foreign body of armed men, and not give them the pleasure of sticking on a badge, laying around the saloons at my little voting place, spoiling for a fight, made deputy marshals to guard Dale creek bridge as a dodge.32

Not surprisingly, however, the delegates were not all of one mind on such issues; some, for example, defended the police who had deputized out-of-staters.33

The more difficult question is history's verdict on whether these provisions were designed to forbid purely private importations, without deputization. There is good evidence that they were. The delegates' comments reflect concerns about corporations importing armed men to break strikes34 and for other kinds of violence and intimidation.35 Delegate Martin Maginnis' sentiments, thundered out at the Montana 1889 convention to general applause, were unambiguous:

... for anyone or anybody to bring an armed body of men into this Territory for any purpose whatever, either to foment trouble or to put it down, is an invasion of the Territory of Montana, and its

Convention, supra note 27, at 130 (Delegate Breen, on arresting powers).
32. Id. at 404; another Wyoming delegate complained of the heavy focus on public deputization, urging that importations by “corporations and individuals be put on exactly the same basis.”
33. E.g., id. at 403-04 (Delegate Riner).
34. The strikebreaking function is mentioned by one author, see supra note 30, at 88; but the transcripts and other sources show broader functions. See also K. ROSS TOOLE, TWENTIETH-CENTURY MONTANA: A STATE OF EXTREMES 148 (1972).
35. Professor Jeff Renz notes two cases that did not involve either mining companies or strikebreakers: (1) the Union Pacific's hiring of armed men to track down and kill the Hole-in-the-Wall Gang and (2) a Wyoming cattlemen's hiring of Tom Horn, on whom see T.A. LARSON, HISTORY OF WYOMING 372-74 (1978) (although Horn did not come to Wyoming until 1892 at the earliest). See also Joan Bishop, Vigorous Attempts to Prosecute: Pinkerton Men on Montana's Range: 1914, MONTANA: THE MAG. OF W. HIST., Spring 1980, at 2 (use of imported detectives to stop rustling, beginning in 1885) [hereinafter Bishop].
sacred rights and privileges.\textsuperscript{36}

But other delegates were not so sure. Many of the delegates seemed to understood that some imported men, including employees of the widely disliked Pinkerton’s National Detective Agency of Chicago, were serving the wholly legitimate public purposes: solving crime, protecting private property, and assisting the police — and that they were doing this not just for mining companies, but for cattlemen.\textsuperscript{37} Thus, at all three conventions, there were strenuous defenses of citizens’ legitimate rights to protect their property and demands for assurance that the right to self-defense would remain if these provisions were adopted.\textsuperscript{38}

Moreover, there is evidence that in Montana the 1889 constitution was not universally understood to forbid purely private importations (i.e., without deputization). Importations continued in Montana for many years thereafter, apparently without any suggestion that they were unconstitutional. One author, Joan Bishop, has detailed how men from the Pinkerton agency were used to check Montana cattle rustling from 1885 until at least 1920.\textsuperscript{39} Hers is not the only report.\textsuperscript{40} One Pinkerton detective, Frank Lavigne, received enough public and positive recognition for his work to be appointed as chief

\begin{verbatim}
\textsuperscript{36} Montana 1889 Convention, supra note 27, at 130 (emphasis added).

\textsuperscript{37} This point was made obliquely at least twice at the Montana convention. Montana Convention, supra note 27, at 129, 131. It also was made at the Idaho Convention. 2 I.W. Hart, ed., PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF IDAHO OF 1889, at 1413 (1912) [hereinafter Idaho Convention]. See also Bishop, supra note 36.

\textsuperscript{38} Montana 1889 Convention, supra note 27, at 129 (Delegate Warren), 131 (Delegate Hogan); Wyoming Convention, supra note 29, at 402 (Delegate Brown). The following colloquy occurred at the Idaho convention:

Delegate Ainslie: I move the adoption of that amendment, and I believe in it. We have had enough of Pinkerton’s private squads of men ranging through the west. I see Montana has adopted the same thing, and I think it is a good thing.

But then a quick clarification by the Chairman:

I will call attention to the words, “private detective agency.” If the gentleman from Boise will examine the amendment and see that it cuts off the employment of private detectives for the detection of individual crime. I don’t think it was the desire of the gentleman from Logan to include that.

With that clarification the measure was passed. Idaho Convention, supra note 38, at 1413.

\textsuperscript{39} Bishop, supra note 36, at 2.

\end{verbatim}
detective of the Montana State Board of Stock Commissioners.41

2. The policies behind the constitutional provisions

The policies that motivated adoption of Article II, Section 33 and the other quadruplets can add insight into their scope. The Montana, Idaho, and Wyoming convention transcripts reveal two principal policies.

One of these was, as Delegate Maginnis said, to preserve the territorial integrity of the state.42 The other, which is perhaps of more interest today, was to prevent clashes and contention between local citizens and unsympathetic out-of-staters.

Both policies are part of a long American constitutional tradition. The first policy – protection of the state's territorial integrity – is desirable because territorial invasion of a state can disrupt republican government. Accordingly, the United States Constitution specifies that the federal government will protect the states against it.43 The latter policy embodies the value that the founding generation at the time of ratification of the U.S. Constitution called sympathy.

The term "sympathy" is omnipresent in the grand constitutional debate of 1787-89.44 It meant identity of interest, values, and "fellow-feeling" between governmental decision makers, including the police, and the citizenry at large. Although a closer modern word might be "empathy," in this essay I shall employ "sympathy" as a term of art because of its strong historical connections.

The value of "sympathy" between governors and governed underlies such well-known state and constitutional features as the large numbers and small districts that characterize lower houses of the legislature, jury trial by local citizens,

41. Bishop, supra note 36, at 12.
42. E.g. Montana 1889 Convention, supra note 27, at 130 (Delegate Maginnis).
43. U.S. CONST. art. IV, § 4. ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion... ").

This list is merely a small sampling.
proscriptions on conflicts of interest – including bans on executive branch officials in the legislature, frequent elections, and term limits.\textsuperscript{45}

At an early date, Americans became attached to the value of sympathy in law enforcement. British importation of Hessian mercenaries to suppress the American Revolution was a topic of particular abhorrence, and was cited as one of the grievances in the Declaration of Independence.\textsuperscript{47} As made clear earlier, in the 19th century public opinion reacted strongly against the practice of local authorities granting law enforcement powers to armed men brought in from other states.\textsuperscript{48} The United States has been one of the few nations that has declined to establish a national police force, preferring to rely on community and state law enforcement. Quartering of troops on homeowners in peacetime is constitutionally prohibited.\textsuperscript{49} Use of the military for internal policing is, in general, forbidden by law.\textsuperscript{50} Lest anyone think that this policy of “sympathy” in law enforcement is anachronistic, he need only reflect on the serious recent attention given to training and disciplining local police so as to maintain an identity of feeling and interest with local citizenry.\textsuperscript{51}

\textsuperscript{45} E.g. MONT. CONST. art. V, § 9.
\textsuperscript{47} THE DECLARATION OF INDEPENDENCE para. 28 (U.S. 1776).
\textsuperscript{48} The lack of “sympathy” between those men and local inhabitants was noted in the Wyoming Constitutional Convention:

\begin{quote}
That is what this section is intended to prevent; that is that armed men shall be brought in from the slums of Chicago, and that they shall be clothed with authority of law. . . . Wyoming Convention, supra note 29, at 402 (1893).
\end{quote}

Some of these men were convicts who had been pardoned not ten days from the Lincoln penitentiary in Nebraska; that was the kind of men that were sent here. . . .

\textit{Id.} at 403.

\textit{See also} the cutting reference to Chicago in Montana 1889 Convention, supra note 27, at 130 (Delegate Breen), as well as the general hostility toward out-of-state enforcers in the discussion.

\textsuperscript{49} U.S. CONST. amend. III. \textit{See also} MONT. CONST. art. II, § 32.

\textsuperscript{50} By the so-called “Posse Comitatus Act.” \textit{See, e.g.,} 10 U.S.C.A. § 375 (1998).

\textsuperscript{51} This is called community policing. \textit{See, e.g.,} Community Policing Consortium, \textit{About Community Policing}, at http://www.communitypolicing.org/about2.html (last visited Aug. 30, 2001) (among the elements of the philosophy: “Law enforcement has long recognized the need for cooperation with the community it serves. Officers speak to neighborhood groups, participate in business and civic events, consult with social agencies and take part in education programs for school children. Foot, bike and horse patrols bring police closer to the community” and “Community policing allows law enforcement to get back to the principles upon which it was founded, to integrate itself
Article II, Section 33 promotes the policy of "sympathy" by making importation administratively inconvenient—that is, by requiring two-tiered deliberation in advance. Before an importation, both local and state authorities must agree on its necessity. The statewide officials to whom the local officials must apply are, first, the legislature—the branch most "sympathetic" to the people—and, if that is impractical, the governor, who commands the militia and is the statewide official most visibly responsive to the people. In the course of this process, the legislature or governor may decide that there are less risky alternatives, such as using the militia or police from other communities within Montana.

Sadly, some consequences of disregarding the constitutional policy were illustrated in the Missoula incident referred to above: A documented lack of "sympathy" between citizens and police that was aggravated, justifiably or not, by the presence of out-of-state police officers. Now that mass invasion of Montana by purely private forces is unlikely, the promotion of sympathy between law enforcement and citizens may be this section's primary usefulness.

The policies underlying Article II, Section 33 are best served by its application to both public and private importers. The territorial integrity of the state could be threatened by invasion sponsored either by another government or by private parties. Either kind of invasion could have local government collaborators; that is one reason the section provides that the legislature or governor must approve the importation. The policy of sympathy is most applicable to public importers, especially of law enforcement personnel. However, even the private use of out-of-state security guards, for example, can cause ill-will, disrespect for the law, or even violence.

3. 1971-72 Constitutional Convention

The 1971-72 Montana convention transcripts, although not copious on this subject, support the conclusion that the Article

once again into the fabric of the community so that the people come to the police for counsel and help before a serious problem arises, not after the fact.

52. See, e.g., Report, supra note 2, at 6-13.

53. Unfortunately, this point seems to have been missed in Elison and Snyder's discussion of the Montana Constitution, which discusses instead isolated instances of tax-protestors and the like, and concludes that, "In practice, the section is probably without significant value . . . ." LARRY M. ELISON & FRITZ SNYDER, THE MONTANA STATE CONSTITUTION 86 (2001).
II, Section 33 applies to both public and private importations. Although some have interpreted references to "strikebreakers" at the convention as a limitation on the Section, examination of the 1971-72 transcript actually suggests that the provision has a very broad sweep indeed.

The primary discussion of Article II, Section 33 at the convention was an oral report from the Bill of Rights Committee. Based on that oral report, the section was read and approved. The entire report is as follows:

**DELEGATE FOSTER:** Mr. Chairman, I move that when this committee does arise and report, having had under consideration Section 33 of the Bill of Rights Proposal Number 8, it recommends that the same be adopted.

Mr. Chairman. Article III, Section 31 [of the 1889 constitution] remains unchanged. The protection, *initially established to prevent the importation of strikebreakers*, is thought to be an adequate safeguard against *any body of armed men coming into the state*. No delegate proposals were received on this provision. This particular section was reviewed in somewhat similar light as to the one previous to it. The thinking of the committee on this question was the same. It does have some history to it, and *there is a possibility that in the case of an unruly situation that someone might be inclined to bring armed men into the state*. And we felt that it was a good safeguard, and the committee felt it was important that this be retained as a safeguard to the people of the State of Montana. Thank you, Mr. President [Chairman].

It is evident from a reading of this passage, which is echoed in the Bill of Rights Committee's formal comments, that the committee's, and by extension the convention's, intent was for the normal rule of interpretation — a clear, general clause is not limited to the historical events that produced it. In the words of Delegate Foster, whatever the reason this section was "initially established," it was now a "safeguard against any body of men

---

54. This is likely a basis for the conclusion in Report, *supra* note 2, at 14.
55. 6 *VERBATIM TRANSCRIPT, MONTANA CONSTITUTIONAL CONVENTION 1971-1972*, at 1832 (emphasis added).
56. See *MONTANA CONSTITUTIONAL CONVENTION 1971-72, BILL OF RIGHTS COMMITTEE PROPOSAL*:

The committee voted unanimously that the former Article III, section 31 remain unchanged. The protection, *initially established to prevent the importation of strike-breakers*, is thought to be an adequate safeguard against *any body of armed men coming into the state*. No delegate proposals were received on this provision. (emphasis added).
coming into the state” because of the “possibility that in the case of an unruly situation [such as a Hell’s Angels’ visit - ed.] that someone might be inclined to bring armed men into the state.” There is no suggestion that the section be read in a historically restrictive way, or that “any body of men” was to be limited to either public or private importations.\(^5^\)

In other words, Article II, Section 33 means what it says.

4. Implications of history for the identity of importers

The history of Article II, Section 33 supports the conclusions from facial analysis that the provision restricts governmental importations and creates a citizen right to be protected from them unless the state complies special procedures. The transcripts of the various constitutional conventions discuss publicly-sanctioned importations, and such coverage is necessary to implement the underlying policies of “sympathy” and territorial integrity.

Facial analysis revealed a lack of certainty as to whether purely private importations were covered. There is some historical evidence that they are not: Delegates expressed reservations against reducing the right of self-defense, and in Montana, in particular, private importations continued for many years without constitutional challenge. Although I am not without reservations on the question, it does seem to me that the weight of the historical evidence is that Article II, Section 33 also restricts purely private importations. This conclusion is supported by strong statements, both at the 1889 and 1971-72 conventions, in favor of broad coverage. It also is supported by the fact that restricting private importations furthers the twin policies of territorial integrity and “sympathy.”

C. An Unresolved (and Perhaps Unresolvable) Problem: Judicial Review of Private Importation Cases

It is with mixed feelings that I conclude that Article II, Section 33, unlike most other provisions in the Montana

\(^5\) N.B. the wording in the oral Bill of Rights Committee report: “This particular section was reviewed in somewhat similar light as the one previous to it.” The one previous to it was the ban on the quartering of soldiers in homes and the superiority of the civil to the military power. Discussion at the convention reveals that the provision was retained (1) because of an unwillingness to remove rights already enjoyed by the people and (2) because future circumstances could once again threaten the right. See 6 VERBATIM TRANSCRIPT, MONTANA CONSTITUTIONAL CONVENTION 1971-1972, at 1829-31.
Declaration of Rights, creates a right against private parties. In general, I favor the traditional view that constitutions ought to limit themselves to protecting "negative rights" against government rather than rights against private parties or positive guarantees from government. Construing Article II, Section 33 creates a knotty interpretative question of the kind that arises when constitution-makers depart from that principle. The question is this: By what standard should a court review a purely private importation?

The Montana Supreme Court opinion in Montana Environmental Information Center v. Department of Environmental Quality58 included dicta concerning another state constitutional right against private parties – the right to a clean and healthy environment vis-a-vis other private citizens.59 Because of that provision's close connection with the environmental right against government in the Article II Declaration of Rights,60 the court opined that it was a fundamental right, and that therefore violations by private citizens must be justified by showing a compelling state interest.61 A fortiori, this reasoning applies to Article II, Section 33, which is itself in the Declaration of Rights: A private importer of armed personnel can justify an unauthorized importation only by showing a compelling state interest.

The problem, however, is that this standard is internally inconsistent, and therefore – quite literally – impossible to apply.

A private actor accused of violating another's fundamental right is often, perhaps usually, proceeding in accordance with one or more of his own fundamental rights. The dicta in Montana Environmental Information Center, for example, spoke of one's right to be protected against a private actor whose acts “implicate” the environment. The court makes it clear that a plaintiff can defend against a private actor's “implication” even if that “implication” does not cause injury to the plaintiff in the traditional sense.62 Hence, if A decides to cut timber on his own

59. MONT. CONST. art. IX, § 1.
60. MONT. CONST. art. II, § 3.
61. See supra note 57, at ¶ 63.
62. Because the right to property generally includes the right to use it in a way that does not create a nuisance, the standard in Montana Environmental Information Center also may entail some federal constitutional difficulties. See Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Palazzolo v. Rhode Island, ___ U.S. ___, 121 S.Ct. 2448 (2001).
land in a way that does not hurt B in a traditional sense—that is, A does not create a nuisance—but B nevertheless convinces a court that A's cut "implicates" the environment, then A cannot proceed unless he proves that the cut furthers a compelling state interest. However, A's right to cut timber without harm to others (in the traditional sense) is part of his right to property. The right to property also is in the Declaration of Rights, and therefore fundamental. It cannot be infringed without a compelling state interest.

The upshot of all this is that if both sides can show a compelling state interest or if neither side can show a compelling state interest, then the cut must be simultaneously permitted and prohibited. I doubt if even the Montana Environmental Information Center majority could find a way to do that.

In a private importation case, if the importation is to protect the importer's life, liberty or property, it cannot be infringed without a compelling state interest. But if private importing is barred by Article II, Section 33, then, under the dicta in Montana Environmental Information Center, it cannot be permitted without a compelling state interest. If there is no compelling state interest either way or if there is a compelling state interest on both sides, the importation must be simultaneously permitted and prohibited.

The quandary demonstrates more than a problem with the Montana Environmental Information Center case. It illustrates the almost insuperable juristic snafus that courts get into when faced with constitutional guarantees against private parties rather than against the state. So perhaps, given the uncertain

63. See Mont. Const. art. II, § 3.
64. The inherent conflict here has been suggested by Justice Rice. See Cape-France Enter. v. Estate of Peel, 2001 MT 139, ¶ 61, 305 Mont. 513, ¶ 61, 29 P.3d 1011, ¶ 61 (Rice, J., dissenting).
65. See Mont. Const. art. II, § 3.
66. The relative success of the U.S. Constitution is attributable partly because it avoids creating rights against private parties or positive guarantees against the state. Positive guarantees also involve juristic quandaries, and almost inevitably draw the courts into the legislative sphere, as the history of the Montana school funding litigation amply shows. See, e.g., Helena Elementary School District No. 1 v. State of Montana, 236 Mont. 44, 769 P.2d 684 (1989). This, in turn, removes policy questions from the more democratic branches (legislature and executive) and lodges it in the judiciary—an essentially un republic an result. See Robert G. Natelson, "A Republic, Not a Democracy?" Initiative, Referendum and the Constitution's Guarantee Clause, 81 Tex. L. Rev. (forthcoming February 2002). (as determined by the founding generation, one of the three "core" requirements of republicanism is rule, either directly or through
nature of the facial and historical evidence, we might breathe easier if the state supreme court did not read the historical evidence quite as I do, and declined to apply Article II, Section 33 to private importers.

III. COMPLIANCE WITH THE MUTUAL AID ACT DOES NOT SATISFY ARTICLE II, SECTION 33

The Montana Interstate Law Enforcement Mutual Aid Act\(^6^7\) purports to authorize the importation of police officers from outside Montana pursuant to mutual aid agreements approved by the attorney general. The City of Missoula relied on the Act for its importation in July, 2000. Although the citizens' committee investigating citizen-police clashes stated that compliance with the Act represented the necessary legislative approval under Article II, Section 33,\(^6^8\) it is difficult to square that conclusion with the clear wording and underlying policy of that section.

Article II, Section 33 prescribes the procedures under which the ban on importation can be waived.\(^6^9\) Particular procedures must be followed – specifically:

1. Application (request for the importation) by the legislature, if the legislature can be convened.

---

representatives, by citizen majorities or pluralities).

In the federal constitution, there is one positive guarantee – U.S. CONST. art. IV, § 4, by which the United States guarantees each state a "republican form of government." The federal courts have avoided entering this legal thicket by declaring the clause a matter for Congress, and non-justiciable. On the Guarantee Clause, see generally WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION (1972). For more recent treatments, see Natelson, supra, and sources cited therein.


68. Report, supra note 2, at 14 ("More importantly, the Legislature expressly authorized mutual aid agreements with out-of-state law enforcement agencies when it passed the Interstate Law Enforcement Mutual Aid Act in 1983.").

Interestingly enough, at the time of the Missoula importations of July, 2000, the Act actually had not been complied with because, for unknown reasons the attorney general had approved the mutual agreements only "as to form" rather than under the full panoply of standards mandated by the Act. See ROBERT G. NATELSON, REPORT ON THE STATE CONSTITUTIONALITY OF IMPORTATION OF OUT-OF-STATE POLICE OFFICERS TO MISSOULA, MONTANA IN JULY, 2000 16-18 (2001) (on file with Montana Law Review).

69. Cf. LARRY M. ELISON & FRITZ SNYDER, THE MONTANA STATE CONSTITUTION 85 (2001) ("This section prohibits bringing armed men into the state except upon official government request.") If the quoted words mean any official request, they are mistaken.
2. If the legislature cannot be convened, the governor.

The literal wording of Article II, Section 33 contemplates waiver neither by local law enforcement nor by any official agency other than those designated. As the various convention transcripts show, the delegates deemed only the legislature and, in unusual cases the Governor, worthy of the waiver power. In addition to creating rights in the citizenry, therefore, this section is in the nature of a “check” amid the larger constitutional system of checks and balances – analogous to the right of the senate to approve gubernatorial appointments or of the governor to veto bills. The reasons for the check are discussed below.

Because the Act permits the attorney general to determine whether an importation will take place, it could be argued that the Act is a valid delegation of legislative power to the attorney general. There is no question that in the usual case the legislature has the constitutional authority to delegate power to executive agencies if certain requirements are met. Among other requirements, the grant must be “sufficiently clear, definite and certain to enable the agencies to know their respective rights and obligations.” The terms of the Act do provide significant guidance to the attorney general on approval of mutual aid agreements. The attorney general has a fair amount of discretionary authority as well, because he must approve the content of a mutual aid agreement, including the level of precision required and undefined “necessary and

---

70. The meaning of “when the legislature cannot be convened” is uncertain, although resolving the uncertainty is not necessary to this discussion. Since MONT. CONST. art. VI, § 11 states, “Whenever the governor considers it in the public interest, he may convene the legislature,” it cannot be the same as being already in session. Cf. KY. CONST. § 225 (reproduced at text accompanying note 24, supra). Presumably, therefore, the language means that the legislature decides the question if either (i) it is then in session or (ii) the emergency is not so serious and time so short that the legislature cannot be brought into session.

71. E.g., Montana 1889 Convention, supra note 21, at 129 (Delegate Courtney – the governor) & 130 (Delegate Maginnis – legislator and governor).

72. See MONT. CONST. art. VI, § 8, cl. 2.

73. See MONT. CONST. art. VI, § 10.


proper matters." The discretionary authority in the Act is certainly within normal limits.

There are, however, certain problems in classifying this with more typical delegation cases. The typical delegation case is a bestowal of a limited portion of the general legislative power granted by Article V, Section 1 of the Montana Constitution. The power exercised under Article II, Section 33 is not a general legislative power at all — it is a specific function lodged alternatively in legislators and the governor. Besides serving as a protection for the citizenry, it also is, as previously noted, a "check" amid the constitutional system of checks and balances. Delegating it to the attorney general is rather as if the state senate tried to delegate to the attorney general its right to confirm gubernatorial nominations or if the governor had sought to abdicate to him the right to veto bills.

Moreover, the underlying constitutional policy of "sympathy" is sabotaged if governor and legislature abandon the Article II, Section 33 power to the attorney general. I previously noted that the drafters' selection of the legislature and governor reflects the popular position of those two agencies. The attorney general, although directly elected, seems a less responsive figure: He is the state's chief law enforcement officer, required to be a lawyer, less visible, the "legal officer of the state" and tied intimately to law enforcement in a way that may render him less impartial in weighing the requests of law enforcement officials. Additionally, there is a possibility of conflict between the approval power and the attorney general's other duties.

Once again, the approval portion of Article II, Section 33 provides that

No . . . armed body of men shall be brought into this state . . . except upon the application of the legislature, or of the governor

77. Mont. Const. art. VI, § 8.
78. Mont. Const. art. VI, § 10. Cf. State ex rel. Judge v. Legislative Fin. Comm., 168 Mont. 470, 543 P.2d 1317 (1975) (holding that the legislature must act on certain measures qua legislature, and could not delegate those functions to a particular committee). The court did authorize delegation to the executive in this particular case, but the broader principle is that a delegation is unconstitutional if it defeats the purpose of a constitutional grant of power to the delegating agency.
79. Mont. Const. art. VI, § 3, cl. 2.
80. Mont. Const. art. VI, § 4, cl. 4.
Delegation to the attorney general directly violates the wording of this section. We have now seen that it violates the spirit – the central purpose of promoting "sympathy" – as well.

A more technical issue with the Act's attempted delegation of power is that not all the Article II, Section 33 approval power is the legislature's to delegate. In the usual delegation case, lawmakers bestow legislative authority held either by the legislature alone (as when a law is passed without the governor's signature) or with the governor conjointly. As noted earlier in this Part, the Article II, Section 33 approval power is discretionary or administrative in nature, and it is divided differently. Here, the power is alternative rather than conjoint. One can question whether the legislature can delegate the governor's authority to approve or disapprove when the legislature cannot be convened.

Assuming, however, that the governor's signing the Act is interpreted as a bestowal of his alternative power as well, there is another issue: Usually, when the legislature delegates power to an executive branch agency, it does so in express terms. This was not done here. On the contrary, the record contains no evidence that the legislature understood it was delegating its special power under Article II, Section 33.

The Interstate Law Enforcement Mutual Aid Act was introduced into the 1983 legislature by multiple sponsors as House Bill 857. Significantly, the bill was requested by the Department of Justice, whose chief officer is the attorney general. As so often happens in Montana, no testimony was offered by or heard from members of the general public. Two of the three proponents were employees of the attorney general's office, and one was the chief administrator of the Highway Patrol. There were no opponents. After some amendment, it passed the senate unanimously and the house with only one dissenting vote.

The record contains no references to Article II, Section 33. The Act does not mention it. The witnesses' testimony contained extensive citations to legal and constitutional authority, but they overlooked Article II, Section 33. The specific examples cited by the witnesses as to how the Act would

82. I am indebted to the State Law Library in Helena for providing to me the legislative materials pertaining to H.B. 857.
operate in practice involved responding to traffic emergencies in remote border areas, not the importation of armed men for peacekeeping purposes. Under the circumstances, it is difficult to conclude that the legislature intended to delegate the special power given it by Article II, Section 33.

Still another factor that removes this from the usual legislative delegation category is Article II, Section 33's placement in the Montana Declaration of Rights. Because of that placement, it arguably creates in each citizen a fundamental constitutional right not to be subject to law enforcement officers from other states unless those officers have been imported with the approval of the citizen's statewide elected representatives. That means each citizen has standing to defend that right and that government infringements are subject to strict judicial scrutiny—they can be justified only by showing a compelling state interest mandating the violation.

Realistically, it is hard to find any compelling state interest to justify transfer of waiver authority to the attorney general from the legislature or governor. Administrative convenience is not, of course, a compelling state interest. On the contrary, rights are established with full recognition that respecting them may render matters administratively inconvenient. In the case of Article II, Section 33, administrative inconveniences are deliberately inserted into the constitution to protect the right.

Although the foregoing is not sufficient, in my view, to conclude definitively that the Act is unconstitutional, it is enough to raise a presumption that it is—and to suggest that state officials need to take remedial action.

IV. CONCLUSION

Whatever the objective merits and demerits of Article II, Section 33, the section was drafted as it was for definite policy reasons. It means what it says. Citizens of Montana have a constitutional right not to be subject to law enforcement from out-of-staters, unless the specific use has been approved by the

83. See Authorizing Mutual Aid Agreements Among Law Enforcement Agencies, etc.: Hearing on H.B. 857 Before the House Comm. on the Judiciary, 48th Leg. (Mont. 1983) (Testimony of Steve Johnson, Assistant Attorney Gen.); Id. (Testimony of Colonel R.W. Landon, Chief Adm'r, Highway Patrol).

84. See supra Part II.A.2.

85. See supra Part II.B.3. Arguably, moreover, review by the governor (commander in chief of the militia) is just as convenient as review by the attorney general.
legislature or, in rare cases, by the governor. This is certainly applicable to public authorities, and probably to private importers as well. Furthermore, this is a fundamental right. Although it is uncertain what implications "fundamental" status may have for private importers,\textsuperscript{86} public agencies' importations are subject to "strict scrutiny" — they may import armed personnel only if there is a compelling state interest in doing so.

Compliance with the Interstate Law Enforcement Mutual Aid Act of 1983 is not sufficient to comply with Article II, Section 33. At the very least, there are sufficient doubts about the constitutionality of the Act to justify official remediation. To comply with the state constitution, law enforcement agencies seeking additional assistance from armed personnel should:

1. Use only in-state officers; or

2. Ask for prior legislative approval; or

3. If the legislature cannot be convened, obtain prior approval of the governor.

\textsuperscript{86} See supra Part II.C.
COMMENTARY*

THE SOUTH AFRICAN TRUTH COMMISSION

Justice Albie Sachs**

It was not very long ago, I was in my chambers at the Constitutional Court in Johannesburg, my telephone rang and the receptionist said "there's a man called Henry who wants to see you." I said "show him to the security gate."

I was quite eager to see Henry. He'd phoned me about a week before to say that he had been the person who'd organized the placing of the bomb in my car. He was now applying to the Truth Commission for amnesty. Was I waiting to see him? I said "yes."

* Justice Albie Sachs delivered this lecture at the University of Montana School of Law on October 15, 2001.

** As a leading member of the African National Congress, Justice Albie Sachs was targeted as a race traitor by the Apartheid Security Forces, who in 1988 planted a car bomb in Maputo, Mozambique, in an attempt to assassinate him. Thankfully, Justice Sachs survived, but his right arm was blown off, and he lost sight in one eye.

This article is essentially a transcript of Justice Sachs' remarks. Justice Sachs returned to South Africa to take an active role in negotiations for a new constitution and was passionate in ensuring that the new South Africa would cultivate a culture of respect for human rights. President Nelson Mandela appointed Justice Sachs to South Africa's first Constitutional Court, where he continues to serve as a Justice today.
I went to the security gate, opened it, and there he was, a little shorter than myself, younger, lean, staring at me as I stared at him: So this was the man who tried to kill me. And I could see in his eyes that he was as curious about me: So this is the man I tried to kill.

He walked down the passage towards my office. I still recall he had a stiff soldier’s gait. I decided to walk with what I call my ambulatory judicial style. We sat down, and he told me about his life. He said he came from a very good family; his mother in particular was a very moral person. He had done well at the university, been recruited into the army, and with great pride mentioned that he had risen rapidly through the ranks and had become integrated into Special Operations.

He was the person who had photographs taken of my car, and had arranged for the explosives to be put in it. He told me that, in fact, the operation had initially been postponed. He had dropped out because he’d fought with the head of the squad. But when he read in the newspaper afterwards that my car had been bombed, he knew that the plan he had organized had been followed. This was one of the matters in respect of which he was going to apply to the Truth Commission for amnesty.

He told me much more about their work in Mozambique, some incidents known, other plans not known. And I could have listened to him and questioned him and probed for hours, but I felt that wasn’t my function: that was for the Truth Commission.

He seemed to be aggrieved, almost seeking sympathy from me, looking around my chambers seeing lovely artwork. I’m a judge, holding an honored position in society, and he now was a discarded, discharged soldier, abandoned by the generals who had given him medals and praised him, and repudiated by the politicians on whose behalf he had worked. He’d even told me that he’d had an injury to his foot as if to seek some kind of equality in his condition and mine.

Eventually I broke off the conversation, stood up and said, “Henry, normally when I say good-bye to somebody, I shake his or her hand.” And then a cheap emotion overtook me: I would have said why I can’t, but I didn’t. I said “I can’t shake your hand, but if you tell the Truth Commission everything you know and do something for South Africa, then maybe we’ll meet again one day.” I recall that as we went back down that corridor, he seemed to shuffle along this time without that proud stride that he’d had before. I opened the gate, and he went out. “Good-bye, Henry.”
I was a victim of terrorism, together with thousands and thousands of other South Africans – terrorism from the State, terrorism from those in power. I can’t help just reflecting on something I heard on National Public Radio yesterday: People from the Black American community saying that they’ve experienced terrorism here in the United States, the lynchings, the burning crosses. Terrorism in that sense isn’t something new to this country. Native Americans have known terrorism. They experienced what it meant to be threatened, dispossessed, and harassed by the powerful. Terrorism is thus not something new here.

Oppressed people in many parts of the world have known terrorism in circumstances where their basic fundamental rights haven’t been acknowledged by society. Certainly we in South Africa knew terrorism. What was unusual about me was that, unlike most victims of terror, I came from the privileged community. I was singled-out in a particular way for the kind of experience that thousands and thousands, and over the ages millions, of my fellow countrymen and countrywomen had experienced.

How did we, in our setting, respond to the terrorism of the State? I can recall the excited debates in the ranks of the ANC exiles in the 1970s when a Middle East group calling themselves Black September hijacked planes. Some of the people (ANC exiles) were saying, yes, that’s what we must do. We’re faced with a powerful enemy that tortures us and kills us and denies us the vote and any chance to express our legitimate claims through proper channels. They’ve got guns. We haven’t got guns. They’ve got superior power. We must hit them where they are most vulnerable. But the leadership of the ANC firmly repudiated that approach. As they noted, when you start hijacking airplanes, it’s ordinary people just traveling who become the victims of terror. You are simply transferring the victimization from yourselves to another group. You are not ending victimization, you are perpetuating it.

As leaders of the ANC, we in exile wanted to demonstrate to the world that one day we would be fit rulers of our country, that we would respect humanity, that we would be sensitive to people’s fears. We too travel in airplanes, and we too want that sense of security that we can go about our business without threat of harm. And so, we firmly squashed the idea that we employ the kinds of terrorism used by other groups in South Africa.
In the 1980s, when terrible massacres were occurring in my country, where people were being tortured to death, when commandos from South Africa would invade neighboring African countries and kill refugees, the idea was revived: We must hit back because until white mothers and fathers cry for their children, they will never understand our pain; they will never give way.

I remember a conference, a very important conference in 1985 in Zambia of the ANC in exile. The conference was surrounded by Zambian troops in case there were commando raids. We were discussing the struggle. We were discussing future democracy in South Africa. At one stage a prominent traditional leader from South Africa who had been forced to flee from the country and hadn’t been very active in the struggle, got up and addressed the delegates. He spoke in the native language. He told the story of two men fighting fiercely with sticks while their wives were urging them on. One man was being severely beaten by the other. His wife said, “My husband, you are being beaten by the other man. Your cause is just. You are truly stronger than him. But you are beaten because you’re fighting with only one hand. Your other hand is used to hold up a blanket to cover your nakedness. Drop the blanket, fight with both hands and then you’ll beat him.”

We all knew what he meant: he was criticizing us for restricting our targets to military personnel and installations, for imposing all sorts of limits on who it hit. In this way, the ANC was making its operatives more vulnerable and achieving what appeared to him to be far more limited consequences.

I would have jumped up then and made a serious philosophical speech about violence and the cycle of violence. The much more savvy audience, however, just laughed in a very friendly, kind way, heard him out, and moved on to the next item on the agenda. His whole approach was repudiated. As a result of our approach, we got a country. With his approach, we could possibly have hastened the downfall of apartheid, but we would have provoked a racial war. We would have inherited ruins, not a country. And I don’t just mean physical ruins; I mean a ruined people with rancor and hatred being passed on from the former victims to the newly victimized. The whole thrust and point of the struggle would have been lost. Our struggle would not have been seen as a war of democratically-minded people who happened to be overwhelmingly black against an unjust system of oppression, but rather a war of
blacks against whites. Our leadership, although consistently under provocation, resisted provocation, resisted any possible temptations, and ultimately repudiated and denied that whole philosophy of violence.

The Truth Commission is an example of how a people deal with past injustice and injury in a way that helps to break the cycle of violence. We had to reflect on matters like this when our Constitutional Court was established. Nelson Mandela said "the last time I stood up in court was to see if I was going to be hanged. Today, I rise to inaugurate South Africa's first Constitutional Court." The next day we opened the Court with our first hearing which focused on the constitutionality of capital punishment. President Mandela, on behalf of the government, asked the Court to strike down the inherited laws which permitted – even required – capital punishment in certain circumstances for a whole range of offenses.

Crime is serious in our country. Law enforcement needs to be improved and strengthened. People have a right to feel that their personal safety is taken seriously by the State. But we unanimously decided capital punishment was not the way. As one of my colleagues said, "capital punishment doesn’t punish the crime, it repeats the crime.” As I wrote in my concurring judgment, the killer, on being executed, secures a perverse moral victory in establishing the calculated extinction of human life that’s done by the State is something legitimate and justifiable.

We wanted to break the cycle of one killing being responded to by further killing. Our rejection of capital punishment didn’t mean that killing and murder would go unpunished. We didn’t mean those responsible would not be apprehended and prevented from doing it again. Our decision meant that the killers could spend the rest of their lives in jail, but it also meant that the State did not become a killer. When I refer to killing by the State, I am not referring to killing in self-defense where there’s imminent threat of serious bodily injury. I’m referring to the State killing somebody who is strapped, trussed, and not offering any violence, simply as an example to society of the power of the State, a form of vengeance.

The Truth Commission was established in that broad kind of setting with an overwhelming feeling coming from the ranks of the firmly oppressed, those who had been the victims of massacre and torture and kidnaping. Archbishop Desmond Tutu was appointed as its head. It had three main functions.
The first was to listen to what Archbishop Tutu called "the small people," the little people, whose voices had never been heard, who had suffered extraordinary pain and repression, the Albie Sachsies, who had been on television, had written books, had been interviewed. The Commission did that. Our pain was recorded, established, spoken about, acknowledged.

Thousands and thousands of people, many in the black townships, sometimes in distant rural areas, had their opportunity to stand up, to speak, to be heard. Sometimes hymns would be sung. There would be comforters. Water would be available. People cried. And so the stories came out.

The Commission also investigated the press. They asked different questions: where were you? Why did you carry so much disinformation, creating a climate in which these violations of human rights could be furthered? Business, where were you? Did you not provide repressive material? Did you not benefit from the laws that prevented black workers from organizing, and having effective unions?

We smiled when we saw these former elite and immune sections of society being interrogated by the Truth Commission. Then the Commission questioned the judges: where were you? We stopped smiling. We had very intense debates in our ranks and eventually sent a memo on behalf of senior judges saying that the judiciary had failed. The judiciary had enforced the apartheid laws. When it came to the security laws, the judiciary, with some very honorable exceptions, had just gone along supporting, interpreting the laws in a way which supported the police, despite the evidence of people being tortured, of being placed in confinement for weeks, months, sometimes even years, as though that was normal. It was a very powerful "mea culpa" from the judiciary, maybe unique in the world. And yet many people feel that wasn't enough. The judges should have gone there and acknowledged directly that the judiciary, with some very, very honorable exceptions, had not done what it could.

The second part of the Commission was the granting of amnesty. Here it was necessary for individuals to come forward to accept personal responsibility for what they had done. There was no blanket amnesty. To the extent that they revealed the truth and established that they were acting in the context of the political conflict, they would be entitled to amnesty. This is what made our Truth Commission possibly unique.

And so "the perpetrators" came forward and acknowledged:
I executed, I tortured, I threw the body into the river to be eaten by crocodiles, I burnt the body not far from where we were having a barbecue. The Commissioners had to hear the evidence, decide if the criteria were being fulfilled, and then decide whether to grant amnesty. In some of the major cases, for example, the killing of Steve Biko, a very prominent and brilliant African leader, amnesty was refused. The police claimed that Biko had suddenly jumped up, lunged at them and that they'd pushed him back. According to the police, Biko had fallen and banged his head on a radiator, and died as a result. The Commissioners asked, “Well, where is the offense in respect to which you're claiming amnesty? We don’t believe you're telling the whole truth, but in any event, on your story, you acted in self-defense; there is nothing to give you amnesty for, so you don’t get amnesty.”

Another case involved the murder of the General Secretary of the Communist Party, one of the leaders of the ANC who was a very popular, charismatic, brilliant figure who had escaped three previous assassination attempts. Now, in peaceful South Africa, he went out jogging one day. He came home. There was somebody waiting for him with a pistol, who shot him down. The person was found, the gun was found. The perpetrator was an immigrant from Poland, a member of an extreme right-wing group who had linked up with another white South African from that extreme right-wing group. They were brought to trial, convicted, and sentenced to death. Ironically, it was the ANC's opposition to capital punishment that saved their lives; whereas the groups to which they belonged, and on behalf of which they had carried out the execution, were campaigning strongly for capital punishment. In their case, the Amnesty Commission concluded that they had not told the truth, the full truth about who else was involved in your conspiracy. Amnesty was refused, and they are serving out their life sentences.

But other people who did terrible things, the people who sent the letter bomb that killed a friend and academic colleague of mine in Mozambique, received amnesty. It was painful to see people who had done cruel and terrible things getting amnesty, but that was one of the functions of the Commission.

The third function of the Commission dealt with reparations. That’s the part that is most incomplete at the moment, and the most controversial. Because there might be a case coming to my Court, I won’t say anything about that, except that in addition to any money payments that ought to be made, I
feel very strongly that one needs to provide as much emotional repair as possible, living memorials identifying the pain of particular families and groups. In that regard, money might be part of the answer, but it's not the core of the answer.

How successful has the Truth Commission been? By and large it's been lauded and praised internationally and held up as a spectacular example of what can be done to address past injustice. At the same time, it's been criticized and sometimes even denounced in South Africa from various quarters with different kinds of motivations. But to me, the truth is like that. The truth is painful, it's incomplete, it's raw. It's not satisfying, it's not consoling in itself. It's the truth about disaster and trauma and terrible deeds.

What have we accomplished with the Truth Commission? The first big achievement has been called "the transformation of knowledge into acknowledgment." There was knowledge that people had died in detention, that people had disappeared, that there had been massacres. But knowledge is factual and sometimes, as statistical information, it's cold. Acknowledgment means the information becomes part of you. It enters your moral and emotional universe. You just don't note it. You hear it. You think about it.

The pain of the victims was acknowledged by the nation. We watched the proceedings on television, we heard them on the radio, we read about them in the press. People in all the localities watched, listened and learned what had happened to their neighbors. It's like a double acknowledgment, because for years, in addition to the pain of the violence done, was the pain of having to repress it and not being able to tell it for fear of further punishment. Now at last we live in a country where we can tell the story of what we went through, we can tell of these things that happened.

There was acknowledgment by the perpetrators of what they had done, not necessarily in that deep confessional sense. The acknowledgment was done in order to gain amnesty. Frequently, the lawyers were there. As people, almost always men, appeared in their suits with their prepared statements, I wished that their emotions could have been more spontaneous and real, that they had been less advised by their lawyers. The impact would have been so much greater.

Many of them expressed sorrow to the families for what they'd done. Sometimes they did it with a kind of half-and-half mixture of really trying to articulate genuine emotion and yet
making a prepared statement that they felt might help them. But it was something. Even if they didn’t come out with all of the truth, even if it was only 20 percent of the truth, it eliminated any possibilities of denial in the future. No one can say in five or ten or twenty years, or in another generation, these things didn’t happen, or that they were invented. No, the testimony came from the mouths of those responsible. In some ways it was far more chilling and fascinating in a rather awful way to hear the accounts from them rather than hearing from the victims or the victims’ families what had happened to them. So there was a form of acknowledgment, even if a semi-compelled acknowledgment, by the perpetrators.

The acknowledgment of wrongdoing came from a broad range of actors. There were ANC security officers who had ill-treated captors during the liberation struggle in the camps in Angola. The ANC insisted that it shouldn’t come in to the new democracy with secrets. Thus, they too testified. The leaders of the ANC had to take responsibility for actions which had resulted in loss of life. The leader of the National Party also testified.

P. W. Botha, the former President, was subpoenaed to give evidence about documents he had signed as a president. He refused to appear. He was then prosecuted for defiance of the subpoena. He was in his 80s. He had heart attacks, was physically feeble. He was nonetheless convicted by a young black magistrate. When his trial started, he got support from some of the old generals, and he made a point about “when you touch the African tiger, watch out.” Someone pointed out we don’t have tigers in Africa. But by the time the trial ended, there were demonstrators outside, and one had a poster saying, “P. W. Botha, Meow Meow.” Even though he was acquitted on appeal, the fact is he had been compelled to go through due process of law. There was no automatic immunity because he was a former president. The basic values of the new society triumphed in his case.

But, to me, there was something more profound in the nature of the process, more elusive. I puzzled about this idea of truth. How can you have a commission to find the truth? You find the truth, you put it in a box, you wrap it up, and there we have the truth. Truth just isn’t like that. It’s dynamic, it’s ongoing, it’s full of contradictions.

I also wondered why it is that so little truth comes out in a court of law, so little that historians can rely on as established
historical fact, so little explanation as to the causes of why things happened, the framework behind the events in a court of law. Yet the truth, whatever that was, was pouring out lava-like in the Commission hearings, and it worried me as a professional judicial, forensic truth-seeker.

I worked out a kind of rough-and-ready classification that I found really helpful. First, there's what I call "microscopic truth." You map out a small area; you define its perimeters; you establish the major variables within that; you investigate them; and you draw certain inferences from your observations. Positive science is like that; a court trial is like that. In court we allege that so-and-so and so-and-so on such-and-such a date had wrongfully, unlawfully and maliciously killed somebody else. Then the evidence is brought, tested, examined, weighed and a verdict is reached.

There's what I call "logical truth," the truth implicit in a proposition in a statement. In this regard, I always think of the example of when I had the manuscript ready for my book, THE SOFT VENGEANCE OF A FREEDOM FIGHTER. I took it to my agent's colleague in New York (my agent being in London). Her name was Abbey. Within five minutes I knew her whole life. She ended up saying, "let's face it, Albie, men are a fundamentally flawed species." But I'm a man, so I am fundamentally flawed. It flows from the general proposition, the particular can be inferred from that – that's logical truth.

Most of our work in a forensic setting is addressing a combination of microscopic truth and logical truth, as well as the play and the interaction between them. For due process of law, that's what you need. If you're going to send somebody to jail, if you're going to take away their money, you need these highly formalized, ritualized processes to justify the particular results.

"Experiential truth" is of a completely different order. The idea came to me from reading M. K. Gandhi's book, MY EXPERIMENTS WITH TRUTH, based on his years as a young lawyer in South Africa, which transformed him from somebody who had taken dancing lessons, elocution and French in London, into the leaner, aesthetic Gandhi that the world knows.

Experiments with truth. To me, experiments were things you did with Bunsen burners and graphs. Ghandi went to the Old Fort Prison as part of his passive resistance campaign and noticed that black African prisoners didn't get condiments with their food. He said if I want to live like and understand – enter into the soul – of the most humble amongst us, I must live like
the most humble amongst us. And so he made the decision to give up condiments with food. He didn’t start with the idea and apply it to his life. He started with his life. He questioned his life. He examined things that were happening to him experientially and built a philosophy on that basis. Even his giving up of sex came as a result of his experiences when he was in a medical auxiliary with the British Colonial forces in what was then called Zululand. Hundreds of captured Zulu rebels, as they were called, were being lashed. He would wash their bodies. He felt if the body is a site of such pain, he couldn’t use his body as a source of pleasure. These were his experiments with truth, deriving from lived experience certain conclusions about life, about existence. And, for most of us, the way we interrogate the world is based far more on experiential truth than on microscopic and logical truth.

And finally, the fourth category is what I call “dialogical truth.” It’s the interaction between all of these experiences and all of these investigations, swirling, contradicting, fusing, never ending. The strength of our Truth Commission was the way in which the experiential truth and the dialogical truth interacted. This interaction made for a huge drama, a piece of participatory theater, in the best sense of the word, played out on a stage in front of the nation.

We heard the laments, we saw the tears, we saw the torturers – replicating in front of the cameras the way they put wet bags over the heads of people who today are members of Parliament. “Tell me, Sergeant Benzien, how could you do it? How could a human being do this to another human being?” A simple question. Sergeant Benzien, a former representative of power who at one time could do whatever he wanted, wept in front of the cameras. There are so many stories in those images – the defeat of Sergeant Benzien’s whole world, the notion of torture conveyed in a way that we could all react to it with shame and embarrassment, the pleasure and delight that these atrocities were being revealed. To my mind, the true strength of our Truth Commission process was to be found in the fact that the nation participated in the whole process, arguing and debating each case.

The process has enabled us at last to start to live in a single country with the beginnings of what can be called a single undivided memory. If we continue to live in a country with completely divided memories, whites seeing South Africa as having been this, blacks seeing South Africa as having been
that, these divided memories, divided relationships with past pain, play themselves out into the future and perpetuate future incomprehension.

If we all accept and acknowledge what happened in the past, at least in its basic outlines, then, as an American put it, for the first time we South Africans start living on the same map, we’re in the same moral universe. That has been the Commission’s huge achievement. It’s not just getting the factual knowledge; it’s not just finding a practical way to enable society to function with so much hidden crime in the past. It’s establishing that torture, violence, terrorism, repression are unacceptable, can’t be hidden, have to be acknowledged, and have to be dealt with in some kind of appropriate way. If we have had any achievement in the last couple of years in South Africa, it’s been to establish that.

In terms of reconciliation, if people were hoping that the former victims and the former repressors would embrace each other, they were disappointed. Although it happened in a few remarkable, astonishing and wonderful instances, it basically didn’t happen. Many of the people who’d suffered, who’d lost families, felt it’s not for the State to forgive. If anyone is to forgive, it’s going to be me. It can be us. But nevertheless, to the extent that we’re living in one country, the foundations of reconciliation are there. What’s really needed for real repair is transformation of our country, ending the massive inequalities still very much associated with race, giving people real full-life opportunities, overcoming the crime, dealing with unemployment, finding humane and effective ways to respond to the terrible pandemic of AIDS, and in particular, enabling people to be able to live dignified lives. That will be the true repair and reconciliation on a massive scale.

Let me conclude by returning to the story with which I began this lecture. I’m at a party at the end of the year, tired; we’d worked very hard. The band is playing, and I hear a voice saying, “Albie.” I look around. “Albie.” I see a face half recognizable. “Henry.” He’s smiling. He comes up to me. We go into a corner to be able to speak over the sound of the band. “What happened?” Very animated he said, “I wrote to the Truth Commission. I told them everything I could, and Bobby and Sue and Farouk came on their behalf to question me.” Bobby, Sue, Farouk – first-name terms, calling me “Albie.” I’ve been out of politics for many years, but it was as though he was establishing an ANC group with himself as a member.
He continued, “I gave them all of the information I could.” I said, “Yes, Henry, I need only see your face to tell me that what you’re saying is the truth.” And I put out my hand and shook his hand. He went away absolutely elated.
"KENNEWICK MAN" OR "ANCIENT ONE"? -
A MATTER OF INTERPRETATION

Maura A. Flood*

Our dead never forget the beautiful world that gave them being. . . . At night, when the streets of your cities and villages are silent and you think them deserted, they will throng with the returning hosts that once filled and still love this beautiful land.1

INTRODUCTION

In the summer of 1996, two young men watching hydroplane races from the banks of the Columbia River near Kennewick, Washington, stumbled across what would turn out to be one of the most complete and well-preserved set of ancient, human skeletal remains ever discovered in this country.2 As

* Visiting Associate Professor of Law, University of Idaho College of Law.
1. Seattle, Chief of the Dwâmish and Suquâmish Tribes, in a speech at the signing of the Treaty of Medicine Creek (Jan. 22, 1855) (transferring the aboriginal lands of his and other tribes to the United States government).
soon as radiocarbon dating determined these remains to be between 9,200 and 9,600 years old, legal wrangling over access to them began.3 Scientists want to study and test the remains; Native American tribes want to rebury the remains; and the federal government wants to ensure that the remains are treated in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA).4

The legal wrangling continues in Bonnichsen v. U.S.,5 an action commenced by eight anthropologists seeking to study the ancient remains. These plaintiffs, the news media, and most of America know the remains by the name of “Kennewick Man,” a name based on the area in which the remains were discovered.6 They were so named by James Chatters, the anthropologist who examined the remains for the local sheriff when they were first discovered, and who announced that discovery to the world.7 These remains also have another name, the name of “Ancient One,” which was conferred upon them by the tribes that have claimed them.8

The authority to name something or someone is, and always has been, a significant power.9 The act of naming the remains is

3. Id.
6. See supra note 2.
8. The tribes have chosen to refer to the remains as Oytpamanatityt, which translates into English as “the Ancient One.” Native American Graves Protection and Repatriations Act: Hearing Before the Senate Comm. on Indian Affairs, 106th Cong. at 3 (2000) (Statement of Armand Minthorn of the Confederated Tribes of the Umatilla Indian Reservation); See also, SKULL WARS, supra, note 7, at xli.
9. The Book of Genesis, for example, recites that God gave Adam dominion over all creatures, including, specifically, the power to name them (Genesis 2:18). England anglicized all Gaelic names after conquering the peoples of Ireland, Scotland and Wales; Spain imposed Spanish names on the peoples it found already residing in the Americas; and the United States required Indians to take on English names in order to qualify for land allotments and other benefits. See also, SKULL WARS, supra, note 7, at xI. Horace Axtell, a Nez Perce Elder, explains that his family got the name Axtell when his grandfather tried to register for an allotment of land from the federal government and was told he had to have an English name. “He started to leave, saying ‘Well, I gotta go
an exercise of such power, an assertion of the right to claim such power. These opposing claims of the scientists and the tribes are grounded in fundamental beliefs: on the one hand, a belief in the supreme importance of scientific knowledge and investigation; on the other hand, a belief in the supreme importance of cultural history, practices and values. The scientists believe that Kennewick Man may reveal information about the development of mankind and the peopling of the Americas, and that this information may be lost forever if the remains are not made available for extensive study and testing.10 The tribes believe that the remains of the Ancient One must be treated with respect, that testing of the bones is a desecration, that the spiritual journey of the Ancient One has been disrupted by his removal from the earth, and that he must be reburied as soon as possible.11 These contrasting beliefs of the scientists and the tribes are so diametrically opposed as to have no common ground between them.12

The battle over these fragile, ancient bones has given rise to several significant issues, relating to constitutional rights, administrative law, the meaning of NAGPRA, and the unique relationship between the federal government and American Indian tribes. The focus of this article is the meaning and import

---

10. Plaintiffs' Amended Complaint, Bonnichsen v. U.S., supra note 5, at paragraph 32, page 10. (This amended complaint was filed on January 2, 2001 and is Document #372 in the records of the U.S. District Court for the District of Oregon in the Bonnichsen case; a copy is on file with the author.)


12. Some have characterized the Bonnichsen case as a collision between science and religion. See, e.g., DAVID L. FAIGMAN, LEGAL ALCHEMY: THE USE AND MISUSE OF SCIENCE IN THE LAW, 177 (1999)(2nd ed. 2000). It might be more accurate to characterize it as a collision between two religions. "Science has been called 'the American faith.' . . . Many Americans with little understanding of science unquestioningly accept both its process and its products. This faith in science has permeated American society since the colonial era, shaping our culture as well as our social and governmental institutions." Holly Doremus, Listing Decisions Under the Endangered Species Act: Why Better Science Isn't Always Better Policy, 75 WASH. U.L.Q. 1029 (1997)(possibly add a parenthetical here). Antone Minthorn, Chairman of the Board of Trustees of the Umatilla, asserts: "It is not science versus religion, . . . it is science versus law." Antone Minthorn, Kennewick Man Issue Damages Relationships, Confederated Tribes of the Umatilla Indian Reservation, at http://www.umatilla.nsn.us/kennman3.html (last visited on December 18, 2001).
of NAGPRA, which can be fully appreciated only through thorough scrutiny and interpretation. This statute is facing its first significant court challenge—its first opportunity for full interpretation—in *Bonnichsen v. U.S.* The court's interpretation of NAGPRA will be the key to the resolution of this case and, undoubtedly, of other cases yet to come. For this reason, the "dynamic" or comprehensive method of statutory interpretation should be used, because it will lead to the most honest and accurate interpretation of NAGPRA.

According to federal Magistrate Judge John Jelderks, who presides over *Bonnichsen v. U.S.*, "the threshold issue" in the case is whether the ancient remains found in Kennewick are "Native American" within the meaning of NAGPRA. That is the pivotal question: are these prehistoric remains "Native American" and therefore subject to the mandates of NAGPRA? And, if they are, the next crucial inquiry becomes: Have the claimant tribes established a "cultural affiliation" with the remains pursuant to NAGPRA, so as to entitle them to possession of the remains?

This article reviews the factual and legal context of *Bonnichsen v. U.S.* It examines the aims, reasoning, and effectiveness of several canons and theories of statutory construction, as a necessary prelude to the work of interpreting NAGPRA. The statute is then interpreted and explicated with the assistance of those canons and theories, and with particular focus on the statutory terms, "Native American" and "cultural affiliation." This interpretation leads to the conclusions that Ancient One/Kennewick Man is "Native American" within the meaning of NAGPRA, and that the claimant tribes have established the requisite "cultural affiliation" to entitle them to ownership of these ancient remains.

In order to conduct a comprehensive interpretation of NAGPRA, it is first necessary to examine the language of the

13. WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994). Professor Eskridge describes this dynamic process of interpretation:

    Just as the changing factual contexts for interpretation render it dynamic . . .,
    so the independent and changing nature of the interpreter ensures dynamic
    interpretation . . . . The interpreter's role involves selection and creativity,
    which is influenced, often unconsciously, by the interpreter's own frame of
    reference—assumptions and beliefs about society, values and the statute itself.

    Id. at 58.

14. Author's personal notes from observation of arguments in court on June 19, 2001 in federal district court for the District of Oregon [hereinafter, "Personal Court Notes"].
statute, in light of the relevant canons and theories of statutory construction. In addition, it is necessary to read congressional committee reports and hearing transcripts; research legal precedent; and become familiar with the historical and social circumstances that prompted enactment of the statute. Every bit of this effort is essential to a complete and accurate understanding of NAGPRA. Judges should have no less an understanding when they construe and apply this or any other federal statute, and thereby affect the lives not only of the litigants in the controversy before them, but of much of American society as well. This article suggests that it is incumbent upon judges, when faced with an unclear or ambiguous federal statute, to engage in rigorous, "dynamic,"15 comprehensive construction of that statute.

The process of statutory interpretation is equal in importance to its product. That product, a statute whose meaning has been comprehensively construed in the context of an actual controversy, can best be appreciated through participation in the process that led to it. This article is intended to replicate that process, that "comprehensive construction" of a statute, with all of its twists, turns and crossroads. Accordingly, significant attention will be given to the canons and theories of construction, and the traditional methods used in interpreting statutes, before those canons, theories and methods are applied to the interpretation of NAGPRA.

**BONNICHSEN V. U.S. – BACKGROUND, PROCEEDINGS AND STATUS**

The anthropologists are busy, indeed, and ready to transport us back into the savage forest where all human things . . . have their beginnings; but the seed never explains the flower.16

The Ancient One17 was discovered on federal property under the control of the Army Corps of Engineers (the "Corps"), property the United States purchased from the Walla Walla,
Cayuse and Umatilla Indian tribes in 1855.\textsuperscript{18} Due to the age of the remains, the Corps gave notice of the discovery to the Confederated Tribes of the Umatilla Indian Reservation ("Umatilla") and other local tribes. NAGPRA requires, among other things, that all Native American human remains discovered on federal property must be repatriated to the appropriate Indian tribe, in accordance with the provisions of the statute and its implementing regulations.\textsuperscript{19} Five American Indian tribes, each having a history of residing upon or using the land on which these remains were discovered, subsequently joined together to submit a claim for repatriation of the remains.\textsuperscript{20} These claimant tribes are the Umatilla, the Confederated Tribes of the Colville Reservation ("Colville"), the Nez Perce Tribe of Idaho, the Wanapum, and the Confederated Tribes and Bands of the Yakama Nation ("Yakama").\textsuperscript{21}

The Corps, and subsequently the U.S. Department of the Interior (the "DOI"), determined that the remains found in Kennewick are "Native American" within the meaning of NAGPRA, that a "cultural affiliation" exists between the remains and the claimant tribes, and that, accordingly, the remains must be repatriated to those tribes.\textsuperscript{22} A group of anthropologists commenced a federal court action to challenge the government's determinations and to oppose the repatriation\textsuperscript{23} of the remains to the tribes.\textsuperscript{24} If the \textit{Bonnichsen}
plaintiffs prevail, they will have an opportunity to secure access to the remains for the purpose of conducting extensive studies and tests. If the defendant United States prevails, the determinations of the Corps and DOI will be upheld, and the remains will be repatriated to the claimant tribes for reburial in accordance with tribal traditions.

In September 1996, two months after the remains of the Ancient One were discovered, the Corps published notice of its intent to repatriate the remains to the claimant tribes. Bonnichsen v. U.S. was the response to that notice. The plaintiffs sought a restraining order to prevent the repatriation, and "demanded a detailed scientific study to determine the origins of the man before the Corps decided whether to repatriate the remains." In addition, the plaintiffs alleged that they have a First Amendment right to study the remains; that NAGPRA is unconstitutional because it promotes Native American religion; and that their civil rights have been violated by the Corps.

The defendants, who include the Corps and several named Corps employees, moved promptly for dismissal on several grounds, including failure to exhaust administrative remedies and failure to state a claim. Judge Jelderks granted that motion in part, dismissing the civil rights claims, but also denied it in part, finding that plaintiffs' other claims were legally sufficient and that the matter was ripe for adjudication.

that its ordinary definition is operative. I believe the various implications and ramifications attendant upon the use of this single word are, potentially, of great importance, and should be thoroughly examined. Such examination, however, is outside the scope of this article.

25. Id. at 618.
26. The plaintiffs are: Robson Bonnichsen, C. Loring Brace, George W. Gill, C. Vance Haynes, Richard L. Jantz, Douglas W. Owsley, Dennis J. Stanford, and D. Gentry Steele. Owsley and Stanford are affiliated with the Smithsonian Institute; the others are university professors. In addition, Bonnichsen is the director of the Center for the Study of the First Americans, in Portland, Oregon. See, Plaintiffs' Amended Complaint, supra note 10.
27. See Bonnichsen, supra note 24, at 618.
29. See Bonnichsen, supra note 24, at 625.
30. See Bonnichsen, supra note 24, at 619.
31. See Bonnichsen, supra note 24. Included in the motion for dismissal, and in the judge's decision, was a companion lawsuit brought by a religious group, the Asatru Folk Assembly, to prevent repatriation of the remains to the tribes (Civ. Action No. 96-1481-
Following that decision, the Corps withdrew its previous notice of intent to repatriate the remains, and announced that it would reconsider the evidence of cultural affiliation between the remains and the claimant tribes. The Nez Perce and Umatilla tribes then filed briefs in this case, as amicus curiae.

In June of 1997, despite the Corps’ withdrawal of its prior determinations, Judge Jelderks vacated those determinations. The judge explained his action as follows:

A change of activity by the defendant under the threat of judicial scrutiny is insufficient to negate the existence of an otherwise ripe case or controversy. I conclude that this action has not been mooted... The dispute here concerns a tangible object, whose custody remains in dispute, and also the rights of various parties to study (or to forbid the study) of that object. Nor am I persuaded that the Corps has entirely abandoned its earlier decision and is now objectively considering the evidence and the law without any preconceived notions concerning the outcome.

Judge Jelderks remanded for reconsideration of the statutory meaning of "Native American" and "cultural affiliation," and of whether NAGPRA applies to these particular remains. He also provided the Corps with a list of specific questions, and directed the Corps to answer those questions during its reconsideration of this matter. Those questions included the following:

1. Whether these remains are subject to NAGPRA, and why (or why not);
2. What is meant by terms such as 'Native American' and 'indigenous' in the context of NAGPRA and the facts of this case;
3. . . .
4. Whether NAGPRA requires (either expressly or implicitly) a

---

JE). The Asatru practice a pre-Christian religion that originated in northern and eastern Europe. They claimed Kennewick Man/Ancient One as an ancient member of their religion, following news reports that he exhibits "caucasoid" features. The Asatru have not filed an amended complaint, and did not appear to present arguments in court on June 19-20, 2001. For these reasons, they are excluded from the focus of this article.

33. Id. at 632.
34. Id.
35. Id. at 640-41.
36. Id. at 632, 651-54.
biological connection between the remains and a contemporary Native American tribe;

5. Whether there has to be any cultural affiliation between the remains and a contemporary Native American tribe . . . ;

6. The level of certainty required to establish such a biological or cultural affiliation, e.g., possible, probable, clear and convincing, etc. 37

Finally, the judge stayed the proceedings, retained jurisdiction, denied plaintiffs' motion for an order permitting them to study the remains, and ordered the Corps to retain custody of the remains. 38

The Corps, pursuant to the provisions of NAGPRA, 39 requested that DOI take responsibility for making the requisite determinations concerning the Ancient One, and DOI consented to do so. 40 Once it agreed to lead agency status, DOI set about the business of answering Judge Jelderks' questions. It authorized additional study and testing of the remains in order to resolve the issues of "cultural affiliation" and "Native American" status. This testing was extensive and invasive; it included the pulverization of bone for the purpose of extracting DNA. 41 It was carried out despite vigorous opposition from the claimant tribes. 42 Many of the tests were done at the urging of the plaintiffs, and by experts recommended by the plaintiffs. 43

37. *Id.* at 651-52.
39. 25 U.S.C. § 3002(d)(3) (2000): "If the Secretary of the Interior consents, the responsibilities (in whole or in part) under paragraphs (1) and (2) of the . . . head of any other agency or instrumentality may be delegated to the Secretary . . . ."
40. Interagency Agreement, signed March 24, 1998. A copy is on file with the author; also available at http://www.cr.nps.gov/aad/kennewick/agree.htm. NOTE: As of 12/05/01, access to DOI documents has been severely restricted by a federal court order intended to protect Indian trust data. All documents cited herein as available at cr nps [Cultural Resources, National Park Service] are not presently accessible, and will not be accessible until the DOI can certify that they contain no data on individual Indian trusts.
41. Bone samples are taken from the remains, then bone is pulverized into a powder for purposes of attempting to extract mitochondrial DNA. See DNA Analysis Reports, copies on file with author, also available at www.cr.nps.gov/aad/kennewick/merriwether_cabana.htm and www.cr.nps.gov/aad/kennewick/kaestle.htm. In addition, five carbon-dating tests, which also require pulverization of the bone, were conducted on these remains. See, letter of Francis P. McManamon, DOI Consulting Archaeologist, dated Jan. 11, 2000, available at http://www.cr.nps.gov/aad/nagpra/kennew.htm.
42. Statements made by counsel to the amicus tribes and counsel to the U.S., in personal court notes.
43. *See, Defendants' Memorandum, supra* note 22.
As it turned out, DNA could not be extracted in a sufficient amount to allow accurate testing, due to the mineralized condition of the bones.\footnote{44} However, a great deal of other information was gathered and examined, \footnote{45} including the following:

The Kennewick remains represent a single individual who most probably was interred rather than left to decompose on the surface. . . . Like other early American skeletons, the Kennewick remains exhibit a number of morphological features that are not found in modern populations. . . . The most craniometrically similar samples appeared to be those from the South Pacific and Polynesia, as well as the Ainu of Japan, a pattern observed in other studies of early American crania in North and South America. . . . Kennewick is clearly not a Caucasoid.\footnote{46}

In January 2000, DOI concluded that the remains known as Ancient One are "Native American" within the meaning of NAGPRA.\footnote{47} The statutory definition of Native American is contained in Section 3001(9) of NAGPRA:

Native American' means of, or relating to, a tribe, people, or culture that is indigenous to the United States.

DOI's determination "was based upon chronological information supplied by the radiocarbon analysis of bone samples and previously conducted scientific examinations."\footnote{48} Those examinations included physical investigation of the bones, study of the lithic spear point, and investigation of the area in

\footnote{44} See, DNA Analysis Reports, supra note 41.

\footnote{45} The various scientific reports are available at www.cr.nps.gov/aad/kennewick. Most of these reports are extremely technical, but some of the information is comprehensible even to non-scientists. Two bits of useful information are: (1) the Ancient One is thousands of years older than any of the specimens with which he was compared; and (2) all conclusions about which "race" he most closely resembles are based on probabilities, and those probabilities are based on scientific theories (i.e., enlightened guesses) about how humans developed over time.

\footnote{46} Joseph F. Powell and Jerome C. Rose, "Report on the Osteological Assessment of the 'Kennewick Man' Skeleton," copy on file with the author (also available at http://www.cr.nps.gov/aad/kennewick/powell_rose.htm.)

\footnote{47} See page 1 of Secretary Babbitt's announcement letter available at http://www.cr.nps.gov/aad/kennewick/babb_letter.htm. The Secretary confirmed this conclusion in a Decision Memo dated 9/21/00 (see, Defendants' Memorandum, supra, note 22).

\footnote{48} Id.
which the remains were discovered. The remaining issue to be addressed was that of the appropriate disposition of the Ancient One. NAGPRA requires, in connection with inadvertent discoveries, that ownership of claimed cultural items\(^49\) shall be established in accordance with Section 3002(a). That section provides, in pertinent part, as follows:\(^50\)

(a) The ownership or control of Native American cultural items which are excavated or discovered on Federal or tribal lands after November 16, 1990, shall be (with priority given in the order listed) –

1. in the case of Native American human remains and associated funerary objects, in the lineal descendants of the Native American; or

2. in any case in which such lineal descendants cannot be ascertained,

   (A) in the Indian tribe... on whose tribal land such objects or remains were discovered;

   (B) in the Indian tribe... which has the closest cultural affiliation with such remains... and which, upon notice, states a claim for such remains...; or

   (C) if the cultural affiliation of the objects cannot be reasonably ascertained and if the objects were discovered on Federal land that is recognized by a final judgment of the Indian Claims Commission or the United States Court of Claims as the aboriginal land of some Indian tribe –

      (2) in the Indian tribe that is recognized as aboriginally occupying the area in which the objects were discovered, if upon notice, such tribe states a claim for such remains or objects...

Due to the age of these remains, DOI concluded that no direct lineal descendants exist.\(^51\) The remains were not discovered on "tribal land," because that term refers only to land within reservations and dependent Indian communities.\(^52\) Nor is there a U.S. Court of Claims or an Indian Claims Commission "final judgment" recognizing the site where the remains were

\(^{49}\) "Cultural items" is a defined term that includes human remains. 25 U.S.C. § 3001(3) (2000).


\(^{51}\) Babbitt letter, supra note 47, at pages 3-4. See also, Defendants' Memorandum, supra note 22.

found as the aboriginal land of one particular tribe.\textsuperscript{53} Therefore, the focus of DOI's investigation had to be whether a cultural affiliation exists between the remains and the claimant tribes, pursuant to subsection 1 of Section 3002(a)(2)(C). NAGPRA defines "cultural affiliation" as follows:

\begin{quote}
'Cultural affiliation' means that there is a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group.\textsuperscript{54}
\end{quote}

The statute does not specify a requisite standard of proof for establishing cultural affiliation in order to determine ownership of inadvertently discovered remains. However, subsection 2 of §3002(2)(C) provides that, in the event of competing claims submitted by different tribes, the tribe which shows "by a preponderance of the evidence" that it has a "stronger cultural relationship with the remains" is the tribe in whom ownership shall vest. A preponderance of the evidence standard is also specified in §3005(a)(4), which governs repatriation of remains in the possession of museums or federal agencies at the time of NAGPRA's enactment. In addition, that section lists relevant evidence to be considered on the issue of cultural affiliation as: "geographical, kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion."\textsuperscript{55}

The regulations pertinent to DOI's handling of the issues concerning the Ancient One include 43 CFR Sections 10.6 and 10.14.\textsuperscript{56} These regulations mirror the language of NAGPRA Section 3002, with only slight variation. Section 10.6 provides

\begin{quote}
\textsuperscript{53} Babbitt letter, supra note 47, at 3-4. There is, however, a settlement agreement of an Indian Claims Commission case pertaining to this land, which includes findings of fact that recognize this area as land utilized by all the tribes that have joined in the N.A.G.P.R.A. claim for the Ancient One. That is not, however, a "final judgment" delineating aboriginal land boundaries, so it does not necessarily have preclusive effect under N.A.G.P.R.A. § 3002(15). The Secretary gave consideration to the settlement agreement, as evidence of aboriginal occupation of this land, but did not deem it determinative on the disposition issue. Id. See also, Defendants' Memorandum, supra note 43.
\textsuperscript{55} See supra note 40. 25 U.S.C. § 3005(a)(4) (2001). This section refers only to repatriation of remains and other cultural articles already in the possession of museums and federal agencies. However, it offers guidance to the Secretary of the Interior on the types of evidence Congress deemed acceptable and relevant on the subject of cultural affiliation.
\end{quote}
that human remains that have not been claimed by lineal descendants and were not found on tribal lands, shall belong to "the Indian tribe or Native Hawaiian organization that has the closest cultural affiliation with the human remains . . . , as determined pursuant to §10.14(c)." Section 10.14 provides, in relevant part, as follows:

(c)(3) . . . Evidence [of shared group identity] . . . must establish that a present-day Indian tribe or Native Hawaiian organization has been identified from prehistoric or historic times to the present as descending from the earlier group.

(d) A finding of cultural affiliation should be based upon an overall evaluation of the totality of the circumstances and evidence pertaining to the connection between the claimant and the material being claimed and should not be precluded solely because of some gaps in the record.

(e) Evidence. Evidence of a kin or cultural affiliation between a present-day individual, Indian tribe, or Native Hawaiian organization and human remains . . . must be established by using the following types of evidence: Geographical, kinship, biological, archeological, anthropological, linguistic, folklore, oral tradition, historical, or other relevant information or expert opinion.

(f) Standard of Proof. . . . Claimants do not have to establish cultural affiliation with scientific certainty. 57

In September 2000, after considering all the evidence gathered, which comprises approximately 25,000 pages of material, DOI concluded: "that the evidence of cultural continuity is sufficient to show by a preponderance of the evidence that the Kennewick remains are culturally affiliated with the present-day Indian claimants." The evidence that established a sufficient nexus between the tribes and the Ancient One was: "The oral tradition, folklore, traditional history and geographic evidence . . . ." 60 The "geographic

---

57. Id. § 10.14.

58. This enormous administrative record includes scientific and anthropological data and reports, expert opinion, information submitted by the plaintiffs, and also oral history and cultural evidence submitted by the tribes. It is assembled into more than 50 volumes of documents, which volumes are on file in the Bonnichsen court records as Documents 310 through 366.


60. Defendants' Memorandum, supra, note 22, at page 11. See also, Babbitt letter, supra note 47, at 5-7. DOI considered the Indian Claims Commission cases as evidence of aboriginal occupation. It explained its reliance on this evidence as follows:

[Disposition under §3002(a)(2)/C(1) may not be precluded when an ICC
evidence" included evidence that all of the claimant tribes had lived on or used the land where the Ancient One was discovered. On the basis of the determination of cultural affiliation, the Secretary directed that the remains be repatriated to the claimant tribes.61

The plaintiffs in Bonnichsen v. U.S. filed an amended complaint, and moved to have DOI's disposition decision vacated.62 Presiding Judge John Jelderks heard arguments for and against that motion on June 19 and 20, in the federal district courthouse in Portland, Oregon. In addition to hearing the arguments of counsel for the parties, Judge Jelderks allowed counsel for each amicus party to present arguments as well.63 He also allowed the president of the Society for American Archaeology, who attended the proceedings without legal counsel, to make a statement concerning his organization's position on the issues raised in this case.64

During the proceedings, Judge Jelderks asked numerous questions about the meaning and requirements of NAGPRA. Several questions that he revisited throughout the full day of argument on June 19th pertained to the statutory terms, "Native American" and "cultural affiliation." This article has taken its cue from the judge, and will focus on the meaning of these terms in its examination and interpretation of the statute. The various methods and means of interpreting statutes must

judgment did not specifically delineate aboriginal territory due to a voluntary settlement agreement. If the ICC's findings of fact and opinions entered prior to the compromise settlement clearly identified an area as being the joint or exclusive territory of a tribe, this evidence is sufficient to establish aboriginal occupation for purposes of §3002(a)(2)(C)(1) . . . The Federal land where the Kennewick remains were found was the subject of several ICC cases brought by the Confederated Tribes of the Umatilla Reservation . . . These cases culminated in a final judgment in accordance with a compromise settlement. Although the compromise settlement did not delineate the aboriginal territory of the Umatilla, the ICC had previously determined in its opinion and findings of fact that several Indian tribes, including the Umatilla (Wallawalla and Cayuse) and Nez Perce, used and occupied this area where the Kennewick remains were found.

Id. at 6-7.

61. Defendants' Memorandum, supra note 22, at Part IV(B).
62. The Amended Complaint also added DOI, its then-Secretary Bruce Babbitt, and its consulting archaeologist, Francis McManamon, to the roster of defendants.
63. Personal court notes. Arguments were presented by legal counsel for the Colville, Nez Perce, Umatilla, and Yakama tribes; and also by counsel for the National Congress of American Indians.
64. Personal court notes. It was refreshing to observe Judge Jelderks' open courtroom demeanor, and his willingness to let every party with some stake in the proceeding have an opportunity to speak.
be explored, before NAGPRA can be properly and fully construed.

Theories and Methods of Statutory Interpretation

There are thousands of articles and books on the subject of statutory interpretation, most of them produced in the last twenty years. These works promote several different theories of interpretation, including Intentionalism, Purposivism, Public Choice Theory, Positivism, Pragmatism, Realism, and Textualism. They propose that the correct way to interpret statutes is objective, subjective, hermeneutical, structuralist, or even "post-structuralist." This theorizing and posturing has reached fever pitch in the courts as well as the law journals, resulting in several instances of dueling opinions issued by Supreme Court justices on the subject of statutory interpretation.

This state of affairs will inevitably affect the interpretation of NAGPRA, as it wends its way through the federal courts, in Bonnichsen and other matters yet to come. It is necessary, therefore, to examine the various theories of interpretation and canons of construction that remain popular among the judiciary and the scholars, in order to make some sense of the interpretation process before we attempt to make sense of NAGPRA.

65. There is an extensive listing of these materials in Footnote 1 of 2A Norman J. Singer, Statutes and Statutory Construction § 45:01 (West Group 6th ed. 2001). Particularly interesting works include: Reed Dickerson, The Interpretation and Application of Statutes (Little, Brown & Co., 1975); William N. Eskridge, Jr., Philip P. Frickey and Elizabeth Garrett, Legislation and Statutory Interpretation (Foundation Press, 2000); Popkin, Statutes in Court: The History and Theory of Statutory Interpretation (1999); Antonin Scalia, A Matter of Interpretation (Princeton Univ. Press, 1997); and Cass R. Sunstein, After the Rights Revolution: Reconceiving the Regulatory State (Harvard University Press, 1990). Other books and articles on the subject of statutory interpretation are cited throughout this article.

66. At the time of this article, a search for "statutory interpretation" (with no additional modifiers) in the Westlaw "JLR" (Journals & Law Reviews Combined) database produced 13,465 articles written after 1981, and 258 articles written in 1981 and earlier years (as of August 1, 2001).

Constitutional Restraints on Statutory Interpretation

The Constitution imposes two clear constraints on the process of statutory interpretation. First of all, it makes the enactment of statutes the exclusive domain of Congress. Second, a bill introduced in one of the houses of Congress can become a statute, and thus the law of the land, only if it progresses through the enactment and presidential signing process required by Article I, Section 7 of the Constitution. In addition, there are two "constitutional assumptions" that have traditionally affected statutory interpretation. The first is that Congress must comply with certain norms and expectancies in communicating with its constituents. Simply put, Congress must use ordinary English in all of its communications, including statutes. The second assumption is that the Constitution requires Congress to make its laws reasonably available to the American people. In other words, laws cannot be kept secret, but must be publicized and made accessible to all persons who will be expected to comply with those laws.

The Basic Rules of Construction

The two most basic rules of statutory construction are known as the "plain meaning rule" and the "golden rule." The "plain meaning rule" holds that, when the meaning of a statute is "plain," or clear and unambiguous, no further inquiry is necessary. The sole exception to this is the "golden rule" of interpretation, which holds that the words of a statute must be given their ordinary meanings, unless Congress has directed otherwise or unless doing so would lead to an absurd or incongruous result.

Generally, the supposition is that a statute must be "plain" or clear in meaning on the basis of the text alone. Some judges, however, look beyond the text to determine whether the
statute's meaning is "plain" when viewed in light of its context.\textsuperscript{74} Context may affect the "golden rule" as well, since the ordinary meanings of words inevitably vary depending upon the context in which they are used. Judges disagree over what context consists of, and how much of it is relevant to statutory meaning. This disagreement about context has created a sort of "continental divide" between the two primary schools of thought on statutory interpretation. On one side of the divide are those who believe that the text of a statute is the primary indicator of statutory meaning; on the other side are those who believe that statutory meaning is affected by, and dependent upon, context.

There is only one theory of interpretation currently in general use which regards the text as determinative of statutory meaning. That theory is known, not surprisingly, as Textualism. There are several different theories, however, which advocate the importance of context, and these shall be referred to collectively, for the sake of simplicity, as "contextual" theories of interpretation.\textsuperscript{75}

\textbf{Textualism}

Whether the interpreter favors a textual or a contextual approach, every exercise in statutory interpretation must begin with an examination of the statute's text.\textsuperscript{76} Textualism\textsuperscript{77} is a

\textsuperscript{74} To determine the plain meaning of a statutory provision, we examine not only the specific provision at issue, but also the structure of the statute as a whole, including its object and policy." Children's Hosp. and Health Ctr. v. Belshe, 188 F.3d 1090, 1096 (9th Cir. 1999).

\textsuperscript{75} Some classify these two schools of thought as "objective" (text-oriented) and "subjective" (context-oriented). The real difference, in practice, is "between disregarding the legislative history and taking it into account." REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES, supra note 68, at 83. Others characterize the continental divide as being between "formalists," who believe in the "determinacy" of the text, and "realists," who believe the text has no meaning until its words are interpreted. KENNETH S. ABRAHAM, STATUTORY INTERPRETATION AND LITERARY THEORY: SOME COMMON CONCERNS OF AN UNLIKELY PAIR, in INTERPRETATION OF LAW AND LITERATURE - A HERMENEUTIC READER, 116 (Sanford Levinson and Steven Mailloux eds., 1988).


\textsuperscript{77} According to Supreme Court Justice Antonin Scalia, a textualist is not wedded to the literal meaning of a text, but rather is one who construes a statute "... reasonably, to contain all that it fairly means." SCALIA, A MATTER OF INTERPRETATION, supra note 65, at 23. Scalia also makes the statement that "In textual interpretation, context is everything." Id. at 37. The context he is referring to, however, is extremely narrow, and often consists of little more than statute itself.
theory that has been in use, though not necessarily in vogue, since the late nineteenth century.\textsuperscript{78} When faced with the task of interpreting a statute, most judges, including textualists, start with the plain meaning rule and the golden rule, giving the words of a statute their ordinary meanings.\textsuperscript{79} If the statute's meaning cannot be gleaned from such a reading of the text, then a textualist may consult a dictionary or dictionaries in order to construe the language of the statute.\textsuperscript{80} A textualist does not look to extrinsic sources, such as legislative history, for assistance in determining the meaning of a statute.\textsuperscript{81} If necessary, however, a textualist will rely on traditional canons of statutory construction.\textsuperscript{82}

Textualism posits that the goal of statutory interpretation is the discernment of statutory meaning, and that the only relevant sources of meaning are the text and text-related materials.\textsuperscript{83} The presumption underlying Textualism is that the use of extrinsic sources, such as congressional committee reports and other legislative history, is not appropriate, for several reasons. First, since those extrinsic materials have not gone through the requisite process for the enactment of law, they are not law, and cannot be regarded as official pronouncements of law.\textsuperscript{84} Secondly, legislative history materials are not a reliable source of information about legislative meaning, due to the self-

\begin{itemize}
\item \textsuperscript{79} Lief H. Carter, \textit{Reason in Law} 61 (Harper Collins, 1988). This emphasis on ordinary meaning is in keeping with the "constitutional assumption" that Congress will speak to its public in language that they can understand.
\item \textsuperscript{81} William N. Eskridge, Jr., \textit{The New Textualism}, 37 U.C.L.A. L. REV. 621, 625 (1990). Eskridge calls the textualism espoused by Justice Scalia and others the "New Textualism." The Textualism described in this article is really the "New Textualism" practiced by Justice Scalia and others. The "old Textualism" was nothing but Literalism with the addition of the "golden rule."
\item \textsuperscript{82} Siegel, \textit{Textualism and Contextualism in Administrative Law}, 78 B.U. L. REV. 1023, 1043 (1998); See also, Scalia, A MATTER OF INTERPRETATION, supra note 65 at 34-35.
\item \textsuperscript{83} Eskridge, et al., supra, note 65, at 228.
\item \textsuperscript{84} Id. at 228-229; Breyer, supra note 58, at 862; and Scalia, supra note 65, at 34-35. See also, John F. Manning, \textit{Textualism as a Nondelegation Doctrine}, 97 COLUM. L. REV. 673, 675 (1997): "[G]iving decisive weight to legislative history assigns dispositive effect to texts that never cleared the constitutionally mandated process of bicameralism and presentment."
\end{itemize}
serving nature of comments made in debates and colloquy, and
the sort of deal-making that is inherent in any congressional
vote.\textsuperscript{85} Thirdly, a court's use of extrinsic materials to assist it in
construing a statute would engage the court in legislative,
rather than judicial, activity, thereby violating the
Constitutional requirement of separation of powers.\textsuperscript{86}

Lastly, textualists opine that the use of extrinsic materials
in statutory construction is a disservice to the general public.
All persons who may be affected by a statute have a right to rely
on its apparent meaning, and the only source commonly
available to them is the statute itself.\textsuperscript{87} One who expressed this
position particularly eloquently is former Supreme Court Justice
Robert Jackson:

Moreover, there are practical reasons why we should accept
whenever possible the meaning which an enactment reveals on its
face. Laws are intended for all of our people to live by; and the
people go to law offices to learn what their rights are... Aside
from a few offices in the larger cities, the materials of legislative
history are not available to the lawyers who can afford neither the
cost of acquisition, cost of housing, nor the cost of repeatedly
examining the whole congressional history. To accept legislative
debates to modify statutory provisions is to make the law
inaccessible to a large part of the country.\textsuperscript{88}

Textualism's critics have succeeded in chipping away at all
four of its cornerstones. First of all, legislative history does not
have to be given conclusive effect, nor treated as the law of the
land, in order for it to provide valuable information relevant to a
statute's interpretation.\textsuperscript{89} An apparently clear statutory
meaning may be confirmed by reference to legislative history;
and a meaning that is ambiguous may be clarified by reference
to legislative history.\textsuperscript{90} Secondly, the fact that members of

\begin{itemize}
  \item \textsuperscript{85} SCALIA, supra note 65, at 32-34.
  \item \textsuperscript{86} ESKRIDGE, ET AL., supra note 65, at 228-229: "Justice Scalia argues that the
    new textualism ... is also ... the methodology most consistent with the rule of law and
    the separation of judicial from legislative powers in our system." \textit{See also} SCALIA, supra
    note 65, at 22.
  \item \textsuperscript{87} DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES, supra note
    65, at 163 and 165.
  \item \textsuperscript{88} Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 396 (1951); quoted in
  \item \textsuperscript{89} Stephen Breyer, \textit{On the Uses of Legislative History in Interpreting Statutes}, 65
  \item \textsuperscript{90} \textit{Id.} at 848-851; William N. Eskridge, Jr., \textit{The New Textualism}, 37 U.C.L.A. L.
Congress may make "deals" in order to get legislation passed is not cause to discount legislative history entirely. Judges review evidence of one sort or another in every case. They learn how to separate the wheat from the chaff, the reliable from the unreliable. Surely this skill is not lost to them when the evidence they are considering relates to the legislative history of a statute.\footnote{1} The textualists' argument that the use of extrinsic sources in statutory construction would turn judges into legislators is spurious. The use of legislative history and other relevant extrinsic materials need not differ from the use of any other sort of interpretational aid, such as dictionaries and traditional canons of construction.\footnote{2} While judges are not and cannot be legislators, they are and always have been makers of law. They are Congress's partners, albeit junior partners, in the law-making business. In addition, a court's use of legislative history in order to clarify ambiguous statutory terms does not violate the separation of powers mandate, but rather reinforces Congress's superior law-making role.\footnote{3}

The argument that legislative history materials are not accessible to the public was once the most persuasive argument against its use. This argument, however, is no longer persuasive.\footnote{4} Legislative history materials, including committee reports, congressional hearing transcripts, and earlier copies of a bill, are readily available to the sole practitioner and to the

\footnote{1}{"Nor am I convinced that courts can ever do more than bring their generally critical faculties to bear on the totality of evidence in the legislative record in the same way that they deal with other complex evidentiary records." Patricia M. Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 IOWA L. REV. 195, 214 (1983). In my opinion, that is enough for them to do.}

\footnote{2}{Breyer, supra note 89, at 870-873.}

\footnote{3}{"The traditional notion is that legislative history/intent should be used to interpret texts whose meaning cannot be conclusively determined from the text alone. And, if the meaning of the statutory provision cannot be determined from the text alone, the idea of trying to discern the intent of the enacting body would seem to further democratic principles rather than undermine them." William L. Funk, Faith in Texts - Justice Scalia's Interpretation of Statutes and the Constitution: Apostasy for the Rest of Us?" 49 ADMIN. L. REV. 825, 841-42 (1997).}

\footnote{4}{According to Justice Stephen Breyer: "This argument overlooks the fact that courts use history to interpret unclear statutes. The use of legislative history can therefore make it easier, not more difficult, for the law-abiding citizen to plan conduct according to law. Legislative history is not difficult to find . . . Summaries are available in most libraries and the federal government maintains depository libraries with full texts of relevant documents." Breyer, On the Uses of Legislative History in Statutory Interpretation, supra note 89, at 869.}
general public through the nation-wide system of federal depository libraries and through on-line research services. Finally, if, as Textualism asserts, the ultimate goal of interpretation is the discernment of meaning, then anything and everything that could have bearing on that meaning ought to be considered.

The Traditional Canons of Construction

Textualism does allow for some consideration of context, but only a very narrow, text-based context. For example, a statutory provision may be interpreted in relation to the rest of the statute of which it constitutes a part; or an entire statute may be construed in relation to other statutes, if it is connected with them as part of a regulatory scheme. The use of traditional canons of construction is also permissible under Textualism, when a statute's meaning is not clear and dictionary definitions do not suffice to make it so. These include text-based canons that relate to usage and syntax, as well as substantive canons that apply well-established principles of law or policy to clarify the meaning of a disputed text.

Two of the traditional text-based canons of construction are noscitur a sociis, or, "it is known by its companions," and ejusdem generis, or, "of the same sort," which requires that a term of general import be construed in light of more specific

95. Several web sites provide access to legislative history materials, free of charge. Persons who do not have their own internet service may, in most locations, secure such access at their local public library.

96. In the words of Felix Frankfurter, "If the purpose of construction is the ascertainment of meaning, nothing that is logically relevant should be excluded." Some Reflections on the Reading of Statutes, 47 COLUM. L. REV. 527, 541 (1947).

97. William N. Eskridge, Jr. and Philip P. Frickey, Statutory Interpretation as Practical Reasoning, 42 STAN. L. REV. 321, 355 (1990). This is referred to as the "whole statute" rule. See also, Watson, Liberal Construction of CERCLA, 20 HARV. ENVTL. L. REV. 199, 224 (1996). The practice of interpreting a statute so as to ensure that all of its provisions work together as an integral whole has also been called "intratextualism." Akhil Reed Amar, Intratextualism, 112 HARV. L. REV. 747 (1999). Interpreting a statutory provision as part of a "whole" may include ensuring that its construction does not make another provision superfluous, or incongruous, and defining terms used in more than one section of a statute in the same way.

98. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES, supra note 65, at 109. This practice of interpreting a statute in the context of related statutes is referred to as construction in pari materia. Id.

99. SCALIA, A MATTER OF INTERPRETATION, supra note 65, at 28.


101. SCALIA, A MATTER OF INTERPRETATION, supra note 65, at 28.
terms listed with it.\textsuperscript{102} For example, a state statute prohibiting grave desecration might provide: “[N]o person shall willfully vandalize, deface, mutilate, or otherwise harm any grave, grave marker or grave contents.” In accordance with \textit{noscitur a sociis} and \textit{ejusdem generis}, the general term, “harm,” should be interpreted in light of the specific terms with which it is listed, namely, the words “vandalize,” “mutilate” and “deface”.

Most judges, including textualists, have traditionally used several substantive canons to assist them in construing ambiguous or unclear statutes.\textsuperscript{103} These include two canons that are particularly relevant to the interpretation of NAGPRA. The first of these is the “remedial purpose” canon, which suggests that a remedial statute must be construed broadly so as to give effect to its purpose.\textsuperscript{104} The second is the “Indian law” canon. This canon requires Indian treaties and legislation to be construed in favor of Indian interests.\textsuperscript{105} The Indian law canon is “a judge-made rule responding to the inequitable treatment of Indians by the nation in the past. . . . In the face of that history, and obvious disparities in bargaining power, courts give Indian tribes the benefit of the doubt.”\textsuperscript{106} These substantive canons have a long history of use in the federal courts. Because these canons are so firmly established in judicial tradition and precedent, even textualist judges are often willing to rely upon them, despite the fact that they bring an “extra-textual” element into the process of statutory interpretation.

There is one other “canon” of sorts that is germane to the interpretation of NAGPRA. A reviewing court will defer to an agency’s interpretation of a statute, if the agency has been authorized by Congress to implement and administer that statute. The level of deference due will depend upon several

\textsuperscript{102} Id.; also, SUNSTEIN, supra note 65, at 151 (discussing all three of these “syntactical” canons or “norms” of interpretation).

\textsuperscript{103} But, see SCALIA, supra note 65, at 28-29. Justice Scalia is not a big fan of the substantive canons. He grudgingly admits, however, that some of them make a certain amount of sense and even serve to preserve important principles of law.

\textsuperscript{104} WILLIAM N. ESKRIDGE, JR. AND PHILIP P. FRICKEY, LEGISLATION AND STATUTORY INTERPRETATION 331 (Foundation Press 2000); also SCALIA, supra note 65, at 28. And see, dissenting opinion of Justice Scalia in U.S. v. Williams, 514 U.S. 527, 548 (1995): “If this case involved the interpretation of a statute designed to confer new benefits or rights upon a class of individuals, today’s decision would be more understandable, since such a statute would be ‘entitled to a liberal construction to accomplish its beneficial purposes.’”

\textsuperscript{105} ESKRIDGE AND FRICKEY, supra note 97, at 340; see also SCALIA, supra note 65, at 27, and SUNSTEIN, supra note 65, at 156-57.

\textsuperscript{106} SUNSTEIN, supra note 65, at 156-157.
factors, as delineated in *Chevron*,107 Skidmore,108 and, most recently, *U.S. v. Mead Corporation*.109 The DOI's interpretation of NAGPRA may not qualify for the maximum deference due under *Chevron*,110 but it is certainly entitled to significant deference, pursuant to *Skidmore* and *Mead*.111 This rule of deference to an administering agency's statutory interpretation is followed by all judges, textualist and contextualist alike.

**Contextual Theories of Interpretation**

Several different theories of statutory interpretation may be clustered together under the "contextual" umbrella. All of them share the notion that a statutory text read in isolation lacks meaning, and that it is necessary to read a statute in its proper context in order to make its meaning fully apparent and comprehensible. "The statute's text is the most important consideration . . . and a clear text ought to be given effect. Yet the meaning of a text critically depends upon its surrounding context."112 Two major theories that promote the importance of context in statutory interpretation are Intentionalism and Purposivism. Both theories advocate interpreting a statute so as to determine the "will" of Congress and give it full effect.113

Intentionalists focus on determining the original intent of the legislature with regard to a particular statute, and on effectuating that intent.114 This theory is rooted in the notion

110. This article is not intended to give an opinion as to whether DOI's interpretation is or is not entitled to "Chevron" deference. A thorough examination of the level of deference due to DOI's interpretation in this case, and the effect of the *Mead* decision, if any, upon that level of deference, is beyond the scope of this article.
111. There is strong language in the *Mead* decision indicating that *Chevron* deference may be due even to an agency determination that is arrived at through less than formal procedures: "[A]s significant as notice- and-comment is in pointing to Chevron deference, the want of that procedure here does not decide the case, for we have sometimes found reasons for Chevron deference even when no such administrative formality was required and none was afforded." *U.S. v. Mead Corporation*, 121 S.Ct. 2164, 2173 (2001)(citations omitted).
113. In a case concerning the interplay between NAGPRA and the Freedom of Information Act, the federal district court for Hawaii included the following language in its decision: "When interpreting a statute, the court's objective is to ascertain the intent of Congress and to give effect to legislative will." *Na Iwi O Na Kupuna O Mokapu v. Dalton*, 894 F. Supp. 1397, 1412 (D. Haw. 1995).
114. ESKRIDGE, FRICKETY AND GARRETT, *supra* note 65, at 214. Early intentionalists
that legislative intent is of "supreme importance" in statutory interpretation because it constitutes, in a representative democracy, the will of the true sovereign, the people. In contrast with textualists, intentionalists attach great significance to legislative history materials. Such materials include House and Senate committee reports, special commission reports or recommendations, transcripts of congressional hearings, and earlier drafts of a bill. It is from these materials that evidence of legislative intent is derived.

Critics of Intentionalism charge that "legislative intent" is a mere fiction, because only individual persons are capable of having intent, and the legislature is comprised of hundreds of individuals with varying personal intents. It is not likely that all members of Congress would ever have the same intent with regard to a particular piece of legislation. It can also be safely assumed, say the critics, that no member of Congress would have formed any specific intent with regard to "the unique facts of the case before the court." It certainly would be impossible to discover the intent of every member of Congress with regard to a particular statute. However, evidence of the intent of some members of Congress can be gleaned from the statute itself, committee reports, and sponsors’ statements. It may not be unreasonable, once that bill has become law, to project that evident intent onto a majority of the members of Congress. The real flaw of Intentionalism is engaged in "imaginative reconstruction," through which they attempted to determine how the legislators who enacted a statute would decide the case at hand. ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION, supra note 13, at 22.

116. ESKRIDGE & FRICKEY, LEGISLATION AND STATUTORY INTERPRETATION, supra note 104, at 326.
117. ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION, supra note 13, at 14; Richard J. Pierce, Jr., Justice Breyer: Intentionalist, Pragmatist, and Empiricist, 8 ADMIN. L. J. AM. U. 747, 747 (1995). "Intentionalists attempt to draw interpretive references from the legislature’s stated goals and from a statute’s legislative history." Id.
119. DICKERSON, supra note 65, at 68.
120. Id.
121. LIEF H. CARTER, REASON IN LAW, supra note 79, at 69; see also, John F. Manning, Textualism as a Nondelegation Doctrine, 97 COLUM. L. REV. 673, 675 (1997).
122. The critics of Intentionalism would disagree with this. For example, see Scalia, supra note 65, at 32. They argue that the intent of committee members cannot be imputed to other members of Congress, because bills are approved for a variety of reasons and not necessarily because individual members ascribe to the intent of the sponsoring committee. However, Justice Stevens, concurring in Bank One Chicago v.
that it focuses on original intent, without regard for the current environment in which the statute operates.

Purposivism focuses on the discernment and effectuation of the purpose, or underlying goal, of a statute.\textsuperscript{123} A statute's purpose is sometimes made clear by its text.\textsuperscript{124} In most instances, however, purposivists must rely upon legislative history in order to interpret a statute.\textsuperscript{125} As an approach to statutory construction, purposivism has a long history of use in the federal courts.\textsuperscript{126} When Justice Holmes referred to the "will" of the legislature, he was really speaking of the "purpose" of a statute, and Congress's desire to have that purpose carried out:

The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before.\textsuperscript{127}

Justice Frankfurter described statutory "purpose" as follows:

Midwest Bank & Trust Co., 516 U.S. 264 (1996), opined:

Legislators, like other busy people, often depend upon the judgment of trusted colleagues when discharging their official responsibilities. If a statute . . . has bipartisan support and has been carefully considered by committees familiar with the subject matter, Representatives and Senators may appropriately rely on the views of the committee in casting their votes. In such circumstances, since most Members are content to endorse the views of the responsible committees, the intent of those involved in the drafting process is properly regarded as the intent of Congress.

Id. at 276-277.

\textsuperscript{123} Id.; ESKRIDGE, FRICKEY AND GARRETT, supra note 65, at 213.
\textsuperscript{124} The words themselves are, "far and away the most reliable source for learning the purpose of a document." Borella v. Borden Co., 145 F.2d 63 (2d Cir. 1944).
\textsuperscript{126} "[L]egislators, like others concerned with ordinary affairs, do not deal in rigid symbols, . . . stripped of suggestion . . . . We can best reach the meaning here, as always, by recourse to the underlying purpose." Borella, 145 F.2d at 64 supra note 112; Keck v. United States, 172 U.S. 434, 455 (1899). See also, SUNSTEIN, supra note 51, at 123: "In cases in which textual and structural approaches are inadequate, a natural and time-honored response is to resort to the 'purpose' of the statute."
\textsuperscript{127} Holmes, J., opinion in Johnson v. U.S., 163 F. 30, 32 (1st Cir., 1908), quoted in POPKIN, supra note 65, at 128.
Legislation has an aim: it seeks to obviate some mischief, to effect change of policy... That aim, that policy is not drawn like nitrogen out of the air; it is evinced in the language of the statute, as read in the light of the external manifestations of purpose. That is what the judge must seek and effectuate...\textsuperscript{128}

The purpose of a statute may be thought of as the policy upon which it is based, or which it seeks to promote. For example, civil rights statutes are based upon the policy favoring equal treatment under the law for all Americans. The purpose of civil rights statutes is to promote or implement that policy. Based on their observation that every statute has a discernible purpose and that construing a statute with that purpose in mind will resolve any textual ambiguities, Professors Hart and Sacks advocated a purposive approach to statutory interpretation.\textsuperscript{129}

It is arguable that Intentionalism and Purposivism allow for considerable flexibility in statutory construction, thereby increasing the risk that judges will in actuality make their own law or policy rather than implement Congress's law and policy.\textsuperscript{130} However, it is equally arguable that a textualist interpretation which ignores all legislative history runs the risk of defeating the congressional intent and purpose behind that statute.\textsuperscript{131}

Why continue to announce that only where the statute is ambiguous is it subject to construction? Why should the legislative intent be defeated simply because the statute may seem clear and unambiguous on its face, when the court could by applying any of the existing rules of construction, actually ascertain true legislative intent?\textsuperscript{132}

\textsuperscript{128} Frankfurter, supra note 92.
\textsuperscript{129} ESKRIDGE, FRICKEY AND GARRETT, supra note 65, at 333-334.
\textsuperscript{130} SCALIA, supra note 65 at 17-18.
\textsuperscript{131} As Eskridge, Frickey and Garrett put it:
Even if one accepts Justice Scalia's premise that courts are supposed to play a neutral, nondiscretionary, and perhaps even mechanical role in statutory policy implementation, it is not clear that his new textualism advances that goal.
\textsuperscript{132} LEGISLATION, supra note 65, at page 238.

\textsuperscript{132} CRAWFORD, supra note 115, at §175. It should be noted that Crawford did not use the terms "interpretation" and "construction" as synonyms. According to Crawford, "interpretation" is the "process of discovering the true meaning of the language" in a statute, using only text-based sources; and "construction" is the process of using extrinsic sources to draw conclusions about statutory meaning, legislative intent, and statutory purpose. Id. at §157. In other words, interpretation is what a textualist does, while construction is what anyone using legislative history materials and other "context-based"
Intentionalism is the less attractive of the two theories, with its focus on original intent and its disregard of legal and social developments. For that reason, statutory purpose is preferable to legislative intent as a focal point for the interpretive process.

"Dynamic" statutory interpretation\textsuperscript{133} is the most preferable method of statutory construction because it is the most comprehensive. It utilizes a variety of guidelines, legal precepts, and sources of information in order to construe the meaning of the statutory text, thereby incorporating the best of the text-based and context-based theories. Professor Eskridge describes this dynamic enterprise as follows:

We do not discover the truth of the provision by limiting our vision to the bare text, or to the original legislative intent, or to current policy. All of these perspectives work together, and each teaches us something.\textsuperscript{134}

Professors Eskridge and Frickey have also described the dynamic process as one of "practical reasoning,"\textsuperscript{135} which includes consideration of "a broad range of textual, historical, and evolutive evidence" and reflects what judges actually do when they interpret statutes.\textsuperscript{136} The dynamic, practical reasoning form of interpretation includes consideration of the text, congressional intent, statutory purpose, and the existing legal and social environment. It also includes recognition of the fact that the interpreting judge is an integral element of the interpretational "mix" – that statutory interpretation is a creative enterprise, and that the judge is a participant in that enterprise.\textsuperscript{137}

"Dynamic" or "Comprehensive" Statutory Interpretation

The hard truth of the matter is that American courts have no sources does.

133. ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION, supra note 65.
135. Eskridge & Frickey, supra note 97.
136. Id. at 322 and 359. "Evolutive" evidence includes things like prior implementation of the statute, current understandings of the Constitution and fundamental notions of fairness and justice, and relationship between the subject statute and newer, related statutes or policies. Id. at 359.
137. Id. at 345.

This statement, when made by Professors Hart and Sacks in 1958, was undoubtedly an accurate description of the current state of affairs in the field of statutory interpretation. And it was, no doubt, equally accurate and descriptive of then-current circumstances when Professor Reed Dickerson used it as a launching point for his book, \textit{The Interpretation and Application of Statutes}, in 1975.\footnote{139}{REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 1 (1975).} Now, in the year 2002, there remains no better way to describe the current state of affairs with regard to statutory interpretation than to borrow the very same words used by Hart and Sacks forty-four years ago.\footnote{140}{See, supra note 65 at 14 (quoting HART and SACKS, supra note 138, at 1201). Justice Scalia sees this as a “sad commentary,” and continues: “Even sadder, however, is the fact that the American bar and American legal education, by and large, are unconcerned with the fact that we have no intelligible theory.” Id. The current state of affairs is \textit{not} that we lack \textit{any} intelligible theory of statutory construction, but that we have so many intelligible theories from which to choose.}

There are several circumstances that have contributed to the lack of a single, generally accepted theory of statutory construction in American jurisprudence and jurispractice. First of all, theory does not always translate well from the printed page into practice. We can talk and write interminably (and indeed, it seems we have\footnote{141}{See, supra notes 65 and 66.}) about how statutes ought to be interpreted, but that does not necessarily bring us closer to accurate interpretation of specific statutes in actual controversies.\footnote{142}{ESKRIDGE, supra note 134, at 322. See also, ROBERT S. SUMMERS, Lon L. Fuller 122 (1984) (stating “A theory of interpretation cannot decide concrete cases. It can only specify steps to be taken and structure the exercise of judgment”).} Secondly, legal scholars have apparently been searching for the Holy Grail of interpretation, the one true and glorious theory that will enable all lawyers and all judges to correctly construe all statutes in all situations. The Holy Grail exists only in mythology.

Another circumstance that has prevented the ascension of one theory of interpretation to a position above all others is the simple fact that judges are human. As human beings, whether
they realize it or not and whether they admit it or not, judges are influenced in every situation by what they value, what they believe, and what they understand about the world around them. In a diverse society, there will always be divergent views about what is right and good and just. A review of the decisions rendered by the U.S. Supreme Court in the last fifteen months should convince all doubters that it is indeed impossible for justices to completely set aside everything that makes them who they are, even when they make the best of efforts to do so.

Eskridge and Frickey’s dynamic interpretation process takes the judge’s personal element and adds it to the mix, recognizing that interpretation is a creative process. This dynamic approach is the most inclusive and comprehensive of the established theories and methods. It allows judges to look to a wide variety of sources and circumstances for guidance relating to the meaning of a statute. It takes into account the will of Congress as well as the text of the statute. It also takes into account the “will of the people” by placing importance on developments in the social and legal environment. Eskridge and Frickey describe the process as the weaving together of various threads—text, intent, purpose, legislative history, current policy—into a strong cable that is capable of supporting the end result, the construed and explicated statute. The greater the number of factors looked to for statutory meaning, the more the element of a judge’s personal opinions and beliefs is diluted.

The truth of the matter is that comprehensive interpretation mirrors reality, because judges typically do weave together various threads of information, text, and precedent to

143. Max Radin reached a similar conclusion more than seventy years ago, when he noted that the choices a judge must make in the process of interpreting a statute are influenced, “by those physical elements which make him [or her] the kind of person that he [or she] is. That this is pure subjectivism and therefore an unfortunate situation is beyond the point. It is hard to see how subjectivism can be avoided or how the personality of the judge can be made to count for nothing in his [or her] decision on statutory interpretation as on everything else.” Max Radin, Statutory Interpretation, 43 HARV. L. REV. 863, 881 (1930). See also, ESKRIDGE, supra note 134; Martha Minow, Justice Engendered, 101 HARV. L. REV. 10 (1987); and Kent Greenawalt, Are Mental States Relevant for Statutory and Constitutional Interpretation? 85 CORNELL L. REV. 1609, 1617-19 (2000).

144. E.g., “We are, quite simply, a diverse society . . . . The fact cannot be avoided that the appropriate vision of society, the individual, and the relationship of individuals, and the appropriate distribution of society’s wealth are substantive issues that cannot help but affect judicial decisions.” POPKIN, STATUTES IN COURT, supra note 65, at 195.

145. ESKRIDGE, supra note 134, at 345.

146. Id. at 351.
arrive at the meaning and import of a statute. Judges who purport to be concerned mainly with purpose do examine the words and syntax of a statute. Judges who purport to be concerned with nothing but the text do look outside the text for statutory meaning. For example, in Bush v. Gore, in which the Supreme Court construed a Florida election statute, Justice Scalia, the champion of New Textualism, stated: "[T]he clearly expressed intent of the legislature must prevail."\textsuperscript{147}

If, in some circumstances, judges do not engage in such a "weaving" process, it is because there is no need to do so. Legislative intent, statutory purpose, and textual meaning are woven inextricably together in a symbiotic relationship from the inception of the legislative process. Purpose gives rise to intent, which then augments meaning, which effectuates purpose, and so forth. Societal values and legal policies change and develop and affect purpose, intent and even textual meaning, and the process begins anew.

The process of construing a statute may be regarded as akin to the threading together of a braided cable, as Eskridge and Frickey suggest. Or, it may be regarded as akin to the creation of a stew or ratatouille in which every ingredient complements the others and in which the flavors mingle and transform and work together to create the final product. This is the sort of process that is necessary for honest, reasonable, and accurate interpretation of a federal statute. It is this sort of dynamic, comprehensive interpretation that will enable us to discern the meaning and import of NAGPRA.

**COMPREHENSIVE INTERPRETATION OF NAGPRA**

A comprehensive construction of NAGPRA requires the use of relevant canons of construction, and the combination of text-based and context-based theories of interpretation. This dynamic, comprehensive approach includes the following:

- Determination of the purpose, or underlying policy goal, of the statute at issue;
- Examination of the statutory text for meaning, using the statutory purpose as a guide to meaning;
- Interpretation of the text with the assistance of traditional text-based and substantive canons of construction, when

applicable; and

- Further interpretation of the text in light of the circumstances that prompted the statute's enactment, the legislative history of the statute, and the current legal and social environment.

A statute's purpose may be apparent on its face. In some instances, however, legislative history must be consulted early on in the interpretation process, for evidence of the statutory purpose or policy goal. Comprehensive construction, then, is not a linear process, but is instead a back-and-forth-and-back-again process of gauging and re-gauging purpose and meaning in order to arrive at an honest and complete understanding of a statute. This is the process that should be used to interpret NAGPRA. This process begins with the legal and social context that gave rise to the statute.

Social Context

In 1940, legal scholar Felix Cohen wrote with dismay about the continuation of discriminatory practices against American Indians. He called for "positive effort to secure appropriate legislation that will secure to the Indian equal treatment before the law." Decades later, Congress made an effort to meet that challenge, in connection with the treatment of American Indian graves and burial artifacts. That effort culminated in the enactment of NAGPRA by the 101st Congress in 1990. This statute has been hailed as "human rights" legislation, and as the vehicle that has put an end to "academic racism" against Native American graves and ancestral remains.

All states have common law and statutory protections

---

148. This article uses the term "American Indian" to describe native persons and tribes. This term was chosen because the law still, for the most part, refers to indigenous Americans as Indians, and to avoid confusion with references to the term, "Native American," as it is used in NAGPRA. No disrespect is meant to any native persons or tribes who would prefer to be called Native American instead of Indian.


against the desecration of burial sites and cemeteries. These laws are not intended to, nor do they, promote certain religious beliefs, although many persons do have strong religious beliefs regarding treatment of the deceased. These laws do, however, recognize a certain sensibility that is common to many persons of differing beliefs and backgrounds. That sensibility is one of respect for the remains of deceased human beings.

The differential treatment of native burials has not been relegated to our distant past. In 1982, a California appellate court held that a Native American burial ground was not a "cemetery" within the meaning of the state statute affording protection to the contents of cemeteries. That decision was based upon legal precedent, which in turn was based upon attitudes that prevailed in this country for centuries. The remains of deceased Indians were never accorded the respect or care with which society usually treats human remains, and they were never protected from harm by the common law or state statutory law.

As a result, it became necessary for Congress to afford them such protection, through federal legislation.

153. See also, New York Penal Law § 145.23 (cemetary desecration in first degree is a felony); Texas Health & Safety Code § 711.0311 (desecration or removal of remains, and other acts of damage to cemetery, constitutes a felony); Idaho Code § 18-7027 (damage to any marker, crypt or other place of burial is a misdemeanor) and § 18-7028 (removal of remains from place of interment is a felony punishable by fine or imprisonment or both).


155. Trope & Echo-Hawk, supra, note 152, at 39-42.

156. Wana the Bear v. Community Construction, Inc., 128 Cal.App.3d 536 (1982); see also Trope and Echo-Hawk, supra note 152, at 46. The failure to treat Indian burial places as sacred is related, in part, to the fact that non-Indians expect burial places to be marked with stone monuments and other memorials to the dead. Indian burial grounds contain no such markers or memorial monuments. It has taken centuries for the rest of America to understand that, for American Indians, there is no memorial more fitting, respectful, and beautiful than earth itself.

157. Trope and Echo-Hawk, supra note 152, at 38-48. Scientists have long looted Indian burial sites for Indian remains and subjected those remains to study, destruction, or display in museums. The U.S. Surgeon General, by order issued in 1868, directed the removal of the heads and other body parts of Indian war dead for study at the Army Medical Museum. Id. See also, THOMAS, SKULL WARS, supra note 7, at 57.

158. Legislation is well suited to furthering the goal of equality. "Clear delineations of permissible and prohibited forms of conduct contribute significantly to the realization of equal treatment under the law, which is one of the basic requirements of justice . . . ."
NAGPRA, in addition to protecting the sanctity of native burial grounds, mandates that all museums receiving federal funds shall inventory the native human remains and burial artifacts in their possession, notify the tribes associated with those items, and return the items to those tribes. The statute also requires that Native American remains and burial artifacts inadvertently discovered on tribal or federal land be repatriated to the tribe that establishes the closest cultural affiliation with those remains or items. It is this requirement that has come into play in Bonnichsen.

Pursuant to NAGPRA, the Corps was required to make the discovery of the Ancient One known to all tribes with a history of use or occupation of the land where the discovery was made. In accordance with the statute, the tribe that makes a claim for such remains, and establishes a “cultural affiliation” with the remains, is entitled to custody and ownership of the remains. The issues of whether the Ancient One is “Native American,” and whether the claimant tribes have sufficiently established a “cultural affiliation” with him cannot be resolved until the statutory terms, “Native American” and “cultural affiliation,” are construed. Before we turn to those terms, however, we must examine the purpose of the statute and explore whether the substantive canons of construction govern the way in which we should interpret this statute.

The Substantive Canons Applied to NAGPRA

The “remedial purpose” canon provides that remedial legislation should be construed broadly, or liberally, so as to give full effect to its purpose. This canon of statutory construction is firmly established in judicial tradition, having been used by


159. 25 U.S.C. § 3003 (2001). This is a simplified description of what is in reality a complex process.

160. 25 U.S.C. § 3002(d) (2001). This requirement put an end to what was apparently the government’s common practice of making such remains available to scientists who wished to study them, according to a comment made by one of the plaintiffs during the Bonnichsen court proceedings (personal court notes).

161. Id.


the Supreme Court since its earliest days. A statute is remedial if it creates new rights, addresses a social evil or "mischief," or establishes a remedy for redress of an injury. NAGPRA does all three. It establishes in American Indians, Native Hawaiians and Native Alaskans the right to claim, and recover ownership of, human remains and cultural patrimony with which they have some connection. It aims to eradicate the looting of native burial sites and sale of burial artifacts by criminalizing such behavior, and it provides a remedy (repatriation) for the injuries resulting from past occurrences of such looting and desecration.

The statutory provisions are sufficient in and of themselves to inform us that NAGPRA is remedial in nature. The statute's legislative history confirms this conclusion. According to Senator Daniel Inouye, co-chair of the Senate Select Committee on Indian Affairs and one of the sponsors of NAGPRA, the statute's purpose is to put an end to a certain form of racism:

When human remains are displayed in museums or historical societies, it is never the bones of white soldiers or the first European settlers that came to this continent that are lying in glass cases. It is Indian remains. The message that this sends to the rest of the world is that Indians are . . . different from and inferior to non-Indians. This is racism . . . [T]he bill before us today is not about the validity of museums or the value of scientific inquiry. It is about human rights.

Whether regarded as human rights legislation, or simply as legislation that redresses an old and continuing injury and aims to prevent its reoccurrence, NAGPRA is undoubtedly a remedial statute. In accordance with the traditional canon, therefore, NAGPRA should be construed in such a way as to give full effect to its remedial purpose. Additional support for this position comes from the language of the statute itself:

Nothing in this chapter shall be construed to –

(1) limit the authority of any Federal agency or museum to –

(A) return or repatriate Native American cultural items to

164 165 Id.
165. SUTHERLAND STAT CONST § 60.2 (6th Ed., Singer, ed.).
Indian tribes, Native Hawaiian organizations, or individuals, and
(B) enter into any other agreement with the consent of the culturally affiliated tribe or organization as to the disposition of, or control over, items covered by this Act;

(4) limit any procedural or substantive right which may otherwise be secured to individuals or Indian tribes or Native Hawaiian organizations; . . .168

The import of this section is that NAGPRA should not in any event be construed so as to limit or restrict rights native peoples have in connection with securing custody of ancestral remains and cultural articles. This is a clear directive from Congress that NAGPRA is to be construed liberally, and that the rights of Native Americans and the underlying purpose of the statute should guide that construction. When Congress has made its desires known, the courts must abide by them.169

The "Indian law" canon of statutory construction, which is also firmly established in judicial tradition, requires that Indian legislation be construed in favor of Indian interests.170 This canon was first utilized in the interpretation of treaties between tribes and the federal government. However, courts have long applied the canon to statutes as well, construing Indian-related statutes liberally, so as to resolve ambiguities in favor of Indian rights.171 NAGPRA confers on Indian tribes and individuals a new right, and it provides mechanisms for the protection of this right. That makes it Indian legislation.172 Any reasonable doubt of that should be put to rest by the final section of the statute:

This Act reflects the unique relationship between the Federal Government and Indian tribes and Native Hawaiian organizations and should not be construed to establish a precedent with respect

169. CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION, supra note 65, at 133-34. See also, BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW, 94 (1924).
171. SCALIA, A MATTER OF INTERPRETATION, supra note 65, at 27. In connection with statutes (as opposed to treaties), the Indian law canon is really just a specialized version of the remedial purpose canon.
172. Counsel to the Bonnichsen plaintiffs argued in court that NAGPRA is not Indian legislation (personal court notes).
Pursuant to the traditional canon, therefore, NAGPRA must be construed in favor of the Indian rights or interests at stake. The primary Indian interest protected by NAGPRA, and at issue in Bonnichsen, is the right to bury one's dead in accordance with cultural traditions and to expect their burial places to remain undisturbed. The statute carves out no exception for human remains or cultural articles of great antiquity. In fact, the requirement that cultural affiliation be established "prehistorically" indicates that ancient remains are intentionally within the scope of the coverage afforded by NAGPRA. Therefore, even remains as ancient as the Ancient One may well be subject to NAGPRA, if they otherwise meet the definition of "Native American." Any interpretation of the statute that would exempt ancient remains from its reach would be detrimental to the Indian interest at stake, and contrary to the established Indian law canon of construction.

The Meaning of "Native American"

§3001(9). Native American means of, or relating to, a tribe, people, or culture that is indigenous to the United States.

It is clear from the language of the statute that it applies only to "Native American" remains and artifacts: "The ownership or control of Native American cultural items . . . shall be . . . ." It is also clear that "Native American," in NAGPRA, is not a synonym for "American Indian," as it is in common usage. This is apparent from a reading of the definition in relation to the statute as a whole. Elsewhere in NAGPRA, the words Indian and Indian tribe are used. Congress could have used these terms in its definition of Native American, but it did not. Therefore, Congress did not intend Native American to be understood as a synonym for American Indian in this particular statute.

In order to understand the statutory term Native American, then, we must make certain that we understand the meaning of the words used to define that term. We must determine what "indigenous," "tribe," "people" and "culture" mean, as used in the

statute. These are familiar words, but they are words that have multiple meanings. When a word or phrase is capable of being understood in more than one way, it is said to be ambiguous, and it requires further clarification. The statutory definition of “Native American” is intended to help us interpret the statute, but we cannot do that properly until we interpret the definition itself.

The component words of the definition of Native American are not separately defined. The word “indigenous” commonly means native to a particular place. Dictionary definitions are not evidence, and cannot be given conclusive effect in connection with statutory meaning, but they can provide useful guidance.

Indigenous is defined in two standard dictionaries as follows:

**Indigenous**: 1. Originating in and characterizing a particular region or country; native . . . 2. Innate; inherent; natural . . . Syn. 1. Autochthonous, aboriginal, natural. 179

**Indigenous**: 1. Born or produced naturally in a land or region; native or belonging naturally to (the soil, region, etc.). (Used primarily of aboriginal or natural products.) 180

Since the word “aboriginal” is used in these definitions of indigenous, it may be helpful to have the precise meaning of that word as well. Random House defines aboriginal as: “1. Of, pertaining to, or typical of aborigines . . . 2. original or earliest known; native; indigenous.” The Oxford English Dictionary offers the following:

**Aboriginal**: 1. First or earliest so far as history or science gives record; primitive; strictly native, indigenous. Used both of the races and natural features of various lands. 2. Dwelling in any

---


177. Judge Jelderks commented during the court arguments that indigenous is a word that might seem simple, “but isn’t really quite that simple.” Personal court notes, June 19, 2001.


179. RANDOM HOUSE UNABRIDGED DICTIONARY 973 (2nd ed. 1993).

180. OXFORD ENGLISH DICTIONARY 867 (2ND ED 1989).

181. RANDOM HOUSE, supra note 180. "Aborigine" is defined as: “one of the original or earliest inhabitants of a country or region.” Id.
country before the arrival of later (European) colonists. 182

It is possible, using these definitions that clarify the meaning of "indigenous," to construct a more detailed definition of the statutory term, "Native American":

"Native American" means of, or relating to, a tribe, people, or culture that originated in or dwelled in the United States before the arrival of European colonists. 183

It is not possible to reach a full understanding of the term "Native American", until the statutory meaning of the words, "tribe," "people," and "culture" is determined. "Tribe" has many meanings, but those most germane to this discussion appear to be the following:

**Tribe:** 1. Any aggregate of people united by ties of descent from a common ancestor, community of customs and traditions, adherence to the same leaders, etc. 2. A local division of an aboriginal people. 184

**Tribe:** 1.a. A group of persons forming a community and claiming descent from a common ancestor; ... b. A particular race of recognized ancestry; a family. ... 3. A race of people; frequently applied to a group of primitive people. 185

The word "people" may need no explanation, but since it, too, has various meanings, the following dictionary definitions may be helpful:

**People:** 4. the entire body of persons who constitute a community, tribe, race, nation, or other group by virtue of a common culture, history, religion, or the like .... 186

**People:** 1. A body of persons composing a community, tribe, race, or nation. 2.a. The persons belonging to a place, or constituting a

---

182. OXFORD ENGLISH DICTIONARY 35 (2ND ED 1989).
183. The use of the word "indigenous" to refer to people who populated a region before Europeans colonized it is consistent with its use in international law, according to a statement made in court by Walter Echo-Hawk, co-counsel for the National Congress of American Indians. (Personal court notes).
184. RANDOM HOUSE UNABRIDGED DICTIONARY 2018 (2ND ED. 1993).
185. OXFORD ENGLISH DICTIONARY 503 (2ND ED. 1989).
186. RANDOM HOUSE UNABRIDGED DICTIONARY 1436 (2ND ED 1993).
tribe, people or culture. This language does not appear to mandate that human remains must be "of or relating to" a modern Indian tribe. On the contrary, the use of the term "indigenous" is an indication that the remains are required only to have some connection to a tribe or people that lived in this country before European colonization. "Relating to" could be construed as "related to," as in "akin to" or "of the same family," but that does not appear to be its meaning in this section of the statute. Other sections of NAGPRA refer specifically to "lineal descendants," a very clear reference to family relationship. It may reasonably be concluded, therefore, from the context of this section within the statute as a whole, that "relating to" in the definition of "Native American" has a broader meaning than relation by blood or family ties.

What, then, does "relating to" mean? In common usage, "relating to" is used interchangeably with the phrases, "in connection with" and "in relation to." According to Webster, "in relation to" means: "concerning; regarding; with reference to."191 The word "relate" means, among other things, "to connect or associate, as in thought or meaning;"192 or "to have reference (often followed by to)."193 It appears, then, that "of, or relating to" in Section 3001(9) of NAGPRA means: "belonging to or being a member of, or having some connection or association with." Accordingly, the statutory term "Native American", as applied to human remains, and as enriched and clarified by the definitions of the words comprising that term, may be expressed as follows:

"Native American" means belonging to or being a member of, or having some connection or association with, a tribe/clan/community/people/group of persons connected by culture, that originated in or dwelled in the United States prior to the arrival of European colonists.

The DOI has defined Native American, in the regulations implementing NAGPRA, as follows: "The term Native American means of, or relating to, a tribe, people or culture indigenous to the United States, including Alaska and Hawaii."194 This definition mirrors the statutory language, and is congruent with

192. Id.
193. RANDOM HOUSE DICTIONARY, supra note 180.
194. 43 C.F.R. § 10.2(d) (2001).
particular... company or class... 3.c. Those to whom any one belongs; the members of one's tribe, clan, family, community... etc., collectively. 187

To complete the triad, "culture" is defined as:

**Culture:** 5.b. A particular form or type of intellectual development. Also, the civilization, customs, artistic achievements, etc., of a people, especially at a certain stage of its development or history. 188

**Culture:** 3. a particular form or stage of civilization, as that of a certain nation or period. 4. the sum total of ways of living built up by a group of human beings and transmitted from one generation to another. 189

The definitions set forth above indicate that the words, "tribe" and "people," are synonyms. Both terms refer to groups of persons who have some connection with each other. That connection may be based on geography, religion, family relationship, or some other factor. "Culture" refers to the characteristics and accomplishments of a group of people, such as belief systems and practices, social customs, and artistic creations. The traditional canon of construction, *noscitur a sociis*, 190 suggests that "culture" should be interpreted in relation to the words with which it is listed. The application of *noscitur a sociis* turns "culture" into a synonym for "tribe" and "people," and its meaning thus becomes "a group of persons known for their particular culture." Based on these three terms, as fully explicated, the statutory term, "Native American," can be expressed as follows:

Native American means of, or relating to, a tribe/clan/community/people/group of persons connected by culture that originated in or dwelled in the United States prior to the arrival of European colonists.

There is one more portion of this statutory definition that must be clarified, and that is the requirement that Native American human remains be "of, or relating to" an indigenous

187. OXFORD ENGLISH DICTIONARY 504, 505 (2ND ED. 1989).
188. Id. at 121.
189. RANDOM HOUSE DICTIONARY, supra note 180.
190. Discussed *supra*. 
the statutory definition.\(^{195}\)

DOI has explained its interpretation of this term as follows:

[We] consider that the term 'Native American' is clearly intended by NAGPRA to encompass all tribes, peoples, and cultures that were residents of the lands comprising the United States prior to historically-documented European exploration of these lands.\(^{196}\)

This interpretation corresponds with the dictionary definitions consulted herein and with the detailed explanation of the term “Native American” developed through examination of the statutory text and those dictionary definitions. The DOI’s interpretation of “Native American” is, therefore, consistent with the construction of the statutory term derived through examination of the text as clarified by dictionaries and traditional syntactical canons. In other words, using nothing more than the theory of Textualism, it is possible to arrive at a meaning of “Native American” that is clear and comprehensible, and that correlates with the meaning DOI has assigned to that term.

Even when a court concludes that the meaning of a statutory provision is clear, it may look to legislative history to confirm its conclusion.\(^{197}\) In this case, the meaning of “Native American” as explicated in the foregoing discussion is confirmed by a review of NAGPRA's legislative history. H.R. 5237, the bill that became NAGPRA, contained the definition of Native American that now appears in the statute. Every precursor bill, however, in the Senate and the House, contained a narrower definition of that term. For example, the earliest of these precursors, S. 187, contained the following definition:

---

195. Plaintiffs in Bonnichsen argue otherwise (personal court notes). They argue that a difference in meaning is created because the statute reads, “...of, or relating to, a tribe, people, or culture that is indigenous to...” (emphasis added), while the regulation reads, “...of, or relating to, a tribe, people or culture indigenous to...” Plaintiffs contend that the words “that is” in the statute indicate a requirement that human remains be related to an existing Indian tribe, and that the DOI has attempted to remove that requirement by removing those two words from its definition of Native American. Id. This is an untenable position. The words “that is” are not essential to the meaning of the definition; it means the same thing whether they are included or not.


The term 'Native American' means any individual who is –

(4) an Indian, or
(5) a Native Hawaiian, or
(6) an Alaskan Native, including Aleuts and Inuits.\textsuperscript{198}

S. 1021, introduced by Senator McCain, contained a definition of “Native American” that was virtually identical to that contained in S. 187. S. 1980, introduced by Senator Inouye, and based largely upon the language in the National Museum of the American Indian Act,\textsuperscript{199} was the first to broaden the definition of Native American. It defines ‘Native American’ as “an individual of a tribe people or culture that is indigenous to the Americas and such term includes a Native Hawaiian.”\textsuperscript{200}

The House also had two bills that preceded its final one on the protection of native graves and repatriation of cultural patrimony. In March of 1989, Representative Charles Bennett introduced H.R. 1381, and Representative Morris Udall introduced H.R. 1646. Both bills defined “Native American” in a way that mirrors those definitions in S. 187 and S. 1021 by simple reference to Indians, Native Hawaiians, and Native Alaskans. H.R. 5237, which replaced S. 1980 and was enacted into law, contained from the time of its introduction the definition of “Native American” that is now in the statute.\textsuperscript{201} This indicates that Congress fully intended the term “Native American” to have a broader meaning than the earlier bills would have given it, and that this explicated version of the statutory term reflects that Congressional intent.

It is still necessary to determine whether the Ancient One fits the definition of Native American. He lived on land now a part of the United States, long before European settlers arrived.

---

\textsuperscript{198} National American Museum Claims Commission Act, Senate Hearing 100-931 on S. 187, Senate Select Committee on Indian Affairs, 100th Congress, July 29, 1988.

\textsuperscript{199} National Museum of the American Indian Act, Pub. L. No. 101-185 (codified as 20 U.S.C. 80q, et. seq.) (1989)(creating a new Museum of the American Indian as a part of the Smithsonian Institution. It also requires the Smithsonian to inventory all its native human remains and sacred artifacts, and to repatriate them to the appropriate tribes in accordance with the statute and with regulations promulgated by the Secretary of the Interior).


For this reason, he can be described as native or indigenous to the continent. He survived life-threatening injuries suffered years before his death – the embedding of a stone spearhead in his hipbone, and the crushing of two ribs. For that reason, it is reasonable to conclude that he belonged to some tribe or group of people, because he could not have survived those injuries on his own.\textsuperscript{202} The “culture” that the Ancient One is identified with can be referred to as that of the people of the Windust Plateau in the Late Holocene period of history.\textsuperscript{203} It is possible, then, to identify the Ancient One in the way that remains must be identified in order to be deemed “Native American.” Therefore, the Ancient One is Native American within the meaning of NAGPRA.

\textit{The Meaning of “Cultural Affiliation”}

\$3001(2). “Cultural affiliation” means that there is a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group.

NAGPRA mandates that ownership of inadvertently discovered Native American remains shall be in the lineal descendants, or in the tribe on whose tribal (reservation) lands the remains were found, or in the tribe with the closest cultural affiliation.\textsuperscript{204} In addition, if cultural affiliation cannot be “reasonably ascertained,” then ownership vests in the tribe that has been recognized, in a “final judgment” of the Indian Claims Commission or the U.S. Court of Claims, as the aboriginal occupant of the land on which the remains were found.\textsuperscript{205} In any event, it is incumbent upon the interested tribe or lineal descendants to submit a claim pursuant to NAGPRA.

In order to establish a “cultural affiliation” with claimed remains, a tribe must, in accordance with the definition of that term, show a “relationship of shared group identity” between itself and the “earlier identifiable group” with which the remains are associated. The statute does not specify just how close or strong a relationship that must be. The use of the word

\textsuperscript{203} \textit{Id.}
\textsuperscript{204} 25 U.S.C. § 3002(a) and §3002(d) (2001).
"prehistorically" in the definition of "cultural affiliation" further obscures the issue of proof. Prehistory is, to a large extent, a great unknown. How close a relationship or connection could possibly be traced "prehistorically"? And just what is a "shared group identity"?

It is advisable, in connection with the comprehensive interpretation of NAGPRA, to use dictionary definitions as an aid to discerning the meaning of cultural affiliation. First, however, it should be recalled that NAGPRA is a remedial statute aimed at redressing past injustice and preventing its future reoccurrence. It is a statute that has as its purpose the eradication of "academic racism" and blatant disregard for the sensibilities of native peoples with regard to their deceased ancestors and burial grounds. It is a statute that must be construed honestly and reasonably in light of this remedial purpose and the Indian interests it protects.

The term "shared group identity," as a component of "cultural affiliation," requires clarification. The word "shared" presents no problem: it means, in common understanding and usage, something owned or enjoyed by more than one person. In the definition of cultural affiliation, it clearly means something attributable to, or associated with, both the claimant tribe and the "earlier identifiable group." In order to understand "shared group identity," however, we need to determine just what the statute means by "group" and "identity." Starting with the word "group" will facilitate explication of both phrases in which the word appears — that is, it will lead to an understanding of both "shared group identity" and "identifiable earlier group."

The word "group" generally means two or more things or persons. It also, however, has numerous more specific meanings. The dictionaries inform us that "group" means, among other things:

**Group: (noun)**
1. any collection or assemblage of persons or things; cluster; aggregation. 2. a number of persons or things ranged or considered together as being related in some way. 3. *Ethnol.* A unit of social organization less complex than a band.

---

206. Term used by Walter Echo-Hawk, co-counsel for the National American Indian Association, during arguments in federal district court on June 20, 2001 (*personal court notes*). See also, *SKULL WARS, supra* note 7, Chapter 4: "A Short History of Scientific Racism in America."

Relationship: 3: an aspect or quality (as resemblance, direction, difference) that can be predicated only of two or more things taken together: something perceived or discovered by observing or thinking about two or more things at the same time: CONNECTION.

Finally, then, the definition of "cultural affiliation" may be fully explicated, as follows:

"Cultural affiliation" means that there is some identifying trait, custom, characteristic or other identifying feature that the claimant tribe and the earlier band or group of persons have in common with one another; and that this common identifying feature creates a connection between the modern tribe and the earlier group, which can be traced historically or prehistorically.

This statutory term, as construed, must now be applied to the Ancient One. Was he a member of an "earlier group"? The evidence indicates that he was. He had a stone spearhead embedded in his hipbone when he was a young man, yet he survived, and the bone shows no trace of infection. This indicates that he had others to help him with this injury, and that they knew something about healing wounds and preventing infection. He also suffered an injury resulting in crushed ribs some years prior to his death. This, too, was a life-threatening injury that he could not have survived without assistance. Finally, two separate reports concluded that, based on the condition of the remains and other relevant factors, the Ancient One had been interred after death. The persons who buried him likely had some relationship with him or they would not have made the effort to bury him, and they must have believed that burial was the appropriate treatment for the remains of a deceased person. On the basis of this evidence, it would not be unreasonable to conclude that the Ancient One was a member of a group.

It is now necessary to determine the level of proof applicable to the element of cultural affiliation under NAGPRA. The statute does not specify a standard of proof for cultural affiliation, but it does suggest that a preponderance of the

216. Powell and Rose, Osteological Report, supra note 46.
217. Id.
218. Id.
evidence might be appropriate.\textsuperscript{219} The Secretary of the Interior found that the claimant tribes had established cultural affiliation by a preponderance of the evidence.\textsuperscript{220} The brief DOI submitted in \textit{Bonnichsen} avers that the Secretary's finding of cultural affiliation is reasonable because it is based on a preponderance of the evidence.\textsuperscript{221} The statute itself, however, does not require this level of proof.

When a tribe submits a claim for remains, and those remains are determined to be Native American within the meaning of NAGPRA, \textit{any reasonable proof} of cultural affiliation should be sufficient for approval of that claim. It is only when there are two or more competing claims that NAGPRA requires a claimant tribe to establish, by a preponderance of the evidence, that it has the closest, or strongest, cultural affiliation with the claimed items.\textsuperscript{222} This is the only mention of any standard of proof that appears in the statutory language governing ownership of inadvertently discovered remains and artifacts.\textsuperscript{223}

Admittedly, it would be rare for a statute to require proof in an amount less than a preponderance of the evidence. However, NAGPRA is not a typical statute. It is remedial in nature, it is Indian legislation, and it embodies an apology for injuries inflicted upon native peoples not only with the acquiescence of the government but pursuant to government order.\textsuperscript{224} NAGPRA is, in essence, a revolution on paper. And revolutions require extraordinary measures. The plain language of the statute appears to require no more than a scintilla of evidence showing a cultural connection between a claimant tribe and the remains or artifacts claimed, except that greater proof is required when necessary to resolve competing tribal claims. Therefore, in the absence of competing tribal claims, the statute does not require that proof of cultural affiliation rise to the level of a preponderance of the evidence.

The legislative history supports this reading of the statute. The Senate Report on S. 1980, which was subsequently replaced

\begin{itemize}
    \item \textsuperscript{219} See discussion in Background Section, \textit{supra}.
    \item \textsuperscript{220} Babbitt letter, \textit{supra} note 47.
    \item \textsuperscript{221} \textit{Defendants' Memorandum, supra} note 43, at 11.
    \item \textsuperscript{223} 25 U.S.C. § 3002 (2001).
    \item \textsuperscript{224} \textit{Hurst Thomas, Skull Wars, supra}, note 7, at 57. \textit{See also}, Trope and Echo-Hawk, \textit{supra} note 152; In the 1860's, the Surgeon General ordered all field officers to collect Indian crania and skeletons and send them to the Army Medical Museum.
\end{itemize}
by H.R. 5237, mentions that proof of cultural affiliation should be "by a simple preponderance of the evidence," but that discussion of proof is limited to claims for human remains and cultural articles in the collections of museums or federal agencies. \(^{225}\) The House Report on H.R. 5237, the bill that became NAGPRA, includes the following discussion concerning proof of cultural affiliation in connection with ancient remains:

Where human remains and associated funerary objects are concerned, the committee is aware that it may be too difficult, in many instances, to trace an item from modern Indian tribes to prehistoric remains without some reasonable gaps in the historic or prehistoric record. In such instances, a finding of cultural affiliation should be based upon an overall evaluation of the totality of circumstances and evidence... and should not be precluded solely because of some gaps in the record. \(^{226}\)

All that is lacking in the proof submitted with regard to the Ancient One is a continuous connection from the claimant tribes all the way back to the Ancient One's lifetime 9,500 years ago. Even if cultural affiliation must be established by a preponderance of the evidence, the gap in time is not sufficient reason to preclude a finding of cultural affiliation. The evidence suggesting cultural affiliation includes geographical location, \(^{227}\) oral histories of the claimant tribes that they have resided in that area of Washington State for all time, and the lack of any "migration stories" in the oral histories of these tribes. \(^{228}\) Another piece of evidence indicating a cultural affiliation between the tribes and the Ancient One is the conclusion, reached by two separate teams of scientists, that the Ancient One was purposefully interred after death. This indicates a belief held by the "earlier group" that burial was appropriate for deceased persons, which corresponds with the belief held by the claimant tribes. All of this information, considered together, is sufficient to establish a nexus between the claimant tribes and the Ancient One.

\(^{225}\) Senate Report on S.101-473, supra note 152.
\(^{227}\) The findings of fact in the settlement of the ICC actions provided this evidence, along with other historical evidence of the occupancy of this area by the Umatilla and other tribes and bands of American Indians.
\(^{228}\) Babbitt letter, supra note 47; also Defendants' Memorandum, supra note 22.
ADDITIONAL SUPPORT FOR THE TRIBES' CLAIM 
TO THE ANCIENT ONE

The 1855 treaty between the U.S. and the Confederated Tribes of the Umatilla Indian Reservation provides additional support for the government's decision to repatriate the Ancient One to the tribes. The Umatilla have an unqualified right to ownership and possession of the Ancient One pursuant to that treaty, by which they sold their tribal lands, including the land on which the Ancient One was discovered, to the U.S. government. Federal courts have frequently held that a tribe may retain certain rights, powers and interests not expressly granted or relinquished by it in a treaty. The Umatilla did not intend to relinquish their rights as kin or caretakers of any human remains buried beneath the lands conveyed in the 1855 treaty. Therefore, they retained such rights and those rights remain in effect to this day.

In accordance with the Indian law canon of construction, treaties must be construed in favor of Indian interests. The interest at stake here is the cultural tradition of honoring deceased ancestors and protecting their remains from disturbance. The tribes and bands of Indians whose lands were transferred to the U.S. through that 1855 treaty, now known collectively as the Umatilla, would never have relinquished their rights to protect the remains of their ancestors. They would never have agreed that, by selling their land, they were also selling the bones of all deceased persons buried in that land. They held those bones sacred, and believed that they should be allowed to rest in the earth for all time.

This belief is expressed in the statement of Armand Minthorn, a member of the Umatilla Board of Trustees, in connection with the Ancient One:

My tribe has ties to this individual because he was uncovered in our traditional homeland— a homeland where we still retain fishing, hunting, gathering, and other rights under our 1855 treaty with the U.S. Government. . . .

229. U.S. v. Winans, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089 (1905); see also Trope and Echo-Hawk, supra note 152.
The use of the word "band" is worth noting, because it is particularly relevant to the subject matter of NAGPRA and to the tribes that have claimed the Ancient One. The parties to the 1855 treaty with the U.S., by which the U.S. purchased the land on which the Ancient One was discovered, were the "Walla-Wallas, Cayuses, and Umatilla tribes, and bands of Indians." For this reason, it makes sense to examine the definition of "band" also, because it may help us to understand the statutory meaning of "group." The pertinent definitions of this word are as follows:

**Band:** 4. a division of a nomadic tribe; a group of individuals who move and camp together.

**Band:** 3.a. a group of persons, animals or things: as b: a body of persons often brought together by a common purpose or bound together by a common fate or lot; *specif:* a relatively self-sufficient tribal subgroup that is mainly united for social and economic reasons.

"Identity" is not the simplest of concepts, because it is the essence of what makes a person herself, and not someone else. Personal identity may include hair color, intelligence, religious affiliation, ancestry, education, height and weight, and more. None of these attributes, other than height and weight, could ever be established in connection with prehistoric, North American remains.

It is necessary to focus on the sorts of qualities or information that might identify several persons as a unified group, because NAGPRA refers to "group" identity. Traits of

---

208. WEBSTER'S THIRD NEW INTERNATIONAL UNABRIDGED DICTIONARY (1971).


210. The meaning of "band" may inform the meaning of "group," in the same way that the meaning of "aboriginal" informs the meaning of "indigenous" in the statutory definition of "Native American."

211. RANDOM HOUSE, *supra* note 208.


213. "Identity: 2. the condition of being oneself or itself, and not another. 3. Condition or character as to who a person or what a thing is." RANDOM HOUSE DICTIONARY, *supra* note 208.
group identity could include geographic location, cultural rites and customs, diet, artworks, physical characteristics, language, tools, and accoutrements such as baskets and cooking vessels. The ancient Greeks, for example, are known for their temples, sculpture and literature. Individual American Indian tribes may be identified in connection with their traditional customs, artwork, oral histories, and geographic location (for example, the “Plains Indians” or “Indians of the Northern Rockies”). None of these attributes identifies everything of importance about a group, but each provides an element of the group’s identity. With this in mind, a comprehensible explanation of the term “shared group identity” may be crafted, as follows:

“Shared group identity” means some identifying feature that is common to both groups, such as physical characteristics, cultural practices, geographical location, or other identifying feature.

The term “earlier identifiable group” must also be explicated in connection with the construction of “cultural affiliation.” The word “earlier” is easy enough: it just refers to a group that existed earlier in time than the modern day. The word “group” has already been examined. It refers to a gathering of individuals bound together by something they have in common. Group may also refer to a tribal sub-group, or a group smaller in size than a band (which is smaller than a tribe), which lives and travels together. The word “identifiable” is likely meant to refer back to “shared group identity”; therefore, it requires that the earlier group have some distinguishing or identifying feature with which it may be associated. It does not mean that the group must have a name that science has bestowed upon it, nor does it require that there be a large collection of tools or textiles or other goods by which the group can be identified.

The meaning of the word “relationship” is the final element necessary for a complete understanding of “cultural affiliation.” In ordinary understanding, “relationship” means a connection between two people or two things. The dictionary definition confirms that understanding of the word:

214. During the arguments on June 19 and 20, Judge Jelderks often came back to the question, “Who is this earlier group? What are they called?” This is a natural question to ask, because we all tend to want names for things as a way of understanding and classifying them. The statute does not require, however, that a name exist for the earlier group mentioned in the definition of cultural affiliation.
Our religious beliefs, culture, and adopted policies and procedures tell us that this individual must be re-buried as soon as possible. Our elders have taught us that once a body goes into the ground, it is meant to stay there until the end of time. 230

The Umatillas' treaty with the federal government must be construed in light of these beliefs and the understandings the tribes would have had at the time the treaty was signed. Pursuant to such a construction of the 1855 treaty, the Umatilla have the right to take custody of the Ancient One's remains and return them to the earth.

This position is strengthened by the Supreme Court's recent decision in Idaho v. United States, in which the Court held that the Coeur d'Alene Tribe retained title to lands submerged under Lake Coeur d'Alene and the St. Joe River. 231 That decision rests, in large part, upon evidence indicating that the Coeur d'Alene tribe viewed the lake and river as vitally important to them at the time they were negotiating their treaty with the federal government. Justice Souter, writing for the majority, noted: "The intent [of Congress], in other words, was that anything not consensually ceded by the Tribe would remain for the Tribe's benefit . . ." 232 Similarly, in the case of the 1855 treaty between the Umatilla and the federal government, anything not ceded by the Umatilla was retained by and reserved in them. One of the rights retained by and reserved in the Umatilla is the right to recover possession of any human remains buried in their tribal lands before those lands were transferred to the U.S. pursuant to the 1855 treaty.

CONCLUSION

NAGPRA must be construed in light of its remedial purpose, in accordance with its statutory definitions of Native American and cultural affiliation, and in the context of its legislative and social history. The use of a comprehensive or "dynamic" approach to interpretation, including a focus on statutory purpose as a guide to meaning, makes possible an honest, complete, and accurate interpretation of the statute. Such comprehensive construction is necessary in order to determine the meaning and scope of the statute, to give full

230. Armand Minthorn, Human Remains Should be Reburied, supra note 11.
232. Id. at 2145.
effect to the statute's remedial purpose and full benefit to the Indian interest at stake, and to give full effect to the will of Congress. In the words of Justice Benjamin Cardozo:

When the legislature has spoken, and declared one interest superior to another, the judge must subordinate his [or her] personal or subjective estimate of value to the estimate thus declared.233

The legislature has spoken: it has declared that the interests of American Indians, Native Alaskans, and Native Hawaiians in the remains of their deceased ancestors, no matter how ancient, are superior to any interests that scientists might have in those remains. The Ancient One is “Native American” as defined by the statute, and the claimant tribes have established a cultural affiliation with him as required by the statute. Accordingly, the Ancient One must be repatriated, without further delay, to the tribes that have claimed him as their own.

Montana has rarely met a Uniform Law it didn’t like. Although Montana has now lost its distinction of having enacted more Uniform Laws than any other jurisdiction, it still ranks near the top.¹ Often the first to enact a Uniform Law, Montana has occasionally had few followers. When a Uniform Law is enacted in only a couple of jurisdictions, it fails to produce national uniformity.

Uniform Laws are the product of the National Conference of Commissioners on Uniform State Laws (NCCUSL)² (assisted, in the case of the Uniform Commercial Code (UCC), by the

---

* Professor of Law, The University of Montana School of Law. I am grateful for the research assistance of Ryan Hyslop, then a student at The University of Montana School of Law, and the comments of David Gray Carlson, Professor of Law at Cardozo School of Law.


2. Additional information may be found at the organization’s web site, <http://www.nccusl.org/nccusl/default.asp> (last visited Nov. 2, 2001).
American Law Institute), an organization created in 1892 to promote uniformity among state laws. Commissioners are chosen from each state and meet annually to review the drafts that have been prepared by a Drafting Committee and reviewed through an extensive process.

Uniform Laws fill a need in a state lacking a professional legislature. The product comes before the legislature ready-made — the drafting has been done, the interest groups have been heard from, the competing policies have been weighed, the effort to construct workable and enactable legislation completed. As long as the products reflect high quality, legislators can feel comfortable with the brand name. Indeed, the very name “Uniform Law” may inspire confidence; it is reassuring that other jurisdictions are using the product. In fact, even if there are few adopting jurisdictions, the Uniform Law still serves as model legislation for the state.

As with most virtues, however, the strengths of Uniform Laws are also their weaknesses. One of those strengths is, to coin a phrase, uniformity. The greatest achievement of the Uniform Laws process, the Uniform Commercial Code, states its underlying purpose explicitly: “to make uniform the law among the various jurisdictions.” To promote uniformity, NCCUSL strongly discourages the adopting jurisdiction from enacting variations. But the enactment of a Uniform Law in a particular jurisdiction often sets off a chain reaction among existing statutes. In the process of replacing or reconciling related statutes, oversights frequently occur, especially in a state with as complex a body of statutes as Montana. More significantly, the “one size fits all” philosophy of NCCUSL may result in a jurisdiction enacting statutes that do not meet its regional needs.

3. “There is potential tension in the partnership because the partners have somewhat different goals. At the risk of over-simplification, the goal of the ALI is to ‘get it right’ (on the merits) and the goal of NCCUSL is to ‘get it right enough to get it enacted.’ Resolving this tension is not an easy task because of disagreements over what is ‘right’ and how to get there.” Richard E. Speidel, Revising UCC Article 2: A View from the Trenches, 52 HASTINGS L.J. 607, 608 (2001).


7. See Miller, supra note 4, at 622.

These strengths and weaknesses may be seen in the Montana enactment of Revised Article 9 of the Uniform Commercial Code in 1999. The name itself reveals a conflict between the Uniform Law and the enacting jurisdiction. To fit within the structure of the Montana Code Annotated, old Article 9 was codified as Chapter 9 of Title 30. Perhaps in the interest of national uniformity, however, no one calls it by its enacted name, "Chapter 9," and I shall continue the practice of calling the Montana enactment "Article 9." This article does not address the overall effect of that revision. Rather, this article explores the adoption of Revised Article 9 in one microcosm — its effect on agricultural lien statutes.

The drafters of Revised Article 9 wrestled with the issue of what to do with agricultural liens. One proposal was to preempt them completely, incorporating agricultural liens within Revised Article 9. The final result represents a compromise, incorporating the liens for some purposes but not for others. Like most compromises, the result is unsatisfactory. It may prove workable in some states, but Montana has a unique set of agricultural lien statutes that do not accommodate themselves to the Code scheme.

This article examines the impact this Uniform Law has on

9. MONT. CODE ANN. §§ 30-9A-101 to -709 (2001)(effective date 07/01/01). Where the distinction is significant, this article refers to the revision as "Revised Article 9" and to the version that has been repealed as "old Article 9."

10. Actually, things are more confused than that. To prevent confusion between the repealed sections of old Article 9 and the newly enacted sections of Revised Article 9 that have the same uniform section number, the Montana Code Commissioner determined that Revised Article 9 would be codified as Chapter 9A. While I shall refer to the sections by their uniform numbers, the reader will look for them in the Montana Code Annotated in Title 30, Chapter 9A.

11. Nevertheless, I cannot resist a prediction. Perhaps unfamiliarity with the revision makes it appear more overwhelming than it is, but to this student familiarity produces not repose but a conviction that the revised statute is in fact overwhelming. Each state fell in line in haste, enacting it because of the call for the greater good of uniformity, but our leisure will provide much opportunity to repent. We will long for the old code, not just because it was familiar, but because it was comprehensible. The principal author of the old Article 9, Grant Gilmore, explained that the accessibility of the Code made secured financing safe for "country bankers." Grant Gilmore, The Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of a Repentant Draftsman, 15 GA. L. REV. 605, 620 (1981). The revision makes secured financing accessible to no one.


these native agricultural liens and urges reform of the Montana agricultural lien laws. Revision of Article 9 did not cause agricultural liens to become problematic. The accretion of changes over time has made them untidy, but Revised Article 9 puts that untidiness in stark relief.\(^4\) The process of reform should not only eliminate existing conflicts, but result in an improvement in the law. I caution, however, that I am not always sure of the direction that reform should take. One strength of the academic ivory tower is that I can survey the problem with dispassion; the concomitant weakness is that I lack the experience in the field, as it were, to fashion a solution that will prove workable in practice. For, in the process of reform, we must always remember another laudable purpose of the Uniform Commercial Code: "to permit the continued expansion of commercial practices through custom, usage and agreement of the parties."\(^5\) My role is not to dictate the particular solution to each problem, but to outline the problem and present the competing considerations. I am hopeful that others will then take up this cause and give us, at least in this area, a body of law that will serve the final underlying purpose of the UCC: "to simplify, clarify and modernize the law governing commercial transactions."\(^6\)

Part II of this article clarifies the Revised Article 9 definition of Agricultural Liens. The article then examines the claims various creditors may have to the same collateral. Part III reviews the attachment process and Part IV the perfection process. Part V reviews the conflict between the secured party and a buyer of farm products, indicating the conflicts between Article 9 and the federal Food Security Act.\(^7\) Part VI then explores the Montana agricultural lien statutes, indicating conflicts among those statutes and conflicts between those statutes and Revised Article 9. Part VII lays out a proposal for addressing the conflicts noted throughout the article.

II. AGRICULTURAL LIENS UNDER REVISED ARTICLE 9.

Although we may think of the term "agricultural lien" as describing any lien on farm products, in fact the term is a term

---

16. § 1-102(2)(a).
of art. It is, however, a term that means different things in different statutes, having one meaning under Revised Article 9, another meaning under Montana Code Annotated Title 71, and another under other statutes. While old Article 9 did not apply to statutory liens, Revised Article 9 expressly applies to agricultural liens. Section 9-109(a)(2)(1)(b) provides that “this article applies to . . . an agricultural lien.” The change is more limited than that section suggests, however, for not all of Revised Article 9 applies to agricultural liens and the applicable provisions apply only to agricultural liens as defined in the statute. The definition provides:

“Agricultural lien” means an interest, other than a security interest, in farm products:

(A) which secures payment or performance of an obligation for:

(i) goods or services furnished in connection with a debtor's farming operation; or

(ii) rent on real property leased by a debtor in connection with its farming operation;

(B) which is created by statute in favor of a person that:

(i) in the ordinary course of its business furnished goods or services to a debtor in connection with a debtor's farming operation; or

(ii) leased real property to a debtor in connection with the debtor's farming operation; and

(C) whose effectiveness does not depend on the person's possession of the personal property.

Under this scheme, an agricultural lien is not a “security interest,” which is defined as “an interest in personal property or fixtures which secures payment or performance of an obligation.” Therefore, although Revised Article 9 applies to agricultural liens, only those parts of Revised Article 9 that expressly refer to agricultural liens, rather than those that refer only to security interests, are applicable to agricultural liens. There are, in fact, few sections that expressly apply to agricultural liens. On the other hand, a “secured party” is defined to include both “a person in whose favor a security

20. § 9-102(a)(5) (emphasis added).
21. § 1-201(37).
interest is created" and "a person that holds an agricultural lien." Therefore, when Revised Article 9 refers to a "secured party," it refers to both a person holding a security interest and a person holding an agricultural lien.

According to the Revised Article 9 definition, the principal difference between a security interest and an agricultural lien is that a security interest is a consensual lien, arising only by contract between the creditor and the debtor, while an agricultural lien is a creature of statute, arising when the creditor satisfies the statutory requirements, irrespective of the consent of the debtor. Furthermore, the definition limits agricultural liens to the statutes that do not make the lien dependent on possession. The statute determines the scope of the lien and may determine its priority.

Although the definition of agricultural liens includes statutes that give a landlord a lien in connection with a lease of farm property, there are no such statutes in Montana. In Montana, therefore, a Revised Article 9 agricultural lien is a statute that gives a non-possessory interest in farm products which secures payment or performance of an obligation in favor of a person that in the ordinary course of its business furnished goods or services to a debtor in connection with a debtor's farming operation. Because lien law, both within and without Article 9, is largely a matter of determining 1) whether a lien becomes effective, 2) the scope of the lien, and 3) its priority among the various claimants to the debtor's property, we will approach the issue of the relationship between agricultural liens and Revised Article 9 by looking at the various competing claimants to the farm products of a debtor.

22. § 9-102(a)(72).
23. See Part VI.B., infra. If the statute does not provide a priority, the Article 9 default rule of first to file or perfect governs. § 9-322(a)(1), (3).
24. Although the definitions of farm products (§ 9-102(a)(34)) and farming operation (§ 9-102(a)(35)) have changed somewhat, the changes have no effect on the agricultural liens. Compare § 9-109(3) (repealed 2001).
25. The scope of the lien is not relevant to our inquiry. Nevertheless, the lienor must carefully study the statute to determine the scope of the lien. For example, the property to which the lien attaches varies. The Seed or Grain Lien attaches to the crops produced from the seed, and seed or grain threshed from those crops. The Threshers' Lien attaches to crops threshed by the lienor's machine. The Hail Insurance Lien attaches to crops grown on the insured land and seed and grain threshed from those crops. The Spraying or Dusting Lien attaches only to the grain or crops dusted. The Farm Laborers' Lien, however, applies to all crops grown raised or harvested by the farmer (except for feed sufficient to maintain certain animals for three months!). But the laborer claiming under the Farm Laborers' Lien would apparently have a claim only to the crop, and not to the grain threshed from that crop, for the statute is so limited.
III. SECURED PARTY V. DEBTOR.

A creditor such as a bank may take a security interest in farm products. Under old Article 9, a creditor acquired a security interest in collateral of a debtor by having the debtor, in return for value given, grant the interest in a signed writing that describes the collateral. This simple requirement for attachment is largely unchanged by Revised Article 9, except that the Code now requires an "authenticated record" rather than a signed writing, to accommodate electronic commerce. Revised Article 9 also more clearly specifies what constitutes a sufficient description of the collateral, allowing for example, "a type of collateral defined in the UCC," but not a supergeneric description, such as "all the debtor's personal property."

For example, in consideration of a loan of $100,000, in an authenticated record, farmer Ingmar Swenson grants First Bank a security interest in Swenson's farm products. This transaction is effective to give First Bank a security interest in Swenson's collateral, farm products as defined in § 9-102(a)(34). Once its security interest has attached to the collateral, First Bank can of course foreclose on the property in the event of default. The security interest also attaches to the proceeds of the collateral, such as cash from the sale of a crop.

IV. SECURED PARTY V. OTHER SECURED PARTIES AND THE BANKRUPTCY TRUSTEE.

Although attachment is sufficient to give the secured creditor rights as against the debtor, a prudent creditor will perfect its security interest by filing in order to gain priority over other secured creditors and to defeat the trustee in bankruptcy in case the debtor declares bankruptcy. The creditor does so under Revised Article 9 by filing a financing statement containing the required information with the appropriate filing office. While the filing rules have substantially changed, the contents of the financing statement have not, although it is not easy to discern the required contents from the Code. Section 9-502, "Contents of a Financing Statement," provides:

27. U.C.C. § 9-203 (2000). Mercifully, even the section number is unchanged.
29. § 9-601(a)(1).
30. § 9-315(a)(2).
(a) A filing statement, to be sufficient, must:

1) provide the name of the debtor;

2) provide the name of the secured party or a representative of the secured party; and

3) indicate the collateral covered by the financing statement.\(^{31}\)

This is not the end of it, however. Section 9-516 provides that "Filing does not occur with respect to a record that a filing office refuses to accept because" certain enumerated information is lacking.\(^{32}\) In other words, Revised Article 9 doesn't affirmatively require that creditors include the § 9-516 information in the financing statement, but if they don't, the filing office may reject it. This information includes the mailing address of the secured party and the debtor, and an indication of whether the debtor is an individual or an organization. If the debtor is an organization, the information includes the type of organization, jurisdiction of organization, and organizational identification number for the debtor if any.\(^{33}\)

Figuring out where to file, however, is problematic, for Revised Article 9 substantially changed the choice of law rules. Section 9-301 provides that "while a debtor is located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral."\(^{34}\) Section 9-307 provides that an individual is located at the individual's principal residence, but a registered organization is located in the state under which it is organized.\(^{35}\) Therefore, if the Montana ranch where the collateral is located is owned by an individual residing in Montana, Montana is the appropriate jurisdiction for filing; if the debtor is a California corporation, California is the appropriate jurisdiction for filing; and if the debtor is a Colorado LLP, Colorado is the appropriate jurisdiction for filing.

Once the creditor has found the relevant jurisdiction in which to file, in Montana and most jurisdictions, except for filings with respect to standing timber, minerals, and fixture

\(^{31}\) § 9-502(a)(1)-(3).

\(^{32}\) § 9-516(b).

\(^{33}\) U.C.C. § 9-516(b)(5)(A)-(C) (2000). The Montana standard form financing statement also asks for the social security number of taxpayer ID number, but this information is not required by the Code.

\(^{34}\) § 9-301(1).

\(^{35}\) § 9-307(b).
filings, the place of filing is the office of the Secretary of State. An error in the financing statement, such as an error in stating the name of the debtor, is not fatal to an effective filing if the filing office's standard search logic would find it. In Montana, under the search logic adopted by the Secretary of State, the search logic will find only the exact name of the debtor. Secured parties

36. MONT. CODE ANN. § 30-9A-501 (2001); U.C.C. § 9-501 (Official Comment 2) (2001). Although not relevant to the present discussion, it might be noted that the major change is that when the collateral is consumer goods, the financing statement is filed with the Secretary of State, not with the county.


38. § 9-516.

39. Defining Search Criteria for Uniform Commercial Code Certified Searches, MONT. ADMIN. R. 44.6.201 (2001), provides:

(1) The secretary of state provides information regarding centrally filed uniform commercial code records from requests to office staff and via the secretary of state website. These searches are certified for their accuracy.

(2) Searches provided by the secretary of state are "exact name" searches. Only the precise name requested, with very little variation, is searched and certified.

(3) The basic standards for searching individual and entity names are that:

(a) there is no limit to the number of matches that are returned in response to a search request;

(b) no distinction is made between upper and lower case letters;

(c) punctuation marks and accents are disregarded; and

(d) spaces in any field are disregarded.

(4) Basic standards for searching individual names include:

(a) exact match of surnames and exact match of first names; and

(b) middle names become an initial or blank space.

(5) Basic standards for searching business names include:

(a) an exact match of the name requested;

(b) "the" at the beginning of a name is disregarded;

(c) words and abbreviations that indicate the existence or nature of an entity are disregarded. These include:

(i) association;

(ii) assn;

(iii) business trust;

(iv) chartered;

(v) chtd;

(vi) co;

(vii) company;

(viii) co-op;

(ix) cooperative;

(x) corp;

(xi) corporations;

(xii) credit union;

(xiii) cu;

(xiv) fcu;

(xv) federal credit union;
must file in the exact legal name of the debtor; anything else is not an effective filing and the security interest will be unperfected.

(xvi) federal savings bank;
(xvii) fsb;
(xviii) gp;
(xix) general partnership;
(xx) inc;
(xxi) incorporated;
(xxii) joint stock company;
(xxiii) joint venture;
(xxiv) jsc;
(xxv) jv;
(xxvi) lc;
(xxvii) limited;
(xxviii) limited company;
(xxix) limited liability company;
(xx) limited liability limited partnership;
(xxi) limited partnership;
(xxii) llc;
(xxiii) llp;
(xxiv) lp;
(xxv) ltd;
(xxvi) ltd co;
(xxvii) na;
(xxviii) national association;
(xli) pa;
(xlii) partnership;
(xliii) pc;
(xliv) plc;
(xlv) pllc;
(xlv) professional association;
(xlvi) professional corporation;
(xlvii) professional limited company;
(xlviii) professional limited liability company;
(xlix) registered limited liability partnership;
(l) rlp;
(li) sa;
(lii) savings association; and
(liii) trust.

(6) A search of the secretary of state's database will not result in accurate findings if:
(a) first or last names are misspelled;
(b) non-universal identifiers are in the name and not included in the search request, such as "a Montana corporation" or "a general partnership";
(c) nicknames or shortened versions of names, i.e., if the debtor's first name is filed as "Robert," the search will not result in finding "Bob"; or
(d) plurals are used in the search but not in original filing.
Example. If the Montana financing statement used the individual name “Ingemar Swenson” instead of the legal name “Ingmar Swenson,” the financing statement would not be effective.

Example. If the Montana financing statement used the corporate name “Ingmar Swenson Natural Food, Inc.,” instead of the legal name “Ingmar Swenson Natural Foods, Inc.,” the financing statement would not be effective.

Although the appropriate jurisdiction for filing may have changed on July 1, 2001, a filing made in the correct place under old Article 9 remains effective for its duration. Searchers must therefore look for filings in the appropriate place under both old Article 9 and Revised Article 9. We will now look at how a perfected security interest fares against other claimants.

V. SECURED PARTY V. BUYER.

Assume First Bank has a security interest, properly perfected under Revised Article 9, in Ingmar Swenson’s farm products and Swenson sells his wheat crop to General Mills. Does First Bank’s security interest remain attached to the crop in the hands of General Mills? With any other kind of collateral, the answer would be found in § 9-320 and the answer would be yes. But with respect to farm products, this particular Article 9 issue has been preempted by federal law and the answer is now found in the Food Security Act of 1985 (FSA). Under the federal scheme in a state with central filing such as Montana, the secured party prevails over the buyer, but only if the secured party has filed an effective financing statement.

The rub is that the requirements for an effective financing statement under the FSA and the requirements for a financing statement under Revised Article 9 differ. The significant

42. The Food Security Act of 1985, 7 U.S.C. § 1631(c)(4), provides:
   (4) The term “effective financing statement” means a statement that—
   (A) is an original or reproduced copy of the statement, or, in the case of a
   State which (under the applicable State law provisions of the Uniform
   Commercial Code) allows the electronic filing of financing statements
   without the signature of the debtor, is an electronically reproduced copy of
   the statement;
differences are that the FSA requires the signatures of the secured party and the debtor, a social security number or Tax ID number, a description of the farm products, and a description of the property where the collateral is located, while Revised Article 9 requires none of this information. On the other hand, Revised Article 9 requires for organizational debtors, the type of organization, the jurisdiction of organization, and an organizational identification number, while the FSA does not.

A prudent creditor perfecting an interest in farm products will include in the financing statement not only information that will satisfy Revised Article 9 to give the creditor priority over other creditors, but also the information that will satisfy the Food Security Act to give the creditor priority over buyers of the collateral. While reform that would reconcile these conflicting requirements would be desirable, it is unlikely that change will be forthcoming at the federal level. Montana has made the FSA requirements easier to satisfy by prompting the filer to include all the relevant information on the financing statement.43

VI. SECURED PARTY V. AGRICULTURAL LIENOR.

A. Agricultural Liens that must be filed under Title 71.

As we saw earlier, “agricultural lien” has a particular

(B) other than in the case of an electronically reproduced copy of the statement, is signed and filed with the Secretary of State of a State by the secured party;

(C) other than in the case of an electronically reproduced copy of the statement, is signed by the debtor;

(D) contains,

(i) the name and address of the secured party;

(ii) the name and address of the person indebted to the secured party;

(iii) the social security number of the debtor or, in the case of a debtor doing business other than as an individual, the Internal Revenue Service taxpayer identification number of such debtor;

(iv) a description of the farm products subject to the security interest created by the debtor, including the amount of such products where applicable; and a reasonable description of the property, including [the] county or parish in which the property is located[.]

43. See State of Montana Uniform Commercial Code Financing Statement - Form REVFS-1 at http://sos.state mt.us/css/BSB/Filing Forms.asp (last visited Dec. 2, 2001). Form REVFS-1 requests a specific collateral description and signatures to comply with "Farm Bill" requirements. Presumably, by "Farm Bill," the Secretary of State means the Food Security Act. The form does not indicate that the Social Security number or Tax ID number of the debtor are also required by the Food Security Act but not by Revised Article 9.
meaning under Revised Article 9. In Montana, the following statutes (the "Title 71 liens") clearly qualify as agricultural liens for this purpose: Farm Laborers' Liens,\textsuperscript{44} Seed or Grain Liens,\textsuperscript{45} Hail Insurance Liens,\textsuperscript{46} Threshers' Liens,\textsuperscript{47} and Spraying or Dusting Liens.\textsuperscript{48} These liens all give the party who provided goods and services to the farmer on credit a lien on certain of the farmer's property. The lien may therefore conflict with the lien acquired by a secured party under Revised Article 9. To determine the applicable rules to resolve that conflict, we must first find the jurisdiction whose law is relevant to the transaction. We saw that the choice of law rules with respect to a security interest looked to the location of the debtor. The choice of law rules with respect to an agricultural lien, however, look to the location of the farm product. Section 9-302 provides:

> While farm products are located in a jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of an agricultural lien on the farm products.\textsuperscript{49}

So, if First Bank takes a security interest in the crops raised on a Montana ranch owned by a California corporation, and Seedco secures an agricultural lien on the same crop, California law provides the rules for perfection and priority of the security interest, but Montana law provides the rules for perfection and priority of the agricultural lien.

Assuming we are dealing with Montana farm products, let us look in detail at one of these statutes to determine how the lien is obtained, the property it attaches to, and its priority as to other liens. The seed or grain lien provides:

\textbf{71-3-701. Lien for seed or grain.} Any person, company, association, or corporation who furnishes to another seed to be sown or planted or funds or means with which to purchase seed to be sown or planted or to be used in the production or cultivation of a crop or crops on the lands owned or contracted to be purchased, used, leased, occupied, or rented by him or held under government entry, upon filing the statement provided for in 71-3-703, has a

\textsuperscript{44} MONT. CODE ANN. §§ 71-3-401 to -408 (2001).
\textsuperscript{45} §§ 71-3-701 to -705.
\textsuperscript{46} §§ 71-3-711 to -713.
\textsuperscript{47} §§ 71-3-801 to -810.
\textsuperscript{48} §§ 71-3-901 to -909.
\textsuperscript{49} U.C.C. § 9-302 (2000).
lien not exceeding the purchase price of the seed or grain furnished upon the crop produced from the seed or grain furnished, or any part thereof, and upon the seed or grain threshed from the crop to secure the payment of the amount or the value of the seed or grain furnished or the funds or means advanced to purchase the seed or grain.\textsuperscript{50}

This lien seems straightforward. The lienor furnishes seed or the money to purchase the seed which is used to plant a crop and obtains a lien in the amount of the price of the seed or grain\textsuperscript{51} and the lien attaches to the crop itself and the seed or grain threshed from the crop. The lien obtains a priority over other liens, including security interests.\textsuperscript{52} The wrinkle is in the language which provides that the lienor obtains the lien “upon filing the statement provided for in 71-3-703.” That section provides:

\textbf{71-3-703. How to obtain lien.} Any person, company, association, or corporation who is entitled to a lien under 71-3-701 shall, within 90 days after the seed or grain is furnished or the funds, means, or money advanced for the seed or grain, file in the office of the secretary of state a statement of agricultural lien as provided in 71-3-125. Unless the person entitled to a lien files the lien statement within the time required, he is considered to have waived the right to a lien.\textsuperscript{53}

The lien is not obtained – does not attach – unless the lienor makes a lien filing in the Secretary of State’s office within 90 days after the grain is furnished. To one schooled in security interests, filing as a condition precedent to effectiveness makes no sense. Security interests attach between the secured party and the debtor when the lien is granted. The purpose of a filing system is public notice. Why should the lien creditor be required to give public notice to make the lien good against the debtor? Furthermore, why should the lienor have 90 days to file the notice? It seems to me there is a difference between extending credit and getting stiffed. If the purpose of the lien statute is to give the unpaid seller an opportunity to recover payment, then

\textsuperscript{50} MONT. CODE ANN. § 71-3-701 (2001).

\textsuperscript{51} The carelessness with which the statute is drafted is indicated by the fact that the lien is obtained by providing “seed,” but attaches in the amount paid for “seed or grain.”

\textsuperscript{52} MONT. CODE ANN. § 71-3-702 (2001). Priorities are discussed in greater detail in section VI.B., \textit{infra}.

\textsuperscript{53} § 71-3-703.
the extended period might make sense. But if the purpose of the statute is to protect a creditor who is entering a credit transaction, there is no reason the creditor could not take the steps at the time credit is extended. Here, it appears that the seed or grain lienor is extending credit, for the intention seems to be to allow the farmer to receive the seed at the beginning of the cultivation cycle and pay for it at the end of the cycle, a period that, in the absence of judicious application of Miracle-Gro, will probably exceed 90 days.

If I have correctly discerned the purpose of the seed lien, then it closely resembles the purpose of the superpriority given under Article 9 to a creditor who enables the debtor to obtain additional financing when the debtor's collateral is already encumbered by an existing security interest containing an after-acquired property clause. For example, if First Bank has a security interest in debtor's inventory, Second Bank may finance the purchase of additional inventory and obtain a superpriority. Similarly, the Farmer who has given a security interest in her crop to First Bank is able to secure the means to plant a new crop from Seedco by giving Seedco a Seed or Grain Lien. Old Article 9 contained a limited superpriority in crops in § 9-312(2).\textsuperscript{54} This provision was not carried over in the body of Revised Article 9, but a similar provision was placed in an appendix for states to consider.\textsuperscript{55} The optional provision was not enacted in Montana.\textsuperscript{56}

One difference between Article 9 superpriority statutes and Title 71 liens is that the security interest given a superpriority is a purchase money security interest, attaching only to the additional collateral provided by the new creditor. The Title 71 lienor, on the other hand, provides no additional collateral, so the lien attaches to the same collateral claimed by the secured party, somewhat diminishing the collateral available to the secured party. For example, Second Bank's superpriority in inventory attaches only to the inventory provided by Second Bank, while Seedco's Seed or Grain Lien attaches to the same crop as First Bank's security interest. The policy question seems to be whether Seedco should be allowed to provide the farmer the means to cultivate another crop at some risk to First Bank, which has first priority in the crop. Under existing law,

\begin{itemize}
\item \textsuperscript{54} U.C.C. § 9-312(2) (1998) (repealed 2001).
\item \textsuperscript{55} U.C.C. § 9-324A (2000), "Priority of Production-Money Security Interests and Agricultural Liens."
\item \textsuperscript{56} See S.B. 153, 56th Leg., Reg. Sess. (Mont. 1999).
\end{itemize}
the fact that such liens have been enacted and given priority indicates the question has been answered in the affirmative, but review might question that policy.

If the policies favor the creation of such a lien, it would make sense to fashion it like a purchase money security interest with a superpriority. If the lien was modeled after the purchase money security interest in inventory or livestock, the lienor would have a lien good against the debtor without filing, but would have a priority over secured creditors only if it filed and gave notice to creditors with conflicting liens at the time the credit was extended. Such a scheme would bring the lien within the sphere of Revised Article 9.

Whatever else is done with the Title 71 liens, it is most important that the filing process be reformed, for enactment of Revised Article 9 has made it unclear what steps the lienor must take to file. The drafters of Revised Article 9 intended that agricultural liens would be perfected by filing in the same manner as security interests. Recall that § 9-302 provides that “local law” governs perfection. However, with the enactment of Revised Article 9, there are now two local laws governing perfection in Montana. Revised Article 9 provides one scheme. Under it, § 9-308(b) provides that “an agricultural lien is perfected if it has become effective and all of the requirements for perfection in Section 9-310 have been satisfied.” Section 9-310(a) provides that “a financing statement must be filed to perfect all security interests and agricultural liens.” At first blush it may appear that an agricultural lien may be perfected by an Article 9 filing.

Section 9-308(b), however, provides that “an agricultural lien is perfected if it has become effective” and it has been properly filed, and the Title 71 liens all provide that they are not effective unless the statement required by § 71-3-125 is filed. The § 71-3-125 statement contains requirements that

58. § 9-324(b).
59. § 9-324(d).
60. § 9-308(b).
61. § 9-310(a).
62. § 9-308(b) (emphasis added).
63. Mont. Code Ann. § 71-3-125 (2001) provides in pertinent part:

(2) A statement of an agricultural lien is sufficient if it:

(a) gives the names and addresses of the debtor and lienor;
(b) describes the type of lien and its statutory authority;
(c) describes the collateral;
differ from the requirements of the Revised Article 9 financing statement. The § 71-3-125 statement must be signed by the lienor, must describe the service or product furnished, must state the county in which the farm products are located, and must state particulars with respect to each type of lien, while the Revised Article 9 financing statement contains no such requirements.

Because the filing requirements of Title 71 and Revised Article 9 are inconsistent, it is not clear which prevails. This issue will come to a head when an agricultural lienor files a financing statement pursuant to the requirements of Revised Article 9 and a creditor with a security interest in the crop will claim the lien is not effective because the lienor did not provide the information required by § 71-3-125. The authorities suggest that if there are two filing systems, then the legislature, knowing of the older system, must have intended the newer one to prevail. Under this view, because Revised Article 9 is newer, it supplants § 71-3-125. The argument might make sense as between two competing filing systems for purposes of perfection. But the agricultural lien statutes prescribe filing for the lien to become effective, in other words, for it to attach. There must be attachment before there is perfection. Because

(d) contains the notation by the secretary of state of the date of filing and filing number;
(e) is signed by the lienor;
(f) describes the service or product furnished. If the collateral is farm products, the statement must state the county in which the farm products are located, designated by type of farm product.
(g) states the price or wage agreed upon or, if the price or wage was not agreed upon, the reasonable value of the service or product furnished;
(h) states the amount remaining unpaid;
(i) states the terms and period of employment if it is a farm laborer's lien filed pursuant to part 4 of this chapter;
(j) describes the land upon which seed or grain was or will be sown, planted, or used if it is a lien for seed or grain filed pursuant to part 7 of this chapter;
(k) describes the land upon which the grain or crops were grown and the place the grain or crops are presently stored if it is a thresher's lien filed pursuant to part 8 of this chapter;
(l) describes the land upon which the service was performed if it is a lien for spraying or dusting filed pursuant to part 9 of this chapter; and
(m) states the starting date of insurance coverage if it is a lien filed pursuant to part 7 of this chapter.

65. See Linda Rusch, Farm Financing Under Revised Article 9, 73 AM. BANKR. L. J. 211, 236 n.170 (1999), which states, "If the statute creating the lien has different perfection requirements, presumably Revised Article 9 will override those requirements."
the Title 71 lien does not even arise until it is filed under § 71-3-125, filing of the Title 71 liens serves a different purpose than filing of security interests, which is required only for purposes of perfection. This distinction persuades me that filing under Revised Article 9 is not sufficient to perfect a Title 71 agricultural lien, and that the secured party would prevail in this dispute.66

The same conflict arises with respect to contests between the lienor and a buyer. According to Revised Article 9, the agricultural lien continues in collateral notwithstanding sale as long as it is perfected.67 This protection is provided in Title 71, but again, only if the § 71-3-125 statement is filed. Section 71-3-125(1) provides:

Unless a statement of an agricultural lien has been filed in the office of the secretary of state as provided in this chapter, a buyer who, in ordinary course of business as defined in 30-1-201(9), buys a farm product takes it free of any lien created by this chapter even though the lien is otherwise perfected.68

For example, if the lienor claiming a Seed or Grain lien filed pursuant to Revised Article 9 and the farmer sold the crop to General Mills, General Mills would claim that the filing was not effective because § 71-3-125 was not complied with. The lienor’s rights as against the buyer are also significant in bankruptcy, for under the Bankruptcy Code, the trustee may avoid a statutory lien that “is not perfected or enforceable at the time of the commencement of the case against a bona fide purchaser that purchases such property at the time of the commencement of the case, whether or not such a purchaser exists.”69 If the lien were filed under Article 9 but not under Title 71, the trustee could avoid it.

The solution to this problem is for the legislature to repeal the filing requirements of Title 71, thereby making Revised

66. See Great Falls Farm Machinery Co. v. Rocky Mountain Elevator Co., 94 Mont. 188, 22 P.2d 303 (1933), which supports this view (holding that a thresher was not entitled to a Thresher's Lien if he did not file within the statutory period). The court held that the lienor lost his right to a lien when he failed to file. The court cited with approval a series of Idaho cases, explaining that “[i]f the filing is made within the statutory period, then the lien relates back in such a way as to give full force and potency to it from the beginning, but if the filing is not made, the inchoate right never ripens into an actual lien.” Id. at 195, 22 P.2d at 305.


Article 9 filing the means to perfect agricultural liens. Although the purpose of filing is to give notice to other creditors, it may not be easy for a creditor to find the filed agricultural lien. Recall that under Revised Article 9, the place for perfecting a security interest is the location of the debtor, which may not be Montana in the case of a registered organization.\(^\text{70}\) The Title 71 liens, however, are filed with the Montana Secretary of State. This practice would not change even if the perfection scheme was governed by Revised Article 9, for agricultural liens follow the location of the farm products, not the location of the debtor.\(^\text{71}\) Thus in the case of a Colorado partnership that owns a ranch in Montana, a searcher looking for liens in Colorado would not find agricultural liens filed in Montana under either the Title 71 scheme or the Revised Article 9 scheme. The burden of finding the relevant filings could be placed on the secured party, but because the agricultural liens are usually filed after the security interest has been filed, the secured party would be required to search continuously. The better solution might again be found in the superpriority statutes, which require both filing and direct notice to existing creditors in order to achieve the superpriority.\(^\text{72}\)

Even under Revised Article 9, the perfected agricultural lienor has no claim to proceeds (unless the proceeds are also farm products). Section 9-315(a)(2) gives such a right only to a secured party.\(^\text{73}\) For example, if Seedco had a Seed or Grain Lien in a farmer’s crop, and the farmer sold the crop to General Mills, the lienor would have no right to the cash received by the farmer. Revised Article 9 leaves the right to proceeds up to the local lien laws and the Title 71 lien laws grant lienors only very limited rights to proceeds. For example, § 71-3-701 provides that the Seed or Grain Lien applies to the crop produced and to “the seed or grain threshed from the crop.”\(^\text{74}\) Another policy question to be determined is whether the agricultural liens should extend to proceeds. Continuing the analogy to Article 9 superpriorities, the purchase money security interests attach to proceeds.\(^\text{75}\)

---

71. § 9-302.
72. § 9-324(c), (e).
73. § 9-315(a)(2).
75. The purchase money security interest generally attaches to all proceeds, except that the superpriority in inventory attaches only to cash proceeds. See U.C.C. § 9-324(b).
We have so far scrutinized the Seed or Grain Lien. The other liens, the Hail Insurance Lien, Threshers' Lien, Farm Laborers' Lien, and Spraying or Dusting Lien, all serve the same purpose of allowing the farmer to complete the crop cycle on credit. If they serve the same purpose, they should be treated similarly, and given a superpriority if the proper filing and notice is complied with. A possible exception is the Farm Laborer's lien, which provides:

71-3-401. Who may have lien—priority. (1) Any person who performs services for another in the capacity of a farm or ranch laborer has a lien on all crops of every kind grown, raised, or harvested by the person for whom the services were performed during that time as security for the payment of any wages due or owing to such persons for services so performed.76

This statute is essentially a wage protection statute, allowing the laborer a lien to recover for services rendered. All employees, including farm laborers, have the protection of modern wage statutes in the event of nonpayment of wages.77 It is questionable whether this lien serves any purpose if there is an alternative available. Before arriving at any conclusion on that question, it would be helpful to know whether the statute has in fact any proven utility and whether the Department of Labor could effectuate the same purpose under existing wage protection statutes.

B. Priority of Title 71 agricultural liens.

Assuming the agricultural liens are effectively created, Revised Article 9 provides the priority rules. Although the general rule is that conflicting security interests and agricultural liens rank according to priority in time of filing,78 an exception recognizes that the statute that creates the agricultural lien may provide a different priority.79 Most of the Title 71 lien statutes contain such a priority rule that 1) ranks them ahead of security interests, and 2) ranks them among each other. These rules are badly written and contradictory. For example, the Seed or Grain Lien has “priority over all other

76. MONT. CODE ANN. § 71-3-401 (2001).
77. See § 39-3-204.
79. § 9-322(g).
liens and encumbrances⁸⁰ while the Threshers' Lien has "priority over any mortgage, encumbrance or other lien . . . ."⁸¹ It is doubtful that the addition of "mortgage" to the latter list is meaningful. Meanwhile, the Farm Laborers' Lien has "priority over all liens, chattel mortgages and encumbrances . . . ."⁸² It does not appear significant that "mortgage" became "chattel mortgages." The Hail Insurance Lien, however, does not state a priority. Section 71-3-711 states that it is "subject to any seed lien,"⁸³ suggesting that the intent was to make it inferior to that lien but superior to all others. It appears, therefore, that the legislative intent was to give all of these liens priority over security interests, and the following priority among themselves:

1. Seed or Grain Lien (§ 71-3-702)
2. Hail Insurance Lien (§ 71-3-711)
3. Threshers' Lien (§ 71-3-804)
4. Farm Laborers' Lien (§ 71-3-401(2))
5. Spraying or Dusting Lien (§ 71-3-904)

It seems a clear policy to give these liens priority over security interests, but if there is any logic to the priority scheme among the Title 71 liens, I cannot discern it. The task for reform would involve determining some basis for priority and clearly stating the priority. If no policy basis can be agreed upon, the liens could be given priority according to the default rule, the order of filing. Alternatively, there could be no priority, with each lien equal to the others and, in the event of insufficient collateral to satisfy all of them, apportionment pro-rata.⁸⁴

A table summarizing these aspects of Title 71 liens is attached at the conclusion of this article as an Appendix, Agricultural Liens Filed Under MCA § 71-3-125.

C. Other agricultural liens.

In reciting the priorities among the Title 71 liens, I neglected to mention that the Spraying or Dusting Lien states that it does not have priority over the lien for warehouse

---

⁸¹ § 71-3-804.
⁸² § 71-3-401(2).
⁸³ § 71-3-711.
⁸⁴ This is the scheme now with pipeline repair liens. See § 71-3-1007.
services. This aberrant provision, which was probably overlooked during earlier revisions, nevertheless serves as a reminder that Montana has enacted agricultural liens other than the Title 71 liens.

The Agisters’ Lien, as evidenced by its name, is an ancient relic. It is not clear whether the Agisters’ Lien is an agricultural lien as defined in Revised Article 9. Section 71-3-1201(1) provides:

If there is an express or implied contract for keeping, feeding, herding, pasturing, or ranching stock, a ranchman, farmer, agister, herder, hotelkeeper, livery, or stablekeeper to whom any horses, mules, cattle, sheep, hogs, or other stock are entrusted has a lien upon the stock for the amount due for keeping, feeding, herding, pasturing, or ranching the stock and may retain possession of the stock until the sum due is paid.

The statute provides that the lienor may retain possession of the livestock he or she has kept, fed, herded, pastured, or ranched. If the may in the statute means the lienor may retain possession in order to secure a lien, then the may means must and the lien is dependent on possession, which would disqualify it from being an agricultural lien as defined in Revised Article 9. If the may is permissive, meaning the lienor secures a lien whether there is possession or not, then it is a Revised Article 9 agricultural lien. It might be noted that in the Mechanic’s Lien that follows in the next subsection, the legislature expressly stated that “the lien is dependent on possession.” This change in language indicates that the legislature was capable of using language requiring possession when it meant to create a possessory lien, thereby suggesting that the word “may” in the prior statute was intended to make possession permissive. Nevertheless, the

85. See § 71-3-904.
86. MONT. CODE ANN. § 71-3-1201(1) (2001).
87. § 71-3-1201(2) provides:
(2) Every person who, while lawfully in possession of an article of personal property, renders any service to the owner or lawful claimant of the article by labor or skill employed for the making, repairing, protection, improvement, safekeeping, carriage, towing, or storage of the article or tows or stores the article as directed under authority of law has a special lien on it. The lien is dependent on possession and is for the compensation, if any, that is due to the person from the owner or lawful claimant for the service and for material, if any, furnished in connection with the service. If the service is towing or storage, the lien is for the reasonable cost of the towing or storage.
88. The “Golden Rule of Drafting” states, “Never change your language unless you wish to change your meaning, and always change your language if you wish to change
author believes the legislative intent was to make the lien dependent on possession. This statute is in need of clarification.\textsuperscript{89}

According to § 71-3-1202, this lien does not need to be filed with the Secretary of State to attach, but it loses priority to a perfected Article 9 secured party or "other party with a recorded lien" if the lienor does not give notice to that party directly.\textsuperscript{90} If this requirement were not onerous enough, the agister must send the notice within 30 days of when the agister received the property, long before the debt is unpaid. An agister would have to be especially untrusting soul to have an effective lien.

If the Agisters' Lien is a Revised Article 9 agricultural lien, not requiring possession, then the statute is in conflict with Revised Article 9, which requires the lienor to file a financing statement with the Secretary of State in order to obtain priority over other agricultural lienors and secured parties rather than notifying them directly.\textsuperscript{92} Moreover, the section contains its own rules for foreclosure on the lien. One of the sound reasons for bringing agricultural liens within the scope of Revised Article 9 is to apply the same foreclosure rules. If the Agisters' Lien is dependent on possession, then it needs to be modernized and harmonized with the Mechanic's Lien that follows it.

Section 71-3-601 provides for a Loggers' Lien that may be obtained either by the person who did the logging or by the person who allowed the logging on his or her land.\textsuperscript{93} Like the other Title 71 liens, it is not effective unless filed, in this case within 30 days after the services have been performed. This lien has yet another filing scheme, with filing in the county in which the logs were cut. While this scheme was at one time consistent with Article 9, under Revised Article 9, security interests in extracted timber are no longer filed in the county, but with the

\begin{tabular}{l}
89. In Vose v. Whitney, 7 Mont. 385, 16 P. 846 (1888), the issue was whether the plaintiff alleged facts that satisfied the elements of the statute when he received the cattle from a deputy sheriff who did not own them. The court held that plaintiff stated a claim, and in presenting the facts, noted that the plaintiff had possession of the cattle. More recently, in Daniels-Sheridan Federal Credit Union v. Bellanger, 2001 MT 235, ¶ 16, 307 Mont. 22, 36 P.3d 397, the court held the claimant under an agisters' lien "lacked both possessory and contractual bases for a valid agister's lien."

90. I'm not sure who that could be, as the liens filed under § 71-3-125 do not encumber livestock. Perhaps another creditor claiming an Agisters' Lien.

91. See § 71-3-1202.


\end{tabular}
Secretary of State where the debtor is located. The lien has priority over all other liens. Reform of this lien should provide secured parties be given notice of this lien, either through filing with the Secretary of State or through both filing and direct notice.

The Warehouseman's Lien coordinates with Revised Article 9 because it appears in Article 7 of the Uniform Commercial Code, which deals with Warehouse Receipts, Bills of Lading, and other Documents of Title. The statute gives the warehouseman a lien for services against the goods covered by the warehouse receipt. Because it is dependent on possession, it is not a Revised Article 9 agricultural lien. The warehouseman does not need to do anything to perfect it except retain possession. The lien is what old Article 9 called "a lien arising by operation of law" and Revised Article 9 calls a "possessory lien." As such it has priority over a perfected security interest.

Finally, § 81-8-301 provides that "a livestock market to which livestock is shipped may not be held liable to any secured party for the proceeds of livestock sold through the livestock market by the debtor unless notice of the security agreement is filed" with the Department of Livestock. This provision alerts the creditor with a security interest in livestock to file not only with the Secretary of State, but also with the Department of Livestock. The contents of the required notice differ from the contents of a Revised Article 9 financing statement. To simplify this process, perhaps the Montana financing statement could designate that a security interest in "livestock" is being claimed. The Secretary of State could then transmit these financing statements to the Department of Agriculture to satisfy the statutory requirement, saving the creditor the necessity of double filing.

VII. CONCLUSION: INQUIRIES AND PROPOSALS.

Decades ago, Grant Gilmore, the principal drafter of the original Article 9, wrote, "It is too much to hope that states

95. See MONT. CODE ANN. § 71-3-602 (2001).
96. See § 30-7-209.
100. See § 81-8-302.
which enacted the Code will concurrently review and revise the local collection of lien statutes."\textsuperscript{101} He was sadly correct. The enactment of Revised Article 9 now raises a similar hope that the Montana agricultural liens will be brought into harmony with the Revised Article 9 scheme.

One of the strengths of old Article 9, perhaps its principal strength, is that it took disparate devices for securing interests in personal property and united them into one device – the security interest. Revised Article 9 incorporates additional forms of collateral, but provides exceptions to the general rules for most of them. Creditors can now take a security interest in bank deposits, tort claims, health insurance receivables, and so forth, but the rules for each form of collateral differ, exceptions compounding on exceptions. Secured financing now begins to resemble the situation prior to adoption of the old Article 9, except that the different financing devices are now collected under the same roof. Agricultural liens suffer from the same fate, all the more so because the governing rules are found outside of Article 9 as well as in exceptions within Article 9.

I believe a desirable direction of reform is simplification that brings agricultural liens into the mainstream of Article 9 security interests and creates fewer exceptions to standard practices. As between revising Article 9 and revising other statutes, the latter should always be considered first, given the policy of keeping Uniform Laws uniform among the states.

In the short run, the Secretary of State has used his power to promulgate filing forms under Article 9\textsuperscript{102} and under § 71-3-125\textsuperscript{103} to assure that a creditor claiming an agricultural lien provides all information necessary to file an effective statement under either of those statutes or under the Food Security Act.\textsuperscript{104} In this way, no secured party or agricultural lienor would be prejudiced by guessing wrong as to how to file under Revised Article 9.

One initial inquiry is whether the agricultural liens serve any significant commercial purpose. Are the transaction costs in obtaining and foreclosing on them so out of proportion to the amounts of money involved that they make little economic sense? The Farm Laborers’ Lien might be addressed by the wage protection statutes and the others abolished if they have

\textsuperscript{101} 2 Grant Gilmore, Security Interests in Personal Property 887 (1965).
\textsuperscript{102} U.C.C. § 9-401 to -407 (2000).
\textsuperscript{103} Mont. Code Ann. § 71-3-125 (2001).
little utility.\textsuperscript{105} If retained, the liens should be rewritten for clarity, to determine what products they attach to and whether they attach to proceeds.

The purpose of the filing requirement for agricultural liens should be explored. Is filing necessary for attachment? If filing for notice is considered desirable, filing under § 71-3-125 should be replaced with perfection under Article 9. The purpose of the time provisions within which the lienor must file should also be explored. If the purpose of the liens is to facilitate the extension of credit, then short time periods are sensible, but if the purpose of the liens is to facilitate the recovery of unpaid bills, then longer time periods make more sense. One proposal would be to model the liens on the Article 9 superpriority statutes, requiring the lienor to file and to give notice in order to obtain first priority.

The statutes should also be rewritten to state clear and consistent priorities among themselves. They should be silent on remedies, deferring to the Revised Article 9 scheme for creditors' remedies on default.\textsuperscript{106}

If the agricultural liens are brought within Article 9, one aspect of Title 71 that might be retained is the attorney fees provision, which allows the court to award "money paid and attorney fees incurred for filing and recording the lien and reasonable attorney fees in the district and supreme courts."\textsuperscript{107} Without this provision, the transaction costs of pursuing an agricultural lien would not be economical. It might be argued that because Article 9 does not award attorney fees to secured creditors, agricultural lienors should not be given this right either. However, because most secured creditors include such a

\textsuperscript{105} Tana Gormely, Filing Specialist for the Montana Secretary of State, informs me that as of June 5, 2001, there were on file 183 Seed and Grain Liens, 15 Farm Laborer Liens, 1 Hail Insurance Lien, 11 Threshers Liens, and 190 Spraying and Dusting Liens. These liens are not necessarily active. Other than the Hail Insurance Lien, which lapses on March 1 of the succeeding year, and the Farm Laborers' Lien, which has no provision for termination, the others must be terminated by the creditor. Prior to the enactment of statutes enacted with Revised Article 9, there were no incentives for termination. See §§ 71-3-704, -713, -808 and -908.

\textsuperscript{106} U.C.C. § 9-102(a)(72)(B) (2000) defines "Secured party" to include "a person that holds an agricultural lien." Thus the provisions that give rights to a secured party on default give the same rights to an agricultural lienor. For example, § 9-606 provides:

\textit{Time of Default for Agricultural Lien.} For purposes of this part, a default occurs in connection with an agricultural lien at the time the secured party becomes entitled to enforce the lien in accordance with the statute under which it was created.

\textsuperscript{107} MONT. CODE ANN. § 71-3-124 (2001).
provision in the security agreement, this statute can be viewed as giving the same right to those whose liens arise by operation of law rather than by contract.

These modest reforms would go a long way to improving the muddied state of agricultural liens in Montana.
<table>
<thead>
<tr>
<th>Party/Person Subject to</th>
<th>Nature of Claim (MCA § 71-3-125)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lien on Seed or Grain Lien (71-3-800)</td>
<td>Owner or operator of a combine harvester, or</td>
</tr>
<tr>
<td></td>
<td>threshing machine, or swathing machine, or</td>
</tr>
<tr>
<td></td>
<td>chopper or muck loader.</td>
</tr>
<tr>
<td>Threshing Lien (71-3-340)</td>
<td>Farm Laborer's Lien (71-3-340)</td>
</tr>
<tr>
<td></td>
<td>Farm Laborer's Lien (71-3-340)</td>
</tr>
<tr>
<td>Hail Insurance Lien (71-3-371)</td>
<td>Person, company, association, or corporation</td>
</tr>
<tr>
<td></td>
<td>furnishing hail insurance to protect crops during the harvest season.</td>
</tr>
<tr>
<td>Spraying or Dusting Lien (71-3-390)</td>
<td>Person, firm, corporation, or partnership, who furnishes materials in crop dusting or spraying.</td>
</tr>
</tbody>
</table>

- How to Obtain the Lien:
  - File a §71-3-125 lien statement with Secretary of State within 45 days of the lien being filed.
- Priority:
  - Priority over other liens and encumbrances.

- Property to Which Lien Attaches:
  - Crops of every kind grown, mixed or harvested by the owner or operator of the machine.

- Subject to any prior encumbrances:
  - Subject to any prior encumbrances.

- Crops grown on the leased land and seed or grain on the leased land.

- Crops grown on the leased land and seed or grain on the leased land.
ARTICLE

INTERCIRCUIT CONFLICTS IN THE
COURTS OF APPEALS*

Stephen L. Wasby**

I. INTRODUCTION ...................................................................................... 120
II. BACKGROUND ......................................................................................... 127
III. CONFLICT CLAIMS AS RHETORIC ...................................................... 133
   A. Conflicts and Sitting En Banc............................................................... 137
   B. Circuit Conflict and the Supreme Court ........................................... 140
IV. MENTION AND DISCUSSION IN PUBLISHED OPINIONS ................. 141
   A. Noncontentious Citation....................................................................... 141
   B. Going Along and the Norm of Avoidance........................................ 144
   C. Responses to Claimed and Actual Conflict ...................................... 147
      1. Distinguishing of Cases................................................................. 149
      2. Acknowledging the Conflict ......................................................... 151
      3. Resolved Conflicts..................................................................... 154
      4. Choosing Sides in a Conflict ....................................................... 158

* An earlier version of this article was presented to the Midwest Political Science Association, Chicago, Illinois, April 27 2000. The comments of Arthur Hellman have been especially helpful. Thanks also to Sara Benesh, Tracey George, Malia Reddick, and Reggie Sheehan. I also wish to acknowledge the substantial assistance of Richard Irving, Law Librarian at the Dewey Graduate Library, University at Albany, in the search for data.

** B.A., Antioch College; M.A., Ph.D., University of Oregon. Professor of Political Science Emeritus, University at Albany - SUNY. E-mail address: wasb@cnsunix.albany.edu
PART I. INTRODUCTION

Each U.S. court of appeals draws to some extent upon other circuits' cases. Unlike the Supreme Court with its almost entirely discretionary jurisdiction, the courts of appeals have mandatory jurisdiction and thus must decide all the cases before them. Any circuit court of appeals can at times defer a decision until another court, particularly the Supreme Court, has decided the issue before it. However, in the courts of appeals, with the parties' urging the judges are likely to look laterally at the actions of the other courts of appeals which have faced the same or similar issues.

The most routine use of other circuits' cases is to support various, often non-central points. Beyond that, however, judges of any one court of appeals note whether other circuits' cases join and support, or diverge from and are in conflict with, the law of their own circuit. References to intercircuit conflicts are found in majority opinions, as when judges say why their court's position is preferable to that of some other circuits; in dissents from the panel opinion, when a judge says the majority is creating an intercircuit conflict; and in dissents from denial of en banc reconsideration of a case, when similar arguments are made. This activity—particularly how courts of appeals respond to the possibility that their actions will create intercircuit conflicts, including their attempts to limit intercircuit conflict before cases are taken to the Supreme Court—has received little scholarly attention.¹

¹. The major exception is Arthur D. Hellman, Precedent, Predictability, and Federal Appellate Structure, 60 U. PITT. L. REV. 1029 (1999). That article reports a study commissioned by the Federal Judicial Center (FJC), after Congress, in the Judicial Improvements Act of 1990, asked the FJC to study "the extent and effect of unresolved
soon as they first appear, it is suggested that some courts of appeals have shifted position, thus eliminating the intercircuit conflict. However, this has never led to systematic treatment of how the courts of appeals in fact dealt with incipient or actual intercircuit conflicts, so that we remain with a virtual absence of work on the topic.

To help repair that omission, this article presents an examination of how courts of appeals deal with those conflicts as they decide cases that may produce a conflict or may reinforce a side in a pre-existing conflict. The purpose here is not to perform a statistical analysis of the frequency with which the issue of intercircuit agreement or divergence takes place or of the proportion of certain types of responses. Instead, it is a look at intercircuit conflict through the eyes of court of appeals judges, with the focus on process. Court of appeals judges' treatment of real or claimed intercircuit conflicts is illustrated by examples. In looking at those cases, we limit our attention to those aspects of the case implicating intercircuit conflict. Our interest is not in the details of the doctrinal analysis in which the judges engage in their published opinions but in the types of discussion they have about the questions before them. Here one must remember that there are cases in which intercircuit conflict is the Supreme Court's focus when it grants review, but in the court of appeals, there was no discussion of real or possible conflict. This may have been because the conflict had not yet developed or because some interpretations of the point at issue had not yet been put on the table.

I do not take issue here with the assumption, implicit in most discussion of intercircuit conflicts, that all intercircuit conflicts should be eliminated or at least kept to a bare minimum. For present purposes, I take that debatable assumption as a given, because it is an important part of the background against which judges deal with the issue, and because most of their discussion seems to be based on its implicit acceptance. Nevertheless, one must keep in mind that the assumption is debatable. One might argue, for example, that differing interpretations of a legal point should be allowed to "percolate" before the Supreme Court intervenes to eliminate

3. The reader may examine those cases which are cited to obtain a better feel for the relative importance of the intercircuit conflict issue within the case.

4. See, e.g., United States v. Gwaltney, 790 F.2d 1378, 1388 n.4 (9th Cir. 1986) ("Unnecessary conflicts among the circuits are to be avoided."). The question, of course, is what constitutes an "unnecessary" conflict.
This article provides an exploration of federal appellate judges' treatment of the case law of other circuits in connection with actual and claimed intercircuit conflicts. As such, it is a departure from the attention usually given to intercircuit conflicts from the perspective of the U.S. Supreme Court, which keeps tabs on intercircuit conflicts as lawyers claim they develop. In that line of scholarship, there are several principal questions examined. One is when, on the basis of its Rule 10(a) that intercircuit conflict will be a consideration in granting certiorari, the Court does grant review to those conflicts and when it does not, as well as the reasons why it does so. Another, related question is whether the court deals sufficiently with such conflict or whether more capacity to announce national law is needed.\(^2\)

Despite the many studies of this genre, comparable attention has not been given to how lower courts have treated intercircuit conflict. In these studies, in connection with mention of the notion that conflicts should be allowed to "percolate," that is, that the Supreme Court should not try to resolve them as conflicts between federal judicial circuits." Id. at 1036. While Hellman examines instances where one court of appeals does not draw on potentially dispositive out-of-circuit cases, the present article provides instances in which judges have used such cases. Hellman deals only with cases containing dissents, while the present article draws on any cases, whether or not the panel is internally divided. The two articles also use somewhat different perspectives in discussing use of cases from another circuit: Hellman focuses on whether uncertainty within other circuits would be reduced by making binding the ruling of the first court to deal with a question, while the present article provides instances where that has happened on a de facto basis.


Important related works are H.W. PERRY, DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT (1991), and DORIS M. PROVINE, CASE SELECTION IN THE UNITED STATES SUPREME COURT (1980).

Of particular importance is the more recent work Arthur D. Hellman, By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts, 56 U.PITT. L. REV. 693 (1995), and Arthur D. Hellman, Light on a Darkling Plain: Intercircuit Conflicts in the Perspective of Time and Experience, 1998 SUPREME COURT REVIEW 247. A professor at University of Pittsburgh School of Law, Hellman was deputy director of the Commission of Revision of the Federal Court Appellate System (the Hruska Commission) in the early 1970s and then chief of staff attorneys for the U.S. Court of Appeals for the Ninth Circuit. His frequent work on the subject made him the logical candidate for the Federal Judicial Center-sponsored study noted above. See Hellman, supra note 1. Much of Hellman's work is related to the proposal to divide the Ninth Circuit. See, e.g., Arthur D. Hellman, Dividing the Ninth Circuit: An Idea Whose Time Has Not Yet Come, 57 MONT. L. REV. 261 (1996).
the conflict.

Court of appeals judges' consideration of other circuits' cases and of claims of intercircuit conflict does not take place in separate, discrete steps in the decision of a case. Rather it occurs at a number of loci in the decision-making process as part and parcel of a seamless web of judicial decision-making. The initial and most basic place for consideration of possible intercircuit conflict is the three-judge panels which decide the vast majority of cases in the U.S. court of appeals. In discussing the case before them after receiving briefs and hearing argument, the members of the panel will examine and discuss cases from outside the circuit, particularly in the absence of circuit precedent on point. Not only must they deal with pre-existing intercircuit conflict, but they may also face claims, by lawyers or their panel colleagues, that to adopt a particular position would be to create an intercircuit conflict.

Once the panel issues its disposition, a claim of an intercircuit conflict may be raised either by lawyers petitioning for rehearing or rehearing en banc, or by judges outside the panel ("off-panel judges") who are stimulated by party initiative or act independent of it to monitor their colleagues' work. Those judges may "stop the clock" to ask the panel to reconsider its position. Or, if the panel will not amend its opinion in a manner acceptable to the off-panel judge, that judge may ask the court to rehear the case en banc to adopt a position that would not cause an intercircuit conflict. 5

Data for this paper are drawn from two sources. One is published opinions of the U.S. courts of appeals from the 1990s, including dissents from denials of rehearing en banc. 6 The other

5. Intercircuit conflicts are also debated within en banc courts, a matter outside the scope of this article.

6. To supplement the author's files, a WESTLAW scan using the command TE (CIRCUIT /5 CONFLICT!) & DA(AFT 1989), that is, "circuit" within five words of "conflict," was performed for Ninth Circuit cases from 1990 through late 1999 to capture as many mentions of intercircuit conflict as possible, even if unusable cases also appeared. The scan produced headnotes and text embodying a reference to conflict for 329 cases; both published opinions from the Federal Reporter and so-called "not-for-publication" memorandum dispositions, which WESTLAW posts for the Ninth Circuit, were included. Because "conflict" also appears in reference to intracircuit conflict and other inter-court conflict, between the Ninth Circuit and Supreme Court or between federal and state court rulings, as well as in such concepts as "conflicting testimony" and "conflict of interest," of the 329 cases mentioning "conflict," only 135 cases involved references of any sort to intercircuit conflict.

The opinions in the 135 "good hits" were then examined to determine the context of the specific language about intercircuit conflict and to see if discussion of other circuits' rulings appeared elsewhere in the opinion. This step is a necessary step because
is case files. The latter are important because published opinions do not tell us about the process by which the judges have considered claims of intercircuit conflicts or even whether judges have discussed such conflicts when no judge chooses to mention them in the court’s disposition. The case files do record the judges’ discussion as they decide cases and agree on the disposition they will issue.

The judges of the Ninth Circuit have their chambers at dispersed locations throughout the circuit in addition to circuit headquarters at San Francisco. They are scattered from Seattle, Portland, and Boise in the north, to Phoenix, San Diego, and Los Angeles in the south, and to Fairbanks, Alaska, and Honolulu outside the contiguous forty-eight states. Most communication among the judges is neither face-to-face nor spoken on the telephone. This is the case for several reasons. One is that the judges are aiming toward a written product. They also use written communication because of their geographic dispersion; because panels of the court rotate, so that judges who sit together one month likely sit with other colleagues the next; and because some sit (are “on calendar”) while others are in their chambers working on opinions. The judges communicate with each other about cases primarily by means of the court’s internal e-mail system, with memoranda and draft opinions printed out in the recipient’s chambers. There they become a hardcopy record of judges’ communication with each other. In the appropriate case file, they join in-chambers memoranda between clerks and judge and an occasional notation about a telephone call.7

only one judge —likely to be the dissenter— may write explicitly of an “intercircuit conflict” but the other judges may have discussed the same cases without referring to “conflict.” This suggests that the search, while over inclusive as noted, may also have been under inclusive to the extent that the judges, without ever using the “magic words” of “circuit conflict,” discussed other circuits’ doctrine that differed from the Ninth Circuit’s position. Herman v. Tidewater Pac. Inc., 160 F.3d 1239 (9th Cir. 1998), provides an example. It was a “hit” because of the mention of “conflicts” with respect to a subsidiary issue but did not “hit” on the panel’s far more extensive discussion of the case’s chief issue, on which the circuits had taken diverse positions but with respect to which the word “conflict” does not appear in the text of the opinion. Under-inclusiveness is not a serious problem here, as the present study does not undertake to calculate the proportion of cases in which the intercircuit conflict issue is raised, but instead deals with how conflict is handled when it is raised.

7. For detail on communication among Ninth Circuit judges, both before and after installation of the e-mail system, see Stephen L. Wasby, Communication Within the Ninth Circuit Court of Appeals: The View from the Bench, 8 GOLDEN GATE U. L. REV. 1 (1977); Stephen L. Wasby, Communication in the Ninth Circuit: A Concern for Collegiality, 11 U. PUGET SOUND L. REV. 73 (1987); Stephen L. Wasby, Technology and
The files used in this study are those of one Ninth Circuit judge, from closed cases in the mid-1980s through the mid-1990s. Basing a study on the files of only one judge does mean that there are many Ninth Circuit cases for which published opinions are available but information about the preceding within-panel discussion is not. Nonetheless, material in a single judge's files is quite likely to be reasonably representative of communication within a court of appeals. The reason is that in due course any judge sits with all other judges of the court. As a result, any one judge's files contain communications to and from many colleagues, including those not on panels with the judge but who have communicated in their role as off-panel monitors.

The case files are fairly complete for most cases, although occasionally context makes clear that some memos have not reached the file. The files contain communications among the three members of a panel considering a case; communications with off-panel judges who have commented on, and requested changes in, the panel's disposition; and communication within the entire court in relation to requests to rehear cases en banc.

Like any internal court communication, the materials in these files are confidential, and the author was allowed access to them on that basis. When published opinions are discussed, they will, of course, be cited as per normal practice. However, because the material drawn from the case files is confidential, it will for the most part be presented without mention of the name of the judge whose memorandum is being quoted and often without mention of the name of the case. Materials presented in this article without attribution or citation are drawn from these


8. There may be variations from one chambers to another in the types of documents retained. It is also possible that a judge willing to grant access to files in closed cases to someone not on the court's staff, even if fairly knowledgeable about the courts, might leave more rather than less material in those files. The author's impression from discussions with judges is that they are too busy with the press of everyday business to have time to sort through case files selectively to create a favorable "paper trail." Few have a systematic "deaccession policy" for documents.

9. As with the Supreme Court, there is no transcript of the judges' post-argument deliberation of a case. There is a "conference memo" prepared by the presiding judge, summarizing the judges' positions to a greater or lesser extent and memorializing the writing assignment.

10. The latter material is particularly complete in these particular files because, as the court's en banc coordinator, the judge oversaw activity after a panel had issued its disposition even when not participating in the within-panel discussion (if any) with respect to intercircuit conflict.
confidential materials, and as a result, the reader should not be looking for the types of citations that would appear as a matter of course in the usual law review article engaging in doctrinal analysis.

After this introduction, Part II provides some background on the intercircuit conflict issue. Part III contains discussion of whether judges' mention of intercircuit conflict is a rhetorical device. Some attention is also given there to the role of intercircuit conflict in holding en banc courts and to the relation between court of appeals' treatment of conflicts and the Supreme Court. Parts IV and V constitute the principal part of the article. Part IV is a discussion of the judges' use in their opinions of cases from other circuits, with a particular focus on treatment of intercircuit conflict, and their responses to dissenters' claims of such conflict. In Part V, we turn to see how questions of intercircuit conflict are handled during the decision-making process leading to an opinion. The article concludes with a brief summary and with a suggestion for further needed research.

Most discussion of intercircuit conflict begins with the mention of the conflicts in the judges' opinions. That warrants using public mention as our starting point before we move on to the previously-unexamined process by which the judges grapple with claimed intercircuit conflict. Separation of pre-opinion activity from the ultimate formal disposition also makes some sense because matters discussed within the panel may not be visible in the ultimately filed opinion; this is likely if disputes over other circuits' rulings are resolved there. That may occur when a judge who complained about an intercircuit conflict chooses not to file a separate writing, as a result of having obtained some modification of the majority opinion, from a feeling that publication may call more attention to the case than is warranted, or from a lack of passion to proceed. An off-panel judge's claim of intercircuit conflict in a "stop clock" memo or en banc call may likewise not result in a published dissent from a denial of rehearing en banc. Here we must remember that judicial opinions are not reports of the exchanges or bargaining that took place before the opinion was put into final form, so that judges do not report discussion of possible or actual intercircuit conflicts.11

11. For example, a Fourth Circuit case that figured prominently in a Ninth Circuit panel's internal discussion received no mention in the opinion in the case. See United
policy-making does not mean that, from the perspective of court of appeals judges, such conflicts are not an important matter. We can begin to obtain some sense of the importance of the matter at that level of the court system if we put aside an implicit assumption that resolution of those conflicts is possible only when they arrive at the Supreme Court's docket. To the extent that court of appeals judges do pay attention to intercircuit conflict, they may reduce it by preventing it from developing or by eliminating it in its infancy. If instead of attending to the Supreme Court's treatment of conflicts, we look at how they are treated in the courts of appeals' published opinions and during the intra-court discussion that leads up to those opinions, what becomes clear is that court of appeals judges are sensitive to conflicts and do pay considerable attention to what their colleagues in other circuits are doing when the same issues face more than one court.

Attention to intercircuit conflicts only after they arrive at the Supreme Court, and the lack of attention to the process by which the court of appeals themselves deal with intercircuit conflict, may result from the related implicit and inaccurate assumptions of "circuit independence" and "mutual ignorance." These notions are that, in developing the rulings which are in conflict, each court of appeals acts with full independence of all the others, and that court of appeals judges lack awareness of other circuits' rulings which conflict with their own decisions. Indeed, the portrayal by advocates of the need for additional capacity to deal with the "flood" of intercircuit conflicts almost seems to be depicting the courts of appeals as manufacturing such conflicts without heed to other circuits.

The picture presented here is quite different. While not all court of appeals judges address claims of intercircuit conflicts in great depth, and sometimes do not address them at all, "the name of the game" seems to be conscious consideration of the possibility of such conflicts, coupled with an effort to avoid them. In short, appellate judges take seriously the charge to reduce or minimize such conflicts before they reach the Supreme Court. We find that judges express concern for maintaining national uniformity in the law and—as will be discussed more fully—

17. See, e.g., Judge Kleinfeld's statement that "on this matter of national tax policy there is something to be said for uniformity among the circuits," so that the claimant's argument was not "so strong as to justify a conflict" between the Ninth Circuit and another court. King v. United States, 152 F.3d 1200, 1202 (9th Cir. 1998). In another case, he stated that "Because of the importance of predictability to commercial relations,
take seriously the norm that they should not casually create intercircuit conflicts. Their paying heed to other circuits' decisions is part of their participation in a coherent institution,\textsuperscript{18} and it allows us to speak of the courts of appeals, sometimes thought of as “regional”, as part of a coherent national system.\textsuperscript{19} Indeed, many of the times that the Supreme Court has taken a case to resolve an intercircuit conflict, that conflict has already been discussed below.\textsuperscript{20} In short, cases from circuits which are in conflict or at least in tension with each other do not simply float up, each independent of the others, to the Supreme Court.

To be sure, there are instances when two courts of appeals are unaware of a conflict between their decisions because the lawyers did not call the conflict to the court's attention or because vagaries of timing “hid” one case from the other court. Additionally, there can be instances where two U.S. courts of appeals come up with the same result, or end up in conflict, without explicitly drawing on each other.\textsuperscript{21} Hellman suggests that where “the disagreement involves a narrow issue that does

\textsuperscript{18} Because judges identify strongly as members of an institution,... they respond to the views of other judges not because it was strategically useful for them to do so in terms of their own policy preferences but because they were professionally committed to the notion of coordinated institutional doctrine.” Anne Bloom, The Post Attitudinal Moment: Judicial Policymaking Through the Lens of New Institutionalism, 35 LAW & SOCY REV. 219, 226-227 (2001).

\textsuperscript{19} There is some evidence that state courts, although not part of a single “system” as are the U.S. courts of appeals, likewise pay attention to each others' rulings in much the same way. See Carey Goldberg, Massachusetts Case Is Latest to Ask Court to Decide Fate of Frozen Embryos, N.Y. TIMES, November 5, 1999, at A20 (“But legal experts say a consensus of sorts has been emerging, though it is nonbinding and has come out of the state courts, which watch each other's decisions as they make their own.”).

\textsuperscript{20} Arthur Hellman, Never the Same River Twice: The Empirics and Epistemology of Intercircuit Conflicts 31 (April 2000) (paper presented to Midwest Political Science Association) (on file with author) (“Most often, the acknowledgment of conflict will be found in the court of appeals decision that is brought for review.”). In noting intercircuit conflict, the Supreme Court acknowledges that this has taken place. See discussion infra.

\textsuperscript{21} The latter may have been the situation with the two cases—a Sixth Circuit case and a Ninth Circuit case—on \textit{in rem} civil forfeiture that the Supreme Court reviewed together. U.S. v. Ursery, 518 U.S. 267 (1996) (decided together with United States v. $405,089.23). The Supreme Court majority said the two lower courts had the “same view.” At least in the material the Supreme Court quoted there was no explicit reliance by one court on the other. Of particular note is the finding that in roughly one-third of the cases Hellman examined in his Federal Judicial Center study of intercircuit conflicts, “neither the majority nor the dissent cited any out-of-circuit precedents on the issue that gave rise to disagreement within the panel.” Hellman, \textit{supra} note 1, at 1057.
panel to reconsider its disposition, or seeking to have the court rehear a case en banc. At those times, although an intercircuit conflict may be the central or determinative issue or may even be the only issue before the court, in order to reinforce their position they often include other elements with the intercircuit conflict claim. These elements include whether the court has developed an intracircuit conflict, which only an en banc court may eliminate just as only an en banc court may overrule past circuit precedent, and whether there is a conflict with the Supreme Court. And a third is the creation of intercircuit conflict.

One can see the combination of some of these elements in a dissent from the court's denial of en banc rehearing. There the dissenting judges complained that the panel's ruling "contradicts the plain language of the [statute], conflicts with a prior decision of this circuit, and creates a needless intercircuit conflict with all courts of appeals that have addressed the issue." In another case, a dissenting judge complained not only about the intercircuit conflict he alleged the majority was creating, but also said the court's decision also contravened a Supreme Court decision and created a conflict within the circuit. Not only may claims of intercircuit conflict be entangled with other elements, but they may also be related, for example, when an intercircuit conflict is said to be mirrored by intracircuit divisions.

The mixture of intra- and inter-circuit conflict claims is illustrated in two cases in which the panel itself called *sua sponte* for en banc hearing before issuing its ruling. In the *Shabani* drug conspiracy case, briefs and oral argument had convinced the panel "that Ninth Circuit opinions are in conflict." Although not the basis for the panel's en banc call,
make it less necessary for judges to monitor other circuits’ rulings on a continuous basis.\textsuperscript{32}

In addition to what members of a panel learn from the attorneys in a case, their clerks, and their own reading, their colleagues also call to their attention real or possible conflicts that they have missed. This is most likely after the panel has filed its disposition, with an “off-panel” colleague making an internal request for reconsideration or a call for rehearing en banc, and often the panel will modify its opinion somewhat to take into account their colleague’s concerns. However, a panel is able to alter its opinion more easily if it has not yet issued its mandate.\textsuperscript{33}

\section*{PART III. CONFLICT CLAIMS AS RHETORIC}

Are conflicts “real” or are claims of conflict only used for rhetorical effect? Judges of varying ideological positions may agree on the presence of intercircuit conflicts in some cases. Yet, the use made of claims that conflict is present, particularly where other judges say it does not, leads to the suspicion that such claims are also rhetorical devices. After examining that topic, in this section, we move on to look at the relation between claims of intercircuit conflict and whether a court of appeals should sit en banc, and then briefly at how intercircuit conflicts implicate the court of appeals’ relation with the Supreme Court.

Judges claiming that their colleagues’ actions will create an intercircuit conflict almost invariably argue against such a conflict as they claim to seek intercircuit uniformity. Judges do so most often while dissenting, “stopping the clock” to get the

\textsuperscript{32} Knowledge of other courts of appeals' views also results from judges sitting in those courts. In such situations, visiting judges learn primarily about new procedures for handling cases. However, they also bring some of their own circuits' law with them. One judge talks about having “insinuated” himself into the law of another court by using “some liberal ideas from the Ninth Circuit.” When the court on which he was sitting relied on its own old circuit precedent, he concurred separately to argue that the case was wrongly decided. The court of appeals then sat en banc to correct the law. Interview with Judge Alfred T. Goodwin, 9th Cir. Court of Appeals, in Sisters, Ore. (October 10 1999). \textit{See also} Morstein v. Nat. Insurance Services, Inc., 74 F.3d 1135 (11th Cir. 1996) (panel decision, Goodwin J., concurring), rev’d \textit{en banc}; 93 F.3d 715 (11th Cir. 1996).

\textsuperscript{33} \textit{See, e.g.}, United States \textit{ex rel.} Long v. SCS Business & Technical Institute, 173 F.3d 890, 891 (D.C. Cir. 1999) (supplemental opinion) (“In the same week that our opinion issued, the Fifth Circuit held that the Eleventh Amendment bars a False Claims Act \textit{qui tam} suit in federal court. . . Since our sister circuit implicitly challenged our jurisdiction . . . and our mandate has not issued, . . we think it appropriate to . . . explain why we believe we should stick with the order of decision we adopted.”).
intercircuit conflict was also implicated, both because the Ninth Circuit cases cited to a Fifth Circuit ruling, which in turn was based on the conflicting doctrine from that circuit, and because, as the panel noted, "This circuit stands alone in its interpretation" of the relevant statute. Then in the *Butros v. INS* case,\(^40\) when the panel had sought *en banc* hearing because of an intracircuit conflict, a judge who had sat on the allegedly conflicting case wrote to distinguish it, but in so doing, introduced mention of an existing intercircuit conflict.

In the debate over "en-bancing" some cases, conflict with Supreme Court precedent has been added to the combination of intracircuit and intercircuit conflict. In a labor election case,\(^41\) a judge stopped the clock "because the opinion is arguably in conflict with Supreme Court and Ninth Circuit precedent"; here too intercircuit matters were also implicated because an earlier Ninth Circuit ruling the present panel used drew on a Fifth Circuit case. Although in a later memo, the "calling" judge made clear that his "major concern is to keep Ninth Circuit law intact," he added the claim of intercircuit conflict. In another case, concerning the law of search and seizure, this judge again combined claims, saying "the decision conflicts with Supreme Court precedent and with our own. It also needlessly creates an intercircuit conflict."

The likelihood that a dispute over an intercircuit conflict will be mixed with other issues is particularly true for a mandatory jurisdiction court. A certiorari court could limit its consideration to the issue causing the intercircuit conflict. However, there is an expectation that a mandatory jurisdiction court, although it can apply canons of judicial restraint to avoid reaching some issues presented, is expected to reach most of them. If the issue containing the conflict is important, judges may have no way out but to decide what stance to take on the intercircuit conflict and to decide as well what weight to give that issue relative to other major factors.

When a judge combines all these elements, it may be another way of saying, "This is a really bad decision." Such combining of claims thus gives rise to the question of whether intercircuit conflicts are "real" or are (simply) used as a

---

\(^{40}\) 990 F.2d 1142 (9th Cir.1993) (en banc).

\(^{41}\) Am. W. Airlines v. Nat'l Mediation Bd., 969 F.2d 777 (9th Cir. 1992), amended by, 986 F.2d 1252 (9th Cir. 1992).
rhetorical device to gain an advantage for the position being advocated, as is done in certiorari petitions to get the Supreme Court's attention. The claimant may believe that a conflict actually exists or there may be a colorable argument that there is indeed a conflict in rulings. However, exaggeration is likely, with opposing parties left to debunk the claim by showing that cited cases are inapposite or by distinguishing them. At times the claim seems to be little more than a mask for dislike of the result the majority has reached, made not to protect the principle of uniformity in national law, but because one judge does not prefer the proposed result. The many calls for rehearing en banc made by judges known to be at one end of the ideological spectrum or the other gives further credence to the notion that those calls are something of a cover for result orientation.

Because a judge who piles claim on claim may create a stronger position than if the claim were limited to only one element, it is not unusual to find that a dissenting judge complaining about his majority colleagues, or an off-panel judge complaining about a panel, will combine a complaint about an intercircuit conflict with complaints about other sins committed by the majority. We see this in Judge Kozinski's dissent to the *Gaudin* en banc's holding that materiality is an element of the offense of making a false statement in a matter within a government agency's jurisdiction. He called the majority's opinion a "tsunami":

> It's not every day, after all, that we provoke a conflict with every other regional circuit, defy Supreme Court authority, implicitly overrule several lines of our own case law—thereby creating a spider web of secondary circuit conflicts— and pave the way for successful habeas petitions for scores, perhaps hundreds, of prisoners convicted of a broad range of federal crimes.\(^\text{42}\)

At times, litanies like these make it appear that a judge may be throwing mud at the wall in the hopes that some will stick – claiming intercircuit conflict, intracircuit conflict, and conflict with the Supreme Court, as well as crimes against man and nature—and they reinforce the notion that claims of intercircuit conflict are used as a rhetorical device.

The question of whether intercircuit conflict claims are

---

\(^{42}\) United States v. Gaudin, 28 F.3d 943, 954 (9th Cir. 1994) (Kozinski, J., dissenting). Despite the hyperbole, the Supreme Court, which not infrequently listens to Judge Kozinski, affirmed. 515 U.S. 506 (1995).
Judge) was said to have been like Chief Justice Burger in wanting a rule that the court must go en banc if there was to be an intercircuit conflict. While the court declined to adopt such a rule—perhaps because if a case were going to go to the Supreme Court, the en banc process would add another year—the court did have a rule that a panel creating an intercircuit conflict should notify the court to that effect.\(^46\) Under this regime, in a case where a government petition for rehearing alleged an intercircuit conflict, Judge Wallace wrote to his colleagues, "Our General Orders indicate that if the suggestion contains as one of its grounds the allegation that the opinion initiates a conflict with another court of appeals, the panel is to advise us," and therefore "[i]t is incumbent upon the panel to advise the court of this alleged conflict."\(^47\)

The Ninth Circuit has since added procedures by which attorneys in the court’s Case Management Unit monitor certain types of cases and notify the entire court about them; among those cases are those in which the panel expressly disagrees with another circuit. This procedure, a result of the work of the court’s Evaluation Committee, makes it unnecessary for a panel to advise colleagues of the conflict, but Judge Wallace’s point is met.\(^48\)

It is also interesting to note what happened when the Supreme Court, in reversing a Ninth Circuit decision, noted that, although not the basis of the reversal, an intercircuit

---

\(^46\) For the practice in another circuit, see this note in a Fifth Circuit case: "In accordance with Court policy, this opinion, being one which initiates a conflict with the rule declared in another circuit, was circulated before release to the entire Court, and rehearing en banc was voted by a majority of the non-recused judges in active service . . . " Riley v. St. Luke's Episcopal Hosp., 196 F.3d 514, 516 n.* (5th Cir. 1999).

\(^47\) Memorandum from Judge J. Clifford Wallace, to all 9th Circuit judges (December 17, 1991) (on file with author) (regarding, Soler v. Scott, 942 F.2d 597 (9th Cir. 1991), vacated, Sivley v. Soler, 506 U.S. 969 (1992)). In another case, there was a contretemps over the meaning of the rule. Judge Wallace stopped the clock so a panel which had consciously created a circuit conflict could comply with the provisions of the General Orders by informing the court of the circuit split. Another judge then pointed out that the rule did not apply because the relevant party "has never alleged that there is an inter-circuit conflict," not even in response to an order requesting the parties' views on whether the case should be heard en banc. The panel opinion's author also pointed out that the panel had already commented on why it had rejected the cases from two circuits (As the amended opinion read, "This holding puts this circuit in conflict with two other circuits.") Those responses led Judge Wallace to withdraw his "stop clock." (In this and other instances without citation to a case or identification of judges, material is taken from case files made available to the author.).

(mere) rhetoric or something more bears on the dispute among political scientists studying the judiciary as to whether (only) attitudes and ideology explain judges' voting, or whether law counts for something in that explanation. To the extent that a judge with known ideological proclivities engages in serious examination of a range of options from other courts, and explains why the position he or she adopts is ultimately to be preferred, one might say that the legal notion of "avoiding intercircuit conflict" in fact does mean something independent of ideology. However, if judges of easily identifiable ideological persuasion repeatedly claim "intercircuit conflict" in a way that would seem to be a cover for seeking particular results, attitude may be said to trump the "legal" explanation.

A. Conflicts and Sitting En Banc.

Independent of whether or not judges' claims concerning intercircuit conflict are rhetorical tools used to achieve a sought-after policy result, such claims affect decision-making within a court of appeals because the presence of an intercircuit conflict may affect the decision as to whether the court should rehear a case en banc. The Ninth Circuit's present formal position is that an intercircuit conflict regarding a rule of national application is a basis for the court's taking a case en banc. Indeed, in a recent case, a judge even used the possibility of one to argue that the court should go en banc. Likewise, nonexistence of an intercircuit conflict can be proffered as reason for not hearing a case en banc. In a rare concurrence from a rejection of suggestion to rehear en banc, Judge Kleinfeld observed for himself and two other judges that factors which "probably explain the court's decision not to rehear the case en banc" included the facts that "[t]he court's decision was compelled by well established precedent. There is no inter- or intra-circuit conflict."

There are judges who believe strongly that the presence of a (claimed) intercircuit conflict is reason for an en banc hearing. Indeed, Judge J. Clifford Wallace (later the Ninth Circuit's Chief

---

43. 9th Cir. R. 35-1.
44. Espinoza-Gutierrez v. Smith, 109 F.3d 551, 557 (9th Cir. 1997) (on denial of rehearing) (Kozinski, J., dissenting) ("A direct conflict with another circuit doesn't yet exist, but one may be on the horizon.").
45. Monterey Mech. Co. v. Wilson, 138 F.3d 1270, 1272 (9th Cir. 1998) (on denying rehearing en banc) (Kleinfeld, J., concurring). This case also illustrates the interplay of intercircuit conflict with other elements.
PART II. BACKGROUND

In this section, we examine some background concerning intercircuit conflicts, including whether they are a "problem" and how courts of appeals avoid them. A principal reason why the Supreme Court is the focus of almost all discussion about intercircuit conflicts is that the presence of an intercircuit conflict is one criterion used by the Supreme Court in considering whether to grant review. Indeed, along with "the importance of the issue," resolution of an intercircuit conflict is the reason stated most frequently for granting certiorari.\(^1\) Another reason for this focus is that starting in the 1970s, policy debate about the federal court system centered on whether the national court system had sufficient capacity to resolve intercircuit conflicts. In particular, the question posed was whether the Supreme Court adequately performed that task or whether, as recommended by the Freund Study Group and by the Commission on Revision of the Federal Appellate System (the Hruska Commission), the perceived need for greater capacity to settle unresolved conflicts required a National Court of Appeals or comparable judicial body to assist the High Court.\(^13\)

Neither the National Court of Appeals or any proposed variant was enacted, and the idea is no longer on the front burner. The retirement of Justice Byron White from the United States Supreme Court removed the "resident nag" who, in dissents from denials of certiorari, regularly reminded his colleagues of the intercircuit conflict cases the Court had refused to review.\(^14\) Moreover, the recent substantial decrease in the Supreme Court's plenary docket has undercut the argument that the system lacks sufficient present capacity to resolve such conflicts. Important studies, particularly by Arthur Hellman, also demonstrated that the seriousness of the purported effect of intercircuit conflicts on national "primary actors" conducting

---

1. States v. Schram, 9 F.3d 741 (9th Cir. 1992).
14. His statements were noted by the lower courts. See, e.g., United States v. Cannon, 29 F.3d 472, 475 (9th Cir. 1994) ("circuit courts now conflict on the proper standard for evaluating 'pretextual stop' claims." Citing Cummings v. United States, 112 S.Ct. 428 (1991) (White, J., dissenting)).
their activities in more than one circuit, was exaggerated. One might expect lawyers attempting to get the Supreme Court's attention to emphasize intercircuit conflicts. However, these studies showed that not all such putative conflicts are clear and direct, as many are only "sideswipes" (that is, partial or oblique conflicts rather than direct ones) and many others can be eliminated by distinguishing cases. Moreover, conflicts allowed to "percolate" may resolve themselves as some circuits fall in line with other circuits and new statutes or regulations resolve other intercircuit disagreements.

In considering the dimensions of the "problem," we must also remember that not all issues are equally likely to result in different interpretations that vary from one circuit to the next. The issue must be one that recurs in several circuits. Examples are federal criminal and civil procedure, which are national in scope, and some areas of regulatory policy such as labor-management relations. Even where an issue is recurring across the circuits, in the Ninth Circuit, "no pattern is discernible in terms of the issue areas." If, however, an issue arises exclusively or predominantly in one circuit, then the possibility of intercircuit conflict is reduced. For example, many of the Indian fishing rights cases arise in the Ninth Circuit; they also turn on treaties specific to a single tribe. In the 1970s, cases on border searches without warrants occurred primarily in the Ninth Circuit and to a lesser extent in the Fifth Circuit, the two circuits with extensive borders with Mexico. Another example is cases in admiralty, which occur in a larger but still limited number of circuits. When jurisdictional statutes place most appeals in one court, as is true for the District of Columbia Circuit hearing cases regarding environmental regulations, by definition there can be no intercircuit conflict. And interpretations of state law under federal diversity-of-citizenship jurisdiction are often specific to a single circuit, although not invariably so.

That the "problem" of unresolved intercircuit conflicts is presently considered of diminished importance for national


not control the merits of the appeal, ... the judges might not think it worthwhile to seek out guidance from out-of-circuit case law."\(^{22}\) However, instead of assuming that this "mutual ignorance" occurs regularly, our working assumption should be that judges are usually made aware of at least other circuits' published opinions. Indeed, at times, judges are aware of cases even prior to their being decided; they may know, for example, that another court of appeals has heard argument in a case\(^ {23} \) or that it has decided to take a case en banc.\(^ {24} \)

The courts of appeals are provided with information and also monitor each other so that each court is aware of other courts' relevant rulings. Supporting evidence for this claim is that the Supreme Court from time to time has noted that one circuit was aware of other circuits' rulings, and may even have taken them into account.\(^ {25} \) In its 1971 ruling in *Rosenberg v. Yee Chien Woo*, the Court noted that the Second Circuit, having "dealt at length with the Ninth Circuit opinion in this case," had "expressly declined to follow the Ninth Circuit interpretation of the statute."\(^ {26} \) And, in *Aldinger v. Howard*, an instance where the lower court maintained an intercircuit conflict, Justice Rehnquist commented that the Ninth Circuit, the source of the case being reviewed, had said that it "was not unaware of the widespread rejection of its position in almost all other Federal Circuits."\(^ {27} \)

Still another notation of one court being aware of the contrary ruling by another court came in *United States v. Hughes Properties*, Inc., where Justice Blackmun pointed to the Claims Court's having noted conflict with a court of appeals:

22. Hellman, supra note 1, at 1063.
23. See, e.g., Granzeier v. Middleton, 173 F.3d 568, 574 n.2 (6th Cir. 1999) (On December 1, 1998, the Fourth Circuit heard oral arguments in the appeal of *Koenick v. Felton*, 973 F.Supp. 522 (D.Md.1997) (holding that a state statute creating a public-school holiday from the Friday before Easter through the Monday after Easter does not violate the Establishment Clause.)).
24. For an instance in which the judges noted that the en banc might serve to eliminate the intercircuit conflict, see Chandler v. United States Army, 125 F.3d 1296, 1302 (9th Cir. 1997) ("It may be that the intercircuit conflict will be obviated, because the Sixth Circuit is reconsidering a recent application of *Murdock* [the conflicting case] en banc.").
25. To determine whether the Supreme Court grants review to resolve the conflicts which the courts of appeals have discussed, one would have to trace cases from a court of appeals in which intercircuit conflict was discussed to determine if the Supreme Court accepted those cases and, if it did so, how it treated and perhaps resolved the conflict, a task not undertaken in this article.
27. 427 U.S. 1, 3 (1976).
The Claims Court further acknowledged that its ruling was in conflict with the decision of the Court of Appeals for the Ninth Circuit in *Nightingale v. United States*, having to do with another Nevada casino, but it declined to follow that precedent and specifically disavowed its reasoning.

While the Supreme Court does speak of the courts of appeals’ treatment of intercircuit conflicts, we have to keep in mind Hellman’s observation that “[w]hether the Court refers to a conflict - or gives any reason for hearing the case - may depend on how the opinion is written and which Justice writes it.” He notes that Justice Scalia “almost never explains why the Court granted review,” and “[i]f he does allude to intercircuit conflict, he almost invariably does so in the course of making an argument on the merits.”

Lawyers, also well aware of intercircuit conflicts as they develop, bring them to the court’s attention by using them while arguing on their clients’ behalf. And if judges considering a case were not aware of another court’s actions before issuing their own ruling, a party’s petition for rehearing will make them aware. It is certainly possible, however, that the lawyers will not catch such cases. Hellman notes that lawyers may have “framed their arguments so single-mindedly around the law of the circuit that they declined to research decisions of other circuits or refrained from citing them even if they were closely on point.” If the judges “confined their analysis to the cases cited by the parties,” other circuits’ work would not be addressed.

At least at the initial stages of the appellate process the judges largely depend on lawyers to bring to their attention relevant cases from other circuits, and to note possible or real conflicts. Yet, case searches by law clerks may reduce that dependence. A law clerk’s search for “on point” cases often provides additional or more-up-to-date citations. Even if lawyers’ citations were up-to-date when briefs were filed, intercircuit conflicts may have been created subsequently, prior to argument or decision in the case. While lawyers do file supplemental letter briefs citing such cases, clerks’ *Insta-cite* searches to retrieve information during consideration of a case not only bring the relevant cases to the judges’ attention but also

---

28. 684 F.2d 611 (1982).
31. Hellman, *supra* note 1, at 1058.
conflict between the Ninth Circuit and another court of appeals was implicated in the case. On the basis of this comment, on remand the Ninth Circuit sat en banc for further consideration of the case.\textsuperscript{49}

One aspect of the intercircuit conflict - en banc relationship is that an en banc ruling as part of an intercircuit conflict situation would make the issue even more visible to the Supreme Court.\textsuperscript{50} There are judges who argue that, if the Supreme Court is going to decide an issue regardless of whether the lower court has sat en banc, resources should not be expended on an en banc sitting. Likewise, judges may argue that if an intercircuit conflict already exists, there is little need for the court of appeals to consider the issue en banc because the existence of the intercircuit conflict per se increases the likelihood the Supreme Court will decide the issue.\textsuperscript{51}

It may also be the case that if the court of appeals chooses not to give en banc treatment to a case, the Supreme Court may have to take the case to clarify the law. In what amounted to a plea to the Supreme Court to take the case, Judge Stephen Reinhardt argued in his dissent from the Ninth Circuit's denial of en banc rehearing in \textit{United States v. Koon}, that "the Supreme Court may yet provide Judge Davies with the guidance that our own court has refused to offer . . . perhaps the Supreme Court will deem it important to clarify the extent of the authority that sentencing judges possess to depart downwardly from the [Sentencing] Guidelines."\textsuperscript{52}

\textsuperscript{49.} The case is United States v. Jose, 519 U.S. 54, 56 (1996) (per curiam) ("We express no opinion on the merits of the underlying dispute. The matter, indeed, is one that implicates an intercircuit conflict." Id. at 56.) On remand, Judge Hall, after noting this language, wrote, "In light of this intercircuit conflict, we decided \textit{sua sponte} to consider the merits of this case en banc." \textit{United States v. Jose}, 131 F.3d 1325, 1327 (9th Cir. 1997)(en banc). And, on the merits, the Ninth Circuit decided to agree with the ruling of the court of appeals with which it had earlier disagreed: "Upon reconsideration, we agree with the Fifth Circuit's reasoning and holding," thus overruling earlier Ninth Circuit cases that had relied on earlier (and later overruled) Fifth Circuit decisions. \textit{Id.} at 1329.

\textsuperscript{50.} H.W. PERRY, DECIDING TO DECIDE, supra note 2, is the leading treatment of the justices' consideration of factors used in granting certiorari. It fails to discuss whether en banc rulings provide a "signal" used by the Supreme Court, so the discussion here is speculative. A recent study finds that the granting of certiorari is definitely related to the court of appeals having sat en banc. Tracey E. George and Michael E. Solimine, \textit{Supreme Court Monitoring of the United States Courts of Appeals En Banc}, 9 SUP. CT. ECON. REV. 171, 196-197 (2001).

\textsuperscript{51.} For further discussion of reasons why the court of appeals would or would not sit en banc, see George and Solimine, supra note 50, passim.

\textsuperscript{52.} United States v. Koon, 45 F.3d 1302, 1308 (9th Cir. 1995) (Reinhardt, J.,
B. Circuit Conflict and the Supreme Court.

How judges deal with intercircuit conflict is also linked to the court of appeals’ relation to the Supreme Court. The importance of intercircuit conflict as a criterion for the Supreme Court’s selection of cases has often been noted. If a court of appeals creates an intercircuit conflict, the Supreme Court is more likely to grant certiorari in the case. The fact that lower court judges wish to avoid having their rulings reviewed may serve as a pragmatic brake on creating intercircuit conflict. This is over and above the norm that, in the interest of nationally uniform law, such conflicts should not be created. Even if the pressure of being the court to create a conflict is removed when an intercircuit conflict already exists, by “weighing in” on the issue and lining up on one side of the conflict or the other, the court may increase the likelihood that the justices will perceive that the conflict is of sufficient importance to warrant granting certiorari. However, one must also keep in mind that there are judges like the one who says he “always took the view that we should not hesitate to create splits if we thoughtfully and carefully concluded that [another] Circuit was wrong,” doing so to “hold the Supreme Court’s toes to the fire,” to force the justices to deal with an issue.53

In any event, when the justices decide a case regarding an issue on which the circuits disagree, what the Supreme Court meant becomes part of the intercircuit dispute, and intercircuit conflict may turn on interpretations of the justices’ statements. This was the case when Ninth Circuit judges deciding Catholic Soc. Servs. v. Thornburgh54 tried to determine which view from the D.C. Circuit to adopt in interpreting McNary v. Haitian Refugee Center,55 and when Ninth Circuit Judge Harry


53. With the Supreme Court’s relatively light docket, he observed, “I was never convinced . . . that we had a public duty to hold en bancs to lighten their burden.” He added, “some of our number actually found it intellectually stimulating to challenge the Supreme Court from time to time,” although, he added, they “usually were rewarded by a Nine Zip reversal.” E-mail from Judge Alfred T. Goodwin, Circuit Judge, 9th Circuit Court of Appeals, to author (July 29, 1999) (on file with author); interview with Judge Alfred T. Goodwin, Circuit Judge, 9th Circuit Court of Appeals, in Pasadena, Cal. (Oct. 10, 1999) (on file with author).


Pregerson, in the 1993 *Casey v. Lewis* prison conditions case, complained that the panel majority relied on two cases from other circuits which "rely on mischaracterizations of Supreme Court decisions" and also provided no basis for what he claimed was the majority's departure from Ninth Circuit precedent. It can also be seen in the District of Columbia Circuit's statement, in the course of disagreeing with two other circuits that "[w]e think our sister circuits have paid insufficient attention to [the] Supreme Court's decision."

**PART IV. MENTION AND DISCUSSION IN PUBLISHED OPINIONS**

In this part of the article, we turn to a detailed examination of the judges' mention and discussion of cases from other circuits. While in Part V, we will look at their discussion during the decision-making leading up to the release of their published opinions, in this part, we look at what the judges say in those opinions. Here, we turn first to noncontentious citation of cases from other circuits, including the tendency to go along with what those other courts have said and to avoid intercircuit conflict. We then treat how judges deal with intercircuit conflict, either claimed or acknowledged, followed by a look at responses by the majority to dissenters' claims of intercircuit conflict.

**A. Noncontentious Citation.**

When courts of appeals consider case law from other circuits, most references to those rulings are without dispute or contention. General citation practice leads a court to cite not only to its own earlier cases, but also to cases from other courts on various points of law. One such use is to provide an example of a general point. Another is as part of a string citation of cases supporting positions being taken. This illustrates that many courts have taken the same position, as in the claim that "[a]ll the circuits which have spoken on this point have agreed that . . . ." As Hellman notes, "When a judge chooses to cite out-of-circuit authority, the precedent generally will be one that supports the position taken in the opinion."

---

56. Casey v. Lewis, 4 F.3d 1516, 1529 (9th Cir. 1993) (Pregerson, J., concurring in part and dissenting in part).


U.S. courts of appeals may engage in mutual citation, and one circuit may even cite to another circuit’s ruling that has cites to the initial circuit’s decision. For example, Judge Goodwin quoted a Third Circuit case which indicated the side of a circuit split the Ninth Circuit had adopted, and in another case, he noted a Tenth Circuit case which had “agreed with the Ninth Circuit’s analysis.” Another example shows that judges do not always draw on other circuits’ majority opinions but may instead utilize dissenting judges’ views. In acknowledging a conflict with the Fourth Circuit while refusing to change Ninth Circuit precedent, Judge Leavy, in Rambo v. Director, referred to the dissent in the Fourth Circuit which had pointed out the direct conflict of the Fourth Circuit majority with the Ninth Circuit.

If the issue before the court of appeals is one of first impression nationally, by definition there will be no rulings from other circuits with which to agree or disagree. However, an issue is likely to have arisen elsewhere even if it is one of first impression in the circuit. This will likely lead the judges considering the matter to mention what other circuits have done, even if those rulings do not become a major part of the court’s analysis. Where “no precedent of the home circuit proves helpful in resolving” the question before the court, Hellman says, “we would expect at least one of the participants to cast a wider net in the hope of finding persuasive authority more closely on point.”

Thus, in an important ruling on sanctions against lawyers under Rule 11, Judge Schroeder alluded to other circuits’ rulings, observing that, because the issue was a new one,

59. McGuire v. City of Portland, 91 F.3d 1293, 1294 (9th Cir. 1996) (citing Balgowan v. N. J. Dept. of Trans., 84 F.3d 656 (3rd Cir. 1996)), op. withdrawn on reh’g, 108 F.3d 1182.

60. United States v. Jackson, 167 F.3d 1280, 1284 (9th Cir. 1999) (citing U.S. v. Bush, 70 F.3d 557 (10th Cir. 1995)); see also United States v. Alvarez-Sanchez, 975 F.2d 1396 (9th Cir. 1992), rev’d 511 U.S. 350 (1994). This discussion produces the possibility of a sort of autoregression, with a court citing another court citing the first court, which had earlier cited the other court, etc. See United States v. Edwards, 13 F.3d 291, 294 (9th Cir. 1993), noting that the Fifth Circuit, in its Lopez ruling, had “considered and rejected our reasoning in [United States v.] Evans,” 928 F.2d 958 (9th Cir. 1991), indicates what can happen.


62. Hellman, supra note 1, at 1061.
"relatively few decisions have as yet percolated up to the courts of appeals." She then characterized those "decisions to date" as "reflect[ing] the drafters' stated intent to curb delay and expense caused by the filing of unsupported pleadings and motions" and noted "a dominant theme in the comments made by the Rules' proponents at the time of its adoption and by its implementers in the court decisions since its adoption."

In another decision, on application of Supreme Court rulings on the filing of petitions for attorney's fees in Social Security disability cases, Judge Schoeder also made noncontentious mention of what other courts of appeals had said. The Ninth Circuit, she said, "decline[d] to be the first [circuit] to reach...[the] inequitable result" of denying attorney's fees for a failure to file for them within thirty days of a final judgment. On her way to that conclusion, she spoke of "the federal courts' then prevailing practice," which the Supreme Court had seemed to approve; what "a majority of the federal courts of appeals" had held; and what "federal courts had uniformly held" prior to a recent Supreme Court decision which the Ninth Circuit declined to apply retroactively.

Even when there is no dispute about the validity of a point for which an out-of-circuit case is cited, and no claim that the circuits differ on the issue, use of out-of-circuit citations without corresponding ones from within the judge's own court affects the decision to publish the disposition. The absence of within-circuit citations in a draft disposition suggests that (a) there is no law of the circuit on point; (b) the circuit is deciding the question, no matter how simple, small, or trivial, for the first time; and (c) by adopting the out-of-circuit position, even if de facto and without fanfare, the opinion is creating new circuit law. The rule is that decisions creating new circuit law should be published. In such situations, either the writing judge will note to fellow panel members that publication is required under circuit rules, or another member of the panel is likely to raise the issue, suggesting either that missing in-circuit precedent be found or that the ruling be published.

An example is provided by a deportation case, in which Judge Goodwin sent his concurrence to the disposition author while saying, "but I think it should be published even though it

63. Golden Eagle Distrib. Corp. v. Burroughs Corp. 801 F.2d 1531,1537-1538 (9th Cir. 1986), rehearing en banc denied, 809 F.2d 584 (9th Cir. 1987).
wasn't argued. The reason for publication includes: . . . citation of a 5th Circuit case, and . . . a 1st Circuit case.\textsuperscript{65} In another case,\textsuperscript{66} however, the author, in a memo to other members of the panel, argued that reliance on Sentencing Guidelines "(with reference to other circuit decisions)" was "sufficient to justify not publishing," particularly as he had "always been reluctant to publish screening decisions on first impression issues for the circuit." However, he was willing to publish saying, "I feel that we have clear guidance from other circuits," a statement which also illustrates the phenomenon of "going along" with other circuits.

B. Going Along and the Norm of Avoidance.

What happens when another U.S. court of appeals has decided a procedural or substantive issue? Does it have any effect on the next panel from any circuit facing that issue? At a minimum, those judges must decide at least that the other circuit's position is acceptable so that they can go along with it. And, as is implicit in Judge Schroeder's comments (noted above), judges of one court of appeals often do go along with others' rulings on the issue. As Hellman observes, "Circuit judges today generally respect the decisions of other circuits.\textsuperscript{67} And another observer has remarked that "circuit court judges are influenced to some degree by the 'weight' of authority on a given matter."\textsuperscript{68}

This can occur even when only one other circuit is cited,\textsuperscript{69} or perhaps two. Thus, in \textit{Martinez-Serrano v. I.N.S.}, concerning whether an alien's filing of a motion to reopen and reconsider tolled the time for appealing a deportation order, the Ninth Circuit panel observed, "The Circuit has not dealt with this issue. The Second and Fifth Circuits, however, have dealt directly with this issue," and had adopted the same rule. The panel then adopted that rule while quoting an earlier case to

\begin{itemize}
  \item \textsuperscript{65} Memorandum from Judge Alfred T. Goodwin, to 9th Circuit Panel (July 13, 1993) (on file with author) (regarding Yao v. I.N.S., 2 F.3d 317 (9th Cir. 1993)).
  \item \textsuperscript{66} United States v. Beck, 992 F.2d 1008 (9th Cir. 1993).
  \item \textsuperscript{68} Lindquist, \textit{supra} note 16, at 12. This is like the situation in which state courts look to the "majority position" on contract or tort law issues as indicated in the Restatements.
  \item \textsuperscript{69} \textit{See e.g.}, Taylor v. Phoenixville Sch. Dist., 174 F.3d 143 (3rd Cir. 1999) (agreeing with the Seventh Circuit that a plaintiff's unmedicated state was the basis for determining whether the person was disabled).  
\end{itemize}
say, "Absent a strong reason to do so, we will not create a direct conflict with other circuits."  

One reason for "going along" may be simple agreement with the other circuits' position. However, it is also possible that the issue on which the court has been offered competing positions falls within the judges' zone of indifference, that is, where it does matter to them one way or another what they do. Given other courts' prior, and consistent, rulings, there is little or no reason for them to stake out a different position. This is related to the fact that adopting other circuits' prior case law is also a matter of convenience. Although the judges do not put it this way, adopting the contrary position would require additional work to justify doing so. Moreover, when many courts which have considered the issue are in agreement, perhaps because each followed the lead of the court(s) which "got there first," a sort of hydraulic pressure to adhere to the existing consensus develops. This makes it even simpler for the court now facing the issue to find the other circuits' position to be acceptable and thus to follow it. Thus we see statements like "following the analysis of our sister circuits," and "Most of our sister Circuits that have considered this question have also reached the conclusion we reach here today."

This following-along could be seen as well when the Second Circuit turned aside a litigant-proposed position that four other courts of appeals had "expressly rejected," particularly when that interpretation also "has been implicitly foreclosed by two of our previous decisions." One can see the strength of the hydraulic pressure in Judge Guido Calabresi's statement that, because "my views have found no adherence among the other circuits," and had as well "been forcefully rejected in my own court," he was "bound both by comity and the respect that I feel

---

70. Martinez-Serrano v. I.N.S., 94 F.3d 1256, 1259 (9th Cir. 1996) (citing United States v. Chavez-Vernaza, 844 F.2d 1368, 1374 (9th Cir. 1987)).

71. "Stare decisis and the norm of consistency may amplify the general tenor of early published opinions interpreting a remedial statute if judges seek interpretations that are consistent with the published decisions of their colleagues." Catherine Albiston, The Rule of Law and the Litigation Process: The Paradox of Losing by Winning, 33 LAW & SOC'Y REV. 869, 899 (1999).

72. Singleton v. Cecil, 176 F.3d 419, 420 (8th Cir. 1999) (en banc) (where other circuits were following Supreme Court precedent).


74. Davis v. United States, 961 F.2d 867, 875 (9th Cir. 1992).
for my siblings to give great weight" to that fact, although, in
this instance it did not prevent him from declaring that those
judges had decided the issue incorrectly.\textsuperscript{75} Indeed, this indicates
that, while speaking of comity, judges may be disinclined to
follow where comity leads unless a case is within their zone of
indifference. Nonetheless, the hydraulic pressure from other
circuits' consistent interpretations also provides strong
ammunition for a prospective dissenter, or an off-panel judge
seeking an en banc rehearing, who argues against the creation
of a conflict.

The likelihood is that one court will go along with its sister
courts even when there is doubt about how to resolve the case.\textsuperscript{76}
When four courts of appeals had interpreted a statute one way,
while none had adopted a contrary interpretation, the Ninth
Circuit adopted the majority position although "the question is
close, and the statute could reasonably be construed either way."
Judge Kleinfeld for the panel did find "textual support for the
construction reached by the other circuits," but he also said that
"we have been much influenced in the construction we adopt by
the desire to avoid intercircuit conflict" and "there is virtue in
uniformity of federal law as construed by the federal circuits."\textsuperscript{77}

This introduces us to the \textit{norm of avoidance} of intercircuit
conflict. This is essentially a default position that, other things
being equal, not only should intercircuit conflicts not be created,
but, more strongly, judges should seek to avoid creating or
perpetuating such conflicts. Most judges appear to accept this
norm that intercircuit conflict is to be avoided. They do not
always value cross-circuit uniformity simply for its own sake, as
they are willing to hold to their own position because they
believe the other courts were wrong. There is, however, no
question but that some judges, believing there ought to be
national uniformity in the law, are serious about avoiding
intercircuit conflict as a matter of principle. They will assert
that their own circuit should not intentionally create an
intercircuit conflict and should be careful to distinguish other
circuits' cases with which their own circuit's rulings are

\textsuperscript{75} Benjamin v. Jacobson, 172 F.3d 144, 189 (2nd Cir. 1999) (en banc) (Calabresi,
J., concurring in result).

\textsuperscript{76} See King v. United States, 152 F.3d 1200 (9th Cir. 1998) ("Though proper
resolution of the case is not without doubt"). \textit{Id} at 1202. See also Portland 76
Auto/Truck Plaza v. Union Oil Co. of Cal., 153 F.3d 938 (9th Cir. 1998) ("[h]ow to
construe the statutory language is difficult"). \textit{Id} at 942.

\textsuperscript{77} James v. Sunrise Hosp., 86 F.3d 885, 889 (9th Cir. 1996).
creating an intercircuit split. In dealing with the requirement that securities fraud be pleaded with particularity, the *Glenfed Securities Litigation* en banc court, disagreeing with the panel's reliance on two Second Circuit cases, immediately concluded that the Ninth Circuit should not adopt the Second Circuit's view of the matter. On an important constitutional question, before the Supreme Court ruled to the contrary, the Ninth Circuit panel "recognize[d] that our decision upholding the constitutionality" of the Gun Free School Zones Act "will create an intercircuit conflict" with the Fifth Circuit's *Lopez* ruling but pointed to the Ninth Circuit's prior case law as compelling its decision. Otherwise, said the panel, it would have to ask for an en banc hearing to deal with the intracircuit conflict that would be created by following the Fifth Circuit would create. As the panel disagreed with the Fifth Circuit's analysis, the judges applied the court's earlier precedent "without recommending an en banc hearing." (As we know, it was the Fifth Circuit's position the Supreme Court upheld.)

At other times, acknowledgment of intercircuit conflict-creation is relegated to a footnote. For example, Judge Canby, in dealing with a statute underlying a Social Security disability regulation, used a note to observe for the court, "Our holding brings us into conflict with the Sixth Circuit," which had found the statute ambiguous. "With all respect to the majority of the Sixth Circuit panel," he stated, "we simply find no ambiguity in that statute's direction to the Commissioner." Likewise, a panel in a Sentencing Guidelines case said in a footnote, "We note that our reading of § 3A1.1 places us in conflict with several other circuits." This illustrates the point that because court of appeals judges must deal with many cases, they have little surplus time in which to engage in intensive analysis of relevant cases if they do not feel it essential. Thus, "If a judge, after studying the decisions of his own circuit and of the Supreme Court, concludes that the outcome of a case should be x, the judge may see no reason to closely analyze the decision of

138. *In re Glenfed Securities Litigation*, 42 F.3d 1541, 1545 (9th Cir. 1994).
139. United States v. Edwards, 13 F.3d 291, 294 (9th Cir. 1993).
141. Newman v. Chater, 87 F.3d 358, 361 n.3 (9th Cir. 1996).
142. United States v. O'Brien, 50 F.3d 751, 755 n. 3 (9th Cir. 1995). It is interesting that the West note for this case made note of the intercircuit disagreement: "The Court of Appeals, Tang, Senior Circuit Judge, disagreeing with the First Circuit, held that ..." Id. at 751.
another circuit that appears to reach a contrary outcome."  

Nonetheless, there is a normative expectation that conscientious judges will explain why they depart from, or do not join, other circuits. An example occurs in Zimmerman v. Oregon Department of Justice. In ruling that Title II of the Americans with Disabilities Act did not apply to employment, Judge Graber explained at some length why, "mindful that most courts have held that Title II applies to employment," the court did not agree with other circuits' interpretation. Only when her analysis of their rulings led to the conclusion that "we simply do not find them persuasive" did she state, "We realize that our decision creates an inter-circuit split of authority," adding that "Although we are hesitant to create such a split, and we do so only after the most painstaking inquiry, we must follow the unambiguously expressed intent of Congress."  

When the majority ruled in the 1993 Stanton Road Associates case that the Superfund statute did not authorize attorney's fees to private litigants as part of response costs in cleaning up contaminated property, it spent considerable time examining the Eighth Circuit's analysis, by which the judges were "unpersuaded." The importance of providing explanations can also be seen in a case on the timing of transfers between individuals, where Judge Hall, having examined other courts' rulings, commented in a footnote, "We believe that the reasons we have cited in the text of our opinion are sufficiently strong to justify our departure from the course plotted by our sister Circuit."  

One circuit may draw on other circuits' writings not so much to support its own position as to reject the contrary position. This of course increases rather than reduces or eliminates contention between the circuits. In a relatively small number of cases in Hellman's sample, "The opinion acknowledged out-of-circuit authority that was contrary to its position and explicitly rejected it." One occurred when the

---

143. Hellman, supra note 1, at 1086-1087.
144. 170 F.3d 1169 (9th Cir. 1999).
145. Id. at 1183-1184.
146. Stanton Rd. Assocs. v. Lohrey Enters., 984 F.2d 1015, 1019 (9th Cir. 1993).
147. In re Roosevelt, 87 F.3d 311, 318 n. 14 (9th Cir. 1996). For an example from another circuit, see United States v. Gatlin, 216 F.3d 207 (2nd Cir. 2000), in which Judge Cabranes, presenting several reasons, analyzed why the Fourth Circuit's position was being rejected. Id., at 214-215.
148. Hellman, supra note 1, at 1078.
Judges' sensitivity to the position the Supreme Court takes on matters from their court can be seen when they demonstrate awareness that the Justices might overturn the Ninth Circuit's position. For example, commenting on a case that was central to resolution of the matter before the court, the Ninth Circuit observed in a footnote, "The viability of our holding in [U.S. v.] Phelps may be in question. The District of Columbia and Eleventh Circuits have disagreed with our holding on identical facts, and the Supreme Court has granted certiorari to the Eleventh Circuit to resolve the conflict."124 In another instance, Ninth circuit judges had been concerned that the Justices' resolution might go in the other direction. The Supreme Court had granted certiorari, vacated, and remanded in Brock v. Shirk. The Ninth Circuit panel members, on remand, noted that in their initial ruling, which had "followed the controlling precedent of this circuit," they had "observed prophetically," in a footnote, "that other circuits have questioned [its] definition of willful, and that the Supreme Court will likely resolve the existing conflict." Observed the judges on remand, "The Court has indeed resolved the matter in McLaughlin v. Richard Shoe Co."125

There are also times when the lower courts' attention is attracted by the Supreme Court's not having resolved conflicts. One instance came when Ninth Circuit judges observed that "the Supreme Court's failure to resolve the circuit split has been the subject of much discussion and speculation in recent cases" in several courts.126 The Supreme Court's inaction concerning a conflict means that the court of appeals are faced with the task

---


125. The initial panel ruling was Brock v. Shirk, 833 F.2d 1326 (9th Cir. 1987); the Supreme Court vacated and remanded, Shirk v. McLaughlin, 488 U.S. 806 (1988), in light of McLaughlin v. Richland Shoe Co., 486 U.S. 128 (1988). The ruling on remand is Brock v. Shirk, 860 F.2d 1545 (9th Cir. 1988). See also Tanner v. Sivley, 76 F.3d 302, 303 (9th Cir. 1996) ("The Supreme Court's decision . . . disposed of the issue in the case."). Where the Supreme Court granted cert. to resolve an intercircuit conflict on whether a convicted defendant was entitled to credit against his sentence for pretrial time spent in a community treatment center.

126. State of Washington v. East Columbia Basin Irrigation District, 105 F.3d 517, 519 (9th Cir. 1997). For another indication of the Supreme Court's not having resolved a question implicating an intercircuit conflict, see Judge Fernandez's dissent in Windham v. Merkle, 16 F.3d 1092, 1108 and n.4 (9th Cir. 1998).
of resolving the conflict, although they do not invariably carry it out. Thus, in dealing with a question under revisions to the Immigration and Naturalization Act, the Ninth Circuit observed that “[t]he Supreme Court has not as yet resolved the intercircuit conflict” concerning whether Congress had violated the prohibition on suspending habeas corpus— but then found that to be “irrelevant to our consideration” because the Ninth Circuit’s earlier ruling was binding on the panel.  

Even worse from the courts of appeals’ perspective is that the justices can create intercircuit conflict, as when a Supreme Court ruling results in varying positions across the circuits. For example, in a case in which the justices affirmed the Ninth Circuit, the appeals court panel noted, “In the wake of Reliable Transfer, the circuits have considered with sometimes conflicting results the issue of whether superseding cause may still be used to attribute fault in admiralty cases.”  


In judges’ eyes, there is a difference between creating an intercircuit conflict and joining a pre-existing position in a conflict that has already developed. The latter is considered less serious, as one can see in seemingly routine mentions that a conflict exists. However, this does put the court in a much more difficult position than when several courts all are on one side of an issue. This difference between finding and creating an intercircuit conflict can be seen in responses to dissenting judges who argue that an intercircuit conflict is being created. In saying that the intercircuit conflict predated the panel’s ruling, the panel majority is saying that even if the ruling is part of such a conflict, the panel did not create it; others did.

The Ninth Circuit was stepping into a pre-existing conflict rather than creating one when, in holding that a district court ruling on “inevitable discovery” was to be reviewed for clear error, it stated, “Our holding is in accord with the Eleventh Circuit.... However, it puts us in conflict with the Sixth Circuit.” It also joined a pre-existing conflict in Chandler v.

127. Magana-Pizano v. I.N.S., 152 F.3d 1213, 1217 n.7 (9th Cir. 1998).
128. Exxon Co. v. Sofec, 54 F.3d 570, 573-574 (9th Cir. 1995), aff’d 517 U.S. 830 (1996). The panel affirmed the Ninth Circuit’s previous position, finding it “not necessary to resolve here whether the Eighth Circuit has proscribed the use of superseding cause...” Id., at 574. The earlier Supreme Court case is United States v. Reliable Transfer Co., 421 U.S. 397 (1975).
129. United States v. Lang, 149 F.3d 1044, 1047 (9th Cir. 1998).
conflict? Of particular interest is the situation in which intercircuit conflicts lead to disagreement among the appellate judges facing them. In about fifty cases of the 260 in Hellman's study, "the judges who disagreed as to the outcome of the appeal before them also disagreed as to the import or authority of the out-of-circuit precedent." In the typical case of this sort, both majority and dissenter "treat the same out-of-circuit decision as squarely on point," with one "embrac[ing] the other circuit's precedent, while the other would reject it."

1. Distinguishing of Cases.

How to deal with intercircuit conflict is often a matter of contention. Judges are often able to avoid involvement in a conflict by disputing parties' claims that a conflict exists, as when they say that "[t]he cases cited ... from other circuits are not in conflict." Closely related is the rejection of an argument in part because of the party's failure to call attention to any conflicting cases from other circuits; there it is the fact of the presence (or absence) of intercircuit conflict which is important, not its substance. Judges may also reject the position of a colleague which, if adopted, might pose the existence of a conflict.

When the dissenting judge on a panel opposes adoption of the position of another court of appeals but does not persuade his colleagues, intercircuit conflict has not been created, at least for the time being. An example of this situation from the Ninth Circuit is United States v. Petty. In that case, the majority followed the seven courts of appeals to have considered the application of the Confrontation Clause in Guidelines sentencing, all of which had ruled against its application. In dissent, Judge Noonan spoke of his colleagues' "admirable desire for harmony with other circuits and understandable unwillingness to challenge the conventional wisdom suggested

---

84. Hellman, supra note 1, at 1073.
85. Id. at 1075.
86. Lust v. Merrell Dow Pharmaceuticals, 89 F.3d 594, 598 (9th Cir. 1996).
87. See United States v. Adler, 152 F.3d 929 (Table), 1998 WL 382702 (9th Cir. 1998).
88. See Hellman, supra note 1, at 1076, providing as an example, Stanton Road Associates v. Lohrey Enterprises, 984 F.2d 1015 (9th Cir. 1983). The conflict in that case, which is discussed below, was ultimately resolved in Key Tronic Corp v. United States, 511 U.S. 809 (1994).
89. 982 F.2d 1365 (9th Cir. 1993).
by their decisions" but thought that other principles override such comity.\textsuperscript{90}

Just as lawyers regularly avoid the effect of cases by distinguishing them, a strategy for judges is to distinguish the cases which are alleged to create a conflict. Conceding a conflict's pre-existence is a potential response by a panel majority to a colleague's claim that the majority's position will create one. However, it is a response that does little to avoid the need to choose one side over another. That helps explain why, when faced with a claim that an intercircuit conflict exists or is about to be created, one response is to deny that the claimed conflict exists, primarily because the allegedly conflicting cases can be distinguished. When litigants or a colleague claim that adoption of a certain position would create an intercircuit conflict,\textsuperscript{91} the panel majority may respond by distinguishing the proffered cases. An example is a dissenting judge's rejection of a case from another circuit, in which the judge characterized the case as having rejected the Ninth Circuit panel majority's position. In response the majority said "we don't see how" the other case could be so viewed because plaintiffs in the other circuit were in a different posture with respect to administrative agency action from those in the present case.\textsuperscript{92}

At times, there is not a direct disagreement or conflict over the basic holding or rule of law, but there is disagreement with another circuit's approach or its reasoning, as when the Fifth Circuit said that an analogy drawn by the Second Circuit, "while conceptually clear, is flawed."\textsuperscript{93} The D.C. Circuit provided another example. Applying a Supreme Court ruling, the court "agree[d] with the Second Circuit's conclusion but not with all of its reasoning."\textsuperscript{94} However, at other times, distinguishing another circuit's work can be equivalent, or at least close, to rejecting it. This occurred when an Eleventh Circuit panel set aside cases

\textsuperscript{90} Id. at 1370 (Noonan, J., dissenting).

\textsuperscript{91} As to a litigant's claim of conflict, see Chandler v. United States Army, 125 F.3d 1296, 1301 (9th Cir. 1997) (although in this case the court found itself "unable to avoid an intercircuit conflict" on another element of the case.) Id. at 1302.

\textsuperscript{92} American Ass'n of Cosmetology Schs v. Riley, 170 F.3d 1250, 1254 n. 4 (9th Cir. 1999). See also Fajardo v. County of Los Angeles, 175 F.3d 698 (9th Cir. 1999) (particularly Judge Pregerson's response for the majority, at 701 n.4, to Judge Kleinfeld's separate concurrence, at 703).

\textsuperscript{93} United States ex rel. Foulds v. Texas Tech. Univ., 171 F.3d 279, 291 n.18 (5th Cir. 1999).

\textsuperscript{94} Kalka v. Hawk, 215 F.3d 90 (D.C. Cir. 2000) (applying County of Sacramento v. Lewis, 523 U.S. 833 (1998)).
arguably in conflict. Thus disagreement over application of cases from other circuits, whether on the basis that some can be distinguished, may occur without the judges engaging in a debate over an intercircuit conflict.\(^7\) Instead of being dismissive of what other circuits have done even while disagreeing with them, the judges instead devote serious, extended attention to the competing positions in other courts' opinions.

The norm gives a claim of intercircuit conflict considerable weight. It prompts those said by their colleagues to have created such conflicts to treat those claims seriously and to give them due attention. Thus, a judge may make a claim of intercircuit conflict to prod colleagues into a response about a case because the claim places on them the burden of defending their position.

The strength of the norm may be seen in the oft-stated position that intercircuit conflict should be created only in extreme circumstances. That leaves the question, "What is 'extreme'?" However, the view is prevalent that "[w]e do not lightly create a conflict with other circuits"\(^7\) and "we avoid unnecessary conflicts with other circuits"\(^8\) — although the latter likewise begs the question of what is "unnecessary." The norm is also particularly evident when a judge goes out of his or her way to note that a conflict is not being created — that one should not read the court's opinion as if it did conflict with another circuit's position.\(^8\)

\[\text{C. Responses to Claimed and Actual Conflict.}\]

We begin by noting that there is some noncontentious

\(^{78}\) See e.g., United States v. Isaacson, 155 F.3d 1083 (9th Cir. 1998), in which both Judge Fletcher, for the majority, and Judge Fernandez, in dissent, discuss cases from the Fourth and Tenth Circuits. Judge Fletcher agrees with those courts' approach. See id. at 1085. Judge Fernandez finds that the Fourth Circuit's analysis does not conflict with other circuits' cases. See id. at 1089.

\(^{79}\) Jones v. Gomez, 66 F.3d 199, 204 (9th Cir. 1995).

\(^{80}\) Hale v. State of Arizona, 993 F.2d 1387, 1393 (9th Cir. 1993) (en banc). The panel in this case noted, "As Judge Rymer reminds us, we are to avoid creating intercircuit conflict when possible." (quoting Gilbreath, 931 F.2d 1320, 1328 n. 1 (9th Cir. 1991) (Rymer, J., concurring)). See also United States v. Gwaltney, 790 F.2d 1378, 1388 n. 4 (9th Cir. 1986) (in responding to a judge's dissent, the majority wrote, "Unnecessary conflicts among the circuits are to be avoided.") A case a year later than Gwaltney often cited for the same proposition is United States v. Larm, 824 F.2d 780, 784 (9th Cir. 1987). Both Gwaltney and Larm are cited in United States v. Chavez-Vernaza, 844 F.2d 1368, 1374 (9th Cir. 1987).

\(^{81}\) See Candelore v. Clark County Sanitation Dist., 975 F.2d 588, 592 (9th Cir. 1992) (Kleinfeld, J., concurring).
mention of intercircuit conflict and then turn to judges’ attempts
to deal with claims of conflicts. If the fact of an intercircuit
conflict may be case-determinative, or at least relevant to case
outcome, the intercircuit conflict may simply be mentioned in
passing, when judges state the relevant case law as background.
Where previous conflicts have been resolved by the Supreme
Court or by others, ‘conflict as fact’ will be mentioned, as when
the Sentencing Commission has resolved disputes over
interpretation of the Sentencing Guidelines, or when Congress
has stepped in to resolve an intercircuit dispute. Failure to
resolve an intercircuit dispute—particularly when the Supreme
Court has not done so—will also be mentioned as a fact.
Although court of appeals judges may wish that the Supreme
Court had resolved intercircuit disputes, mention of such failure
is not usually contentious.

There are also instances where a difference between circuits
in interpretation of the law is not a matter to be resolved but
instead is taken as constituting a legal fact relevant to the
disposition of the present case. For example, in seeking to
determine if a defendant official should be granted qualified
immunity from suit, intercircuit conflict has been taken as
evidence of the lack of clarity in the law which provides a basis
for such immunity; for immunity to be denied, the law must be
so clear that an official could know his acts violated someone’s
rights. If the U.S. courts of appeals cannot agree on the law,
how can one expect it to be sufficiently clear for an official to
know it?82 Conversely, the fact of the absence of an intercircuit
conflict may be relevant. For example, a Ninth Circuit panel
used that fact, among others, in denying an injunction sought by
those who would have set aside California’s Proposition 209.83

Often, however, there is a definite disagreement among the
judges as to whether there is a conflict, or there is a clear
intercircuit conflict, with which the judges must contend. What
do court of appeals judges do in that situation? What do they do
upon finding themselves faced with a conflict, or a claim of a

82. See Schroeder v. Kaplan, 60 F.3d 834 (Table), 1995 WL 398878 n.2 (9th Cir. 1995) (dissenting judge, citing conflicts between Seventh Circuit and another circuit: “there was sufficient conflict among the circuits regarding the right to be free from exposure to ETS during this time to prevent a reasonable government official from understanding that there was a clearly established right”). See also McClure v. City of Long Beach, 104 F.3d 365 (Table), 1996 WL 740816 (9th Cir. 1996), citing Lume v. Jensen, 876 F.2d 1385 (9th Cir. 1989) (presence of intercircuit conflict taken as evidence that a right has not been fully established).

83. Coalition for Econ. Equity v. Wilson, 122 F.3d 718, 719 (9th Cir. 1997).
from three other circuits permitting transfer of successive habeas petitions to the court of appeals because those courts "did not analyze §1631 or explain why it was appropriate authority for the transfer."

In a Ninth Circuit instance, a panel majority, which noted that the Ninth Circuit had "not yet decided this issue," first said that "our sister circuits have reached conflicting results" and then found all cases "denying Constitutional status to allocation" to be "factually distinguishable"; the panel also added that the reasoning of those cases was "unpersuasive" and their rule had not been adopted. Likewise, when agreeing with the Seventh Circuit to hold that application of an amendment to the supervised release statute to defendants violated the Ex Post Facto clause, the Ninth Circuit distinguished a Third Circuit ruling that "appears to conflict with the Seventh Circuit's decision." The court went on to state that the Third Circuit ruling differed in not addressing a key matter, and "[f]or that reason, we elect, with all due respect, to follow the Seventh Circuit rather than the Third Circuit on this issue."

2. Acknowledging the Conflict.

Although joining conflict is often unavoidable, at times judges only acknowledge a conflict by mentioning it and moving on without further discussion to decide the case. While, as we have noted, judges may assert the nonexistence of a conflict, many times they do acknowledge its existence. In a study of the Supreme Court's 1989-1991 Terms, Lindquist found that in almost three-fourths of the cases she examined, "the majority opinion recognized the conflict in one form or another." As Hellman observes, "Acknowledgment of conflict can take a variety of forms": through explicit rejection of another court's precedent, declining to follow it, by "respectfully disagreeing", by "reading the law differently", or, ultimately, by choosing one side over another. Although acknowledgment without action can occur even when the court's own ruling is part of the intercircuit conflict, it appears to be more likely when only out-of circuit cases conflict with each other.

96. Boardman v. Estelle, 957 F.2d 1523, 1528-1529 (9th Cir. 1992).
97. United States v. Collins, 118 F.3d 1394, 1398 (9th Cir. 1997).
In examples of judges acknowledging an intercircuit conflict without doing more, one panel noted simply, “There is a conflict of authority in other circuits whether Younger abstention may be applied to §1983 claims for monetary damages.” In a case on a sentencing enhancement for a defendant’s leadership role in a crime, the judges only stated, “There is a conflict among the circuits” on that issue. And the judges dealing with whether Indian tribes could sue states or whether such suits were barred by Eleventh Amendment stated, “There is an existing circuit conflict on this issue.” In this instance, one of the cases cited was the Eleventh Circuit’s Seminole Tribe ruling, which the Supreme Court accepted and affirmed. Likewise, in dealing with the constitutionality of the Child Pornography Protection Act (CPPA), the Fourth Circuit mentioned initially, “The federal courts of appeals that have considered this issue are split on its proper resolution.” It then identified the circuits taking the respective sides. Having again stated this division and noting that they were “[m]indful of the conflicting views that have emerged,” the judges then moved on to their own discussion of the matter.

In still another case, the Ninth Circuit pointed to a circuit split by saying, “As the Third Circuit has noted.” Then it moved on to further discussion of Ninth Circuit law. What makes this case interesting is that one of the judges, concurring separately, first said concerning Eighth and Eleventh Circuit decisions that “Our circuit law clearly conflicts with these rulings,” and then offered an explanation for the “conflict in circuits.” He thought it “likely due to the fact that the Department of Labor regulations are not easily applied to public employees.”

When acknowledging the existence of a conflict, judges may explicitly state that they are not resolving it. Thus, after noting that “[t]he circuits are divided about whether bankruptcy courts are ‘courts of the United States’” so that they could award attorney’s fees under certain statutes, Ninth Circuit Judge Cynthia Hall sidestepped the issue by writing for the court, “We express no opinion on the issue” – because it was not the

100. Martinez v. Newport Beach City, 125 F.3d 777, 781 n.4 (9th Cir. 1997).
101. United States v. Neal, 33 F.3d 60 (9th Cir. 1994) (Table).
102. Spokane Tribe of Indians v. Washington, 28 F.3d 991, 993 (9th Cir. 1994).
105. McGuire v. City of Portland, 91 F.3d 1293, 1296 (9th Cir. 1996).
drawing on out-of-circuit cases to support a different outcome or to assert that the majority is creating an intercircuit conflict are quite likely to have been known to the other panel members through a memorandum from the judge raising the matter, as we will see in Part V. The panel members will also usually have exchanged views about the matter, and the majority judges and their clerks will have reviewed the proposed dissent and perhaps modified their opinion in response to it.

1. Absence of Response.

Dialogue over putative intercircuit conflicts does not always occur. Indeed, we must first ask whether the majority responds to the dissenter at all. Given the importance of intercircuit conflict, we might expect a dissenter’s claim to be taken seriously and thus to receive a public response. Yet often there is no response from the panel majority, leaving numerous cases in which an intercircuit conflict is discussed only by the dissenter who claimed it. This occurred, for example, when Judge Kozinski, saying that the majority’s view conflicted with an earlier Ninth Circuit ruling “as well as the opinions of two other circuits,” dissented to a holding that a subcontractor had a due process interest in moneys withheld for failure to comply with prevailing wage rates.\(^{159}\) The majority, although referring to cases from other circuits to support its position on attorney fees, did not discuss the possible circuit conflict which Judge Kozinski said existed over the principal issue.

Of course, the majority’s mention of cases to which the dissenter refers does not necessarily equal a response. This can be seen in a Perishable Agricultural Commodities Act (PACA) case involving whether a putative officer was “responsibly connected” to a company. The majority, speaking through Judge Schroeder, relied on District of Columbia Circuit case law but did not speak to whether, as Judge Kozinski claimed, it was thereby “creating a circuit conflict” because, as he claimed, “those cases do not support the majority’s conclusion.”\(^{160}\)

In another case, involving the method of calculating weekly wages for an injured seaman, Judge Reed (of the District of


\(^{160}\) Maldonado v. Dep't of Agric., 154 F.3d 1086, 1089 and n.1 (9th Cir. 1998) (Kozinski, J., dissenting).
Nevada, sitting by designation) pointed to a Seventh Circuit case and said the Ninth Circuit majority, by presumptively applying a statute, "has consciously created an inter-Circuit conflict." The majority opinion, however, contains no mention of the Seventh Circuit case, much less of the purported conflict. Likewise, in a case about the application of the expedited review provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA), when the panel majority held a prisoners' suit within the *Ex parte Young* exception to states' Eleventh Amendment immunity, the panel made no response to Judge Beezer's comment in dissent that he "would avoid the intercircuit conflict of decision in a matter of national concern that is created by the rejection of the [Fourth Circuit's] holding in our court's opinion."

There was also no response when Judge Norris, who found the case of a Ninth Circuit plaintiff "on all fours with" a Fifth Circuit's en banc ruling, claimed "the majority has created as intercircuit conflict with the Fifth Circuit" over Airline Deregulation Act preemption of state law claims. (Later, the court, en banc, overruled the position the panel had taken.) Nor was there one in a case where the majority ruled that a retroactive amendment to a tax statute would violate due process; when he claimed, in a dissent, "The majority, in reaching a different conclusion [from other courts], creates a split among the circuits, as well as a conflict with our own, older precedent."

Why doesn't a majority respond? The press of business from other cases is one important consideration. The judges may already have considered the dissenter's claims, and, having perhaps made accommodations to the dissenter and reworked its opinion several times, decide to stand by it, they see no reason to

---

161. Matulic v. Director, Office of Workers Compen. Programs, 154 F.3d 1052, 1061 (9th Cir. 1998) (Reed, J., concurring in part, dissenting in part).
166. Carlton v. United States, 972 F.2d 1051, 1064 (9th Cir. 1992) (Norris, J., dissenting); see also United States v. Spencer, 981 F.2d 1083, 1092 n. 2 (9th Cir. 1992) (Reinhardt, J., dissenting), where Judge Reinhardt suggested that his colleagues had engaged in an "unnecessary and perhaps unwitting creation of an inter-circuit conflict" in holding there was no error in excluding an arrest report with information helpful to the defendant."
the majority, but his claims were not discussed.\textsuperscript{173}

After the fact, an implicit dialogue of sorts may be said to have occurred if the majority, even though not providing a direct response, discusses the elements of the conflict about which the dissenter complains. For example, both sides spoke about same cases in the \textit{Proa-Tovar} case.\textsuperscript{174} The majority held that a deportation order could be challenged collaterally, and ruled that an appointed counsel's decision to forego an appeal was not a knowing waiver by the alien, who did not have to show prejudice. Acknowledging that three circuits had interpreted the Supreme Court's \textit{Mendoza-Lopez} ruling\textsuperscript{175} "to require a showing of prejudice in [a] collateral challenge," the majority stated that it was "a better reading of \textit{Mendoza-Lopez} to read it as a bright-line rule and to the INS to make certain that every person deported as the result of an administrative hearing was adequately apprized, on the record, of his right to appeal."\textsuperscript{176} In dissent, Judge Farris, after noting the majority's acknowledgment of other circuits' position, argued, "We should not create a conflict among the circuits to salvage the dicta" in a Ninth Circuit case.\textsuperscript{177}

A case several years later, on whether an administrator's failure to adjust an equity limit for inflation was unreasonable, provides another example. Judge Pregerson for the majority cited, and also discussed, cases from several circuits. He agreed that the dollar figure "was valid when first established" but disagreed with its continuing validity in the face of inflation. His further discussion dealt with those cases extensively. Dissenting

\textsuperscript{173} Another en banc case in which dissenters received no response also illustrates how intercircuit variation in legal interpretation can affect financial transactions which reach across circuit boundaries, yet one circuit is faced with having to rule on some aspect of those transactions. The case is \textit{In re Robert L. Helms Construction and Development Co.,} 139 F.3d 702 (9th Cir. 1998)(en banc). A bankruptcy court had applied the law of its own circuit, but a contested transaction involved in the bankruptcy had taken place in another circuit which had different law. Judges Thomas and Hawkins complained that the Ninth Circuit, "[b]y imposing our view of how option contracts should be treated . . . on a Fifth Circuit bankruptcy, . . . unnecessarily intrudes upon the law of another circuit," and had created an intercircuit conflict with the Fifth Circuit but also "resolved the conflict by declaring Fifth Circuit authority inapplicable to a Texas bankruptcy," counter to the demands of "[c]omity and simple respect for our colleagues in another circuit." \textit{Id.} at 707-708 (Thomas, J., concurring part, dissenting in part). Despite the strength with which this claim was made, the majority did not mention the case the dissenters had pressed.

\textsuperscript{174} \textit{See United States v. Proa-Tovar,} 945 F.2d 1450, 1450 (9th Cir. 1991).


\textsuperscript{176} 945 F.2d at 1453.

\textsuperscript{177} \textit{Id.} at 1455 (Farris, J., dissenting).
Judge Kozinski, in claiming that the majority "raises a direct conflict with every other circuit that has considered the issue," discussed the same cases.\textsuperscript{178}

The same sort of implicit dialogue between the panel and off-panel judges took place in a case involving the Indian Gaming Regulatory Act (IGRA). The panel disagreed with the Second Circuit's use of legislative history but agreed with its result, and thus did not see an intercircuit conflict.\textsuperscript{179} On the other hand, four judges who dissented from the denial of rehearing en banc thought the panel had decided the issue at hand "incorrectly, in a manner that conflicts with the Second Circuit's interpretation of the same statutory language." The Second Circuit, these judges said, had "arriv[ed] at a conclusion precisely opposite" to that reached by the Ninth Circuit panel; they did acknowledge that the Second Circuit's "approach is supported by the Eighth Circuit" but thought the Second Circuit had "much the better overview of IRGA."\textsuperscript{180}

2. Types of Response.

Despite these instances of non-response or of only implicit dialogue without explicit discussion, there are many instances where the majority does address the matter openly. Here we look at the types of responses the majority does make.

Although the dissenter usually says more about intercircuit conflicts than does the majority, there are instances in which there is extensive majority treatment of the cases which the dissenter only briefly claims cause an intercircuit conflict. For example, in \textit{Craft v. Campbell Soup}, on whether the Federal Arbitration Act applies to labor or employment contracts, the majority noted early in its per curiam opinion, "Courts have developed two interpretations of these [statutory] provisions." The judges then discussed the positions of the "majority of

\textsuperscript{178} Gamboa v. Rubin, 80 F.3d 1338, 1351-1352 (9th Cir. 1996) (Kozinski, J., dissenting); \textit{Id. at} 1343-1344, 1347 (Pregerson, J.). Judge Kozinski went beyond claiming an intercircuit conflict when he said with respect to the other circuits' cases that the majority "actually overrules them by precluding the agency from applying the regulation even where the regional circuit has upheld it." \textit{Id. at} 1351. Although the court did take this case en banc, it did not reach the merits, dismissing it for lack of a final judgment—a ruling in which Judge Kozinski joined. Gamboa v. Chandler, 101 F.3d 90 (9th Cir. 1996) (en banc).

\textsuperscript{179} Rumsey Indian Rancheria of Wintun Indians v. Wilson, 64 F.3d 1250, 1259 n. 5 (9th Cir. 1994)

\textsuperscript{180} \textit{Id. at} 1252-1253 and 1253 n.1 (Canby, J., dissenting from denial of rehearing en banc).
more narrowly."

These are numerous cases in which a majority distinguishes cases mentioned in the dissent. One instance related to Judge Ferguson's claim that "the court today unnecessarily creates a conflict with the only other circuit to have considered" the issue of whether a district court should accept a foreign expert's declaration as to the proper application of foreign law. For the majority, Judge Brunetti directly stated the dissent's contention and then said, "To the contrary, that case is easily distinguished;" he followed that assertion with a paragraph drawing such a distinction. Several years before, when Judge Ferguson had likewise dissented on the basis that the majority in an ERISA case had created a conflict with three circuits, the majority both explained why a party's reliance on one of the cases he cited was "misplaced" and then pointed to "significant differences" between an Eighth Circuit case he cited and the present case.

Another example is a case which implicated Supreme Court law as well as rulings of another circuit. It concerned to whom a ship's seller owed a duty of protection from a dangerous defective condition, and for what items compensation could be recovered. Judge Noonan claimed the panel "abandon[ed]" the leading Supreme Court case "and puts this circuit in conflict with another major maritime circuit." The majority, however, while noting that "[T]he Fifth Circuit has developed some principles in this area," concluded, "We are faced here with a slightly different situation" from the one addressed by the Fifth Circuit. Moreover, it said a later Fifth Circuit decision mentioned by Judge Noonan was "not in conflict with [the] principle" the panel had adopted.

The next year, when the majority held unconstitutionally vague the "decency and respect" standard Congress had required the National Endowment for the Arts to apply, Judge Kleinfeld

---

192. Executive Software N. Am. v. U.S. District Court, Central District of California, 24 F.3d 1545, 1564 (9th Cir. 1994)(Leavy, J., dissenting); id. at 1550.
193. Universe Sales Co. v. Silver Castle, 182 F.3d 1036, 1040 (9th Cir. 1999) (Ferguson, J., dissenting).
194. Id. at 1038-39.
195. Thomas, Head & Greisen Employees Trust v. Buster, 24 F.3d 1114, 1118 (9th Cir. 1994). For Judge Ferguson's dissent, see id. at 1121.
asserted, “Our decision today creates a conflict with the only other circuits to have confronted a similar issue.” The majority did not address other circuits’ cases but talked about Supreme Court doctrine, it also addressed the dissent briefly by asserting that the two cases on which it relied “are distinguishable” and were decided before a recent Supreme Court ruling, *Rosenberger v. Rector & Visitors of University of Virginia,* which had changed the legal landscape. Judge Kleinfeld in turn dealt with that brief effort by saying, “The majority tries to distinguish” two circuits’ cases because of their timing in relation to the Supreme Court’s decision, an attempt he obviously found unsatisfactory.

Despite these numerous instances of the majority distinguishing the dissenter’s proffered cases, as one might expect, there are instances when majority and dissenters do “engage” over the latter’s claim of an intercircuit conflict. *Blazak v. Ricketts* provides an example. There the per curiam majority of Judges Tang and Brunetti held that an order granting habeas corpus was a final order and thus appealable even though the habeas court had not addressed punishment issues. Dissenting, Judge Beezer pointed to a recent Eleventh Circuit case to contrary, which he said “effectively reversed a conflict with the Eighth Circuit referred to by Justice White, so that both the Eighth and Eleventh Circuits held a position contrary to that of the Ninth Circuit.” The majority responded, first stating Judge Beezer’s position, “The dissent insists that the recent case of *Clisby v. Jones...* ‘clearly undermined’ the [Eleventh Circuit] decision in *Blake* (and, by virtue of its citation to *Blake*, the [Fifth Circuit] decision in *Young*)” on which the majority had relied. Saying, with respect to the dissenter’s

198. Finley v. National Endowment for the Arts, 100 F.3d 671, 685 (1996) (Kleinfeld, J., dissenting). When several judges (including Judge Kleinfeld) later dissented from the court’s denial to rehear the case en banc, their language was even stronger: “The majority’s opinion does far more than give a hostile construction to a Congressional enactment in order to create a conflict with other circuits and Supreme Court precedent, and overturn a law.” Finley v. National Endowment for the Arts, 112 F.3d 1015, 1016 n. 1 (9th Cir. 1997)(O’Scannlain, J., dissenting from denial of rehearing en banc). The Supreme Court did reverse. See, National Endowment for the Arts v. Finley, 524 U.S. 569 (1998).


200. Finley, 100 F.3d, at 682 n. 21.

201. *Id.* at 686 (Kleinfeld, J., dissenting).

202. 971 F.2d 1408 (9th Cir. 1992).

203. *Id.* at 1417. See also Kemp v. Blake, 474 U.S. 998 (1985)(White, J., dissenting from denial of certiorari).
circuits” and of the “few courts” which had adopted the opposite position, and closely examined the analysis in the conflicting cases. Dissenting Judge Brunetti, on the other hand, observed only that “[T]oday, the majority goes against the great weight of circuit authority” and attached a footnote, “As the majority concedes, almost every circuit to have considered this question directly has held that the employment exclusion clause of §1 should be interpreted narrowly.”

At times, the majority discusses the cases cited by the dissenter but does not discuss the claimed intercircuit conflict per se. An example, involving a claim that existing conflict had been made worse rather than created, is the Butros en banc.

This case involved the point at which an alien’s status is “finally determined” with respect to eligibility for discretionary relief from deportation. Writing one of two dissents, Judge Trott (joined by Judge Brunetti) spoke of the majority’s position as one that “aggravate[s] what is already a sorry state of inter-circuit conflicts.” He then noted the circuits in which “the current rule is that lawful status is terminated in connection with a petition for §212(c) relief when a deportation order becomes administrative final,” and those in which, by contrast, “the cutoff date of the accrual of the time needed for §212(c) eligibility is neither the date the deportation order becomes administratively final, nor the date the Board may not longer reconsider or reopen the case, but the date ‘upon which the INS commences the deportation proceedings’;” in the states of the Second Circuit, he added, “it is unclear what the rule on eligibility is.”

The majority said “we have no quarrel with” the relevant Board of Immigration Appeals ruling “as it was affirmed and interpreted” by the Second Circuit, nor with the Ninth Circuit’s earlier position, but did not discuss circuit conflict per se.

When the majority does respond to a dissenter’s intercircuit conflict claim, it does not necessarily do so extensively. Thus, although the majority explicitly notes the conflict claim, its response concerning may be minimal. One such instance was the Meinhold case, in which the majority affirmed a district

181. Craft v. Campbell Soup Co., 177 F.3d 1083, 1085-86 and n. 6 (9th Cir. 1998); see also id., at 1091-1093.
182. Id. at 1094, n. 1 (Brunetti, J., dissenting).
183. Butros v. Immigration & Naturalization Servs., 990 F.2d 1142 (9th Cir. 1993)(en banc).
184. Id. at 1151 (Trott, J., dissenting).
185. Id., 1145-46.
court ruling that the government's legal position on discharging homosexuals from the military was not substantially justified.\(^\text{186}\) Judge Kozinski, dissenting, thought that the majority's disposition "causes a conflict with four other circuits that have held the government may discharge members of the armed forces for saying they are homosexuals" and claimed that his colleagues did "not acknowledge these conflicts."\(^\text{187}\) The majority did not run up the "Conflict!" flag. However, counter to Judge Kozinski, it did acknowledge the conflict without the use of the term when it discussed two of the cases Judge Kozinski cited; it treated one in a long sentence and noted that another did support the government's position.\(^\text{188}\)

Another instance of limited response came in a case applying the Higher Education Act's anti-injunction provision. Judge Reinhardt, dissenting, asserted that "the only other circuit to have considered the precise question presented by the instant litigation concluded that §1082(a)(2) does not bar declaratory relief," and also said that in "analogous contexts," the First Circuit had read an identical provision in another statute not to bar injunctive relief.\(^\text{189}\) The majority's response was limited to a footnote on the First Circuit case, saying "we don't see how," given the posture of that case, Judge Reinhardt could so characterize it.\(^\text{190}\)

This case also illustrates that, just as a panel may deal with other circuits' cases cited by the parties by distinguishing them, so a panel majority may respond to a dissenter by distinguishing the cases supposedly creating a conflict. At times the majority's distinguishing of a case is not direct and might better be called finessing the case to which the dissenter has called attention. Thus, when Judge Leavy, dissenting, claimed that the majority's ruling that a district court had committed clear error in not exercising supplemental jurisdiction over pendent state law claims without giving written reasons "puts us in conflict with other circuits," the majority did not explicitly distinguish, but it\(^\text{191}\) did address those decisions, saying "other circuits construe the collateral order doctrine in this context more broadly... and

---

186. Meinhold v. U.S. Dep't of Defense, 123 F.3d 1275 (9th Cir. 1997).
187. Id. at 1281 (Kozinski, J., dissenting).
188. Id. at 1279.
189. Am. Ass'n of Cosmetology Sch. v. Riley, 170 F.3d 1250, 1256 (9th Cir. 1999) (Reinhardt, J., dissenting).
190. Id. at 1254.
191. Id. at 1254, n. 4.
claim, "This is not true," the majority proceeded to explain the Eleventh Circuit's position.\textsuperscript{204}

\textbf{PART V. DISCUSSION DURING DECISION-MAKING}

We have discussed judges' treatment of intercircuit conflicts in their published opinions. We also need to examine whether and how the judges have dealt with claims of intercircuit conflicts prior to these written manifestations of their views, and it is to that we now turn. In some ways, judges' treatment of out-of-circuit cases and claims about them is not much different prior to the release of an opinion and after its release than in the opinion itself, but because we know so little about the internal processes of courts of appeals, it is important to give this our attention. Within-panel discussion cannot be matched with published outcomes for the many cases for which the former is not available, but we do have both within-panel exchange and the resulting opinion for some cases.

\textit{A. Within the Panel: Before Disposition.}

Often, before judges release their opinions, their discussion of other circuits' rulings and of possible and actual intercircuit conflicts is simply a noncontentious mention of what other courts have done. During this time, one judge might suggest to another that use of an out-of-circuit case be revised. For example, Judge Goodwin, concurring generally in the author's draft opinion, said he "would prefer... to modify our discussion" of an Eighth Circuit case on which the district court had relied, and the ultimate opinion mentioned the case only to distinguish it.\textsuperscript{205} A somewhat atypical reason for mentioning a case, which illustrates an effect of court of appeals judges sitting in different circuits, came when a judge, scheduled to sit elsewhere the following month on a case involving the same bankruptcy issue as the one before him in the Ninth Circuit, suggested that the panel's draft opinion "fails to discuss the reasons set forth" in the latter circuit's case.\textsuperscript{206} The resulting opinion discussed both

\textsuperscript{204} 971 F.2d, at 1411.
\textsuperscript{205} Erdman v. Cochise County, Ariz., 926 F.2d 877, 881 and n. 4 (9th Cir. 1991). Memorandum from Judge Alfred Goodwin to 9th Circuit panel (Jan. 22 1991)(regarding the Erdman case)(on file with author); see also also Radecki v. Amoco Oil Co., 858 F.2d 397 (8th Cir. 1988).
\textsuperscript{206} The reader is reminded that unattributed quotations are taken from internal court communications.
that case and a Third Circuit case.\textsuperscript{207}

In a 1992 case concerning Federal Deposit Insurance Corporation (FDIC) efforts to remove a case to federal court,\textsuperscript{208} a judge wrote before argument to the other panel members about “a very recent Fifth Circuit case” concerning FDIC removal while a case was on state appeal.\textsuperscript{209} He did so to convey the view that “the dissenters in that case may have the better of the argument” so counsel should address that case during oral argument. After a conference discussion in which another member of the panel seemed to agree with the Fifth Circuit majority, the court decided that, given the posture of the case as it came to the court, the appeal should be dismissed. The opinion cited the Fifth Circuit case as well as one from the Eleventh Circuit\textsuperscript{210} and noted that “[i]ssues of district court jurisdiction have recently been considered by other circuits,” but that in the present case, “we cannot address such questions at this time because there is no appeal before us from an appealable judgment or order.”\textsuperscript{211}

At times judges talk of other circuits’ rulings to suggest or urge their use. In a case on the tax consequences of liquidated damages under the Age Discrimination in Employment Act (ADEA),\textsuperscript{212} one judge wrote to his colleagues, “I think we should join the Second and Eleventh Circuits” in holding such damages punitive in nature, while another panel member noted, “I am in substantial agreement with the Federal Circuit’s opinion” that the government had submitted. All three of the cases were among the many the court cited in its opinion.\textsuperscript{213} In another case, where the Consumer Products Safety Commission was said to have improperly made paint a banned hazardous substance, the presiding judge’s post-conference memo called a Fourth Circuit ruling “the leading case.” The opinion called it “the only circuit decision dealing with similar issues of enforcement under

\begin{footnotes}
\item[207] In re Jensen, 995 F.2d 925 (9th Cir. 1993). See In re Penn Cent. Transp. Co., 944 F.2d 164, 168 (3rd Cir. 1991); In re Chicago, Milwaukee, St. Paul & Pacific Railroad Co., 974 F.2d 775 (7th Cir. 1992).
\item[208] F.D.I.C. v. Letterman Brothers, 980 F.2d 1298 (9th Cir. 1992).
\item[209] Matter of Meyerland Co., 960 F.2d 512 (5th Cir. 1992)(en banc).
\item[210] In re Savers Fed. Savings & Loan Ass'n, 872 F.2d 963 (11th Cir. 1989).
\item[211] 980 F.2d, at 1300.
\item[212] Schmitz and Schmitz v. C.I.R., 34 F.3d 790 (9th Cir. 1994).
\item[213] See Riechman v. Bonsignore, Brignati & Mazzotta, P.C., 818 F.2d 278 (2nd Cir. 1987) (cited at 34 F.3d 795 n. 7); Lindsay v. Cast Iron Pipe Co., 810 F.2d 1094 (11th Cir. 1987) (cited at 34 F.3d at 795 n. 7); Reese v. United States, 24 F.3d 228 (Fed Cir. 1994) (cited at 34 F.3d at 794).
\end{footnotes}
especially the asserted conflicts with other circuits"; he sent his colleagues a lengthy memo, saying he found other circuits' cases "to be distinguishable on their facts," with one "actually support[ing] Judge Hug's proposed opinion."  

Disagreement with other members of the court was also obvious in a case in which two panels dealing with the same issue were communicating about their differing positions. Judge Goodwin, writing to other members of the panel on which he sat, found "not persuasive" the citation by the other panel's author of a Fourth Circuit case. He further observed that the Fourth Circuit had "expressed discomfort with its holding and reached its result only because it had to follow prior Fourth Circuit precedent." At the same time, he said, "We believe Second Circuit precedent is in accord with our decision," and that Second Circuit ruling became the basis for the panel's opinion. The absence of further mention of the Fourth Circuit case illustrates that a case may be discussed within a panel but never appear in the opinion. Likewise, after Judge Goodwin mentioned to his colleagues that an earlier Ninth Circuit ruling had "explicitly adopted the Seventh Circuit standard" of a particular case, that out-of-circuit basis for the Ninth Circuit's position is not again mentioned.  

B. After the Opinion is Filed.

What happens after a panel files its disposition? While for many cases, this is the last of the matter, in a significant number of instances, there is further activity. Not only may the parties seek rehearing or suggest rehearing en banc, but the court's other judges may raise questions about the panel's opinion without necessarily waiting for the parties to act. In this post-opinion period, the matter of intercircuit conflicts is quite...
likely to be raised, either as part of the request that the panel reconsider its opinion or in the call for an en banc rehearing. That may take place even when the judge making the call does not subsequently dissent from denial of such rehearing.

We first look extensively at several individual cases to see how, with the panel opinion as the starting point, judges use cases from other circuits and the possibility of intercircuit conflict in their exchanges as to whether to rehear a case en banc. Then we discuss the judges’ modes of reacting when faced with an intercircuit conflict; we end this section with some observations on judges’ use of other circuits’ work.

1. Some Individual Cases.

The first case which we examine extensively involved an appeal by Canadian citizens from a district court ruling upholding a summons issued by the IRS at the request of Revenue Canada under the tax treaty, for records held by their U.S. bank. The majority of the divided panel, concluding that “it was clear error to find the affidavits [supporting the summons] made a prima facie showing of legitimate purpose,” reversed and remanded. Early in his opinion, Judge Boochever noted that one court (the Second Circuit) “has suggested that the international character of treaty requests counsels against judicial intervention,” but ruled the “political question” doctrine did not apply, so that the court would decide the case. He then noted that the government had urged the court to adopt the Second Circuit’s position that, when a treaty partner requests a summons, the “legitimate purpose” notion should not apply. Distinguishing the Second Circuit case on the grounds that, after the summons there, Congress had changed the law, the panel “decline[d] the government’s request” and held that “the good faith doctrine applies to summonses issued under the treaty.”

Judge Wright raised the issue of intercircuit conflict in his dissent. He said the panel had created a conflict by rejecting the Second Circuit position without “sound bases” to do so. The

228. Interestingly, it did so by adopting the position of the dissenting justices in United States v. LaSalle National Bank, 437 U.S. 298 (1978).
229. Stuart, 813 F.2d at 249.
Second Circuit's ruling, he said, was "not undercut by the fact that TEFRA eliminated the requirement that one requesting information from the IRS not abandon the civil investigation intent," "was consistent with current law," and also "shows a healthy respect for the United States' responsibilities under an international treaty."[230]

Not surprisingly, later discussion within the court of appeals pivoted on the Second Circuit case and Judge Wright's dissent became the basis for others' support for rehearing en banc. Among the reasons offered by one of the panel judges for such rehearing was that "the majority needlessly creates an intercircuit split." This judge found "unavailing" the panel majority's "attempt to distinguish the Second Circuit case by reference to minor intervening change wrought by TEFRA."[231]

Responding to a number of his colleagues, the author of the panel's opinion asserted, "There ... is no conflict between the majority's opinion and the Second Circuit's." This was because the latter dealt only with a "judicial gloss" on a case with international ramifications, while here Congress had imposed "a mandate of the legislature" which courts were not free to ignore and which the Second Circuit had not had to confront. Given his conclusion that the case did not create an intercircuit conflict (nor an intracircuit one, as had also been argued), he said it was not "of sufficient importance for rehearing en banc." The case did not in fact receive a requisite vote to be heard en banc.

The second case involved a district judge's sentencing provision that a defendant, a state trooper found guilty of rape and murder, was not eligible for parole for 30 years. The panel majority affirmed, but Judge Norris disagreed about the limitation on parole eligibility. He claimed that the majority, instead of following Congress' intent, had followed a Tenth Circuit case which "did not interpret section 4205; it amended it."[232] Illustrating that off-panel judges often draw on a panel dissenter's views in calling for en banc rehearing, one judge made such a call, saying "Judge Norris's partial dissent makes

[230] Id. at 253 (Wright, J., dissenting).
[231] Agreeing with Judge Wright, Judge Goodwin's law clerk wrote that "[T]he majority attempts, vainly, to distinguish this case from a 2nd Cir. case coming down the other way. We're creating an intercircuit conflict for no good reason." Memorandum from Miriam Reed to Judge Alfred T. Goodwin (May 19, 1987) (on file with author).
the point better than I could."

During the extended debate within the court on whether to go en banc, another judge, also referring to "Judge Norris' powerful dissent," argued against an en banc rehearing by pointing out that both the Eighth and Tenth Circuits had reached the same conclusion on the issue at hand, while "[n]o court appears to have reached the contrary result." With "[f]orceful dissents" in both the Ninth and Eighth Circuits, this judge thought the Supreme Court, if it "wishes to consider the issue, . . . certainly has enough grist for the mill," so he didn't "think much would be added to the debate by generating a circuit conflict." That would happen were the Ninth Circuit to rehear the case en banc and to adopt Judge Norris's position.

Responding, Judge Norris commented that the recent Eighth Circuit case agreed with both the Tenth Circuit case and Ninth Circuit panel majority, which he conceded all on the panel had missed. Turning to the dissent by the Eighth Circuit's chief judge agreeing with his own interpretation of the statute, he quoted from that opinion at length. He recognized that an en banc court might "ultimately agree with the Lay and Norris dissents, thereby creating a conflict in the circuits. But that is not a sin," he said. He also called attention to an earlier case in which, during consideration of whether to take the case en banc, a judge had been critical of "the supposed vice of unnecessarily creating a conflict in the circuits;" there where, despite the creation of a conflict with several other circuits, the Supreme Court had affirmed the Ninth Circuit ruling.

Continuing debate over whether to rehear the case contained further discussion of whether the other circuits were correct and references to the dissents there. Judge Norris could not find a case adopting the interpretation of the relevant legislation advocated by his adversary on the court; he thought a Supreme Court ruling, an earlier Ninth Circuit decision, and an Eighth Circuit case were "to the contrary," with the Ninth Circuit panel majority, the Tenth Circuit, and the more recent Eighth Circuit case "unsound innovations that find little support in statutory language, legislative history, or common sense." Responding, the other judge was "not sure what Judge Norris finds . . . supporting his view" in those cases and found three

---

the Consumer Product Safety Act” and quoted from it at two places, saying at one of them that “Our reading of the statute comports with that of the Fourth Circuit.” \(^{214}\) Later, another member of the panel noted that the response to the petition for rehearing found the Fourth Circuit case and a cited Supreme Court case to be “directly analogous and ‘on all fours’ to the instant case” but noted that the former did not apply the Administrative Procedures Act, which petitioner felt should be addressed.

Potential dissenters may also turn to other circuits for case law favoring their position. Thus, the judge who was to dissent from the majority’s interpretation of the firearms statute in a case on enhanced penalties for multiple convictions from the same indictment, pointed for support to a Tenth Circuit en banc ruling on the subject. \(^{215}\) In a later memorandum supporting the dissenter’s position, an off-panel judge pointed to the same case, saying, “You will see that the interpretation that [the judge] and I, and seven judges of the Tenth Circuit, believe to be a plausible one is indeed a plausible one.” That communication from an off-panel judge prompted the author “to reexamine our opinion.” However, having done so, he wished to retain the same result, but on the basis of the view propounded by another circuit.

As this suggests, when cases from more than one circuit are available for use, one may be chosen over the other based on its rationale. Thus, a conference memo in a RICO drug case \(^{216}\) noted that on one of the issues, one of the judges “prefers the Tenth Circuit’s point of view . . . rather than the Second’s.” In the opinion in this case, a footnote indicated that the issue need not be addressed; \(^{217}\) both cases were cited, \(^{218}\) while the panel relied on the Third Circuit’s position on another issue. \(^{219}\)

While judges most often turn to other circuits’ majority opinions, they are also attracted to dissents elsewhere. However, they may shy away from choosing between the competing positions in other courts, as when Judge Goodwin observed that

\(^{214}\) X-Tra Art v. Consumer Product Safety Com., 969 F.2d 793, 795-796 (9th Cir. 1992); see also United States v. Articles of Hazardous Substance, 588 F.2d 39 (4th Cir. 1978).

\(^{215}\) United States v. Neal, 976 F.2d 601 (9th Cir. 1992).

\(^{216}\) United States v. Saccoccia, 18 F.3d 795 (9th Cir. 1994).

\(^{217}\) Id. at 799, n. 3.

\(^{218}\) United States v. McCormick, 992 F.2d 437 (2nd Cir. 1993); United States v. Koonce, 945 F.2d 1145 (10th Cir. 1991).

\(^{219}\) United States v. Esposito, 912 F.2d 60, 65 (3rd Cir. 1990).
he “hesitate[d] to get involved in the D.C. Circuit’s debate” on whether a statute provided for a cause of action. He added, moreover, that getting involved in that debate was also unnecessary to resolve the Ninth Circuit’s case.220

Any such qualms did not seem to affect the judges in the Catholic Social Services immigration case, however. In developing the majority opinion, the author found that Chief Judge Patricia Wald of the D.C. Circuit had written a dissent which “effectively refutes” the majority opinion to which she was responding; the other panel members and judges from another panel agreed with this view.221 The author, however, did exercise some caution when he told his colleagues that his opinion would hold that the courts had jurisdiction; he wanted to check with them on that point because “this is a threshold issue and we would be disagreeing with the D.C. Circuit.” Here one sees acknowledgment that a conflict with other circuits will be created with a choice being made to do so.

Likewise, a Tenth Circuit judge, using that circuit’s opinion-circulation procedures, informed not only fellow panel members but all the court’s judges that “the result reached in this proposed opinion splits us from the Third Circuit.” The panel adhered to this position, but not before Judge Goodwin (sitting by designation) suggested in his concurrence to the proposed opinion “that we deal directly with the [Third and Fourth Circuit] cases that appear to go against us”222—an illustration of the felt need to deal seriously with cases that create conflicts.

Disagreement among judges may also arise. Illustrating the dialogue that can be provoked, a judge’s claim in a proposed dissent that the majority was creating an intercircuit conflict caused Judge Goodwin, who had already concurred in Judge Hug’s majority opinion, “to want to study the matter further—

220. Memorandum from Judge Alfred T. Goodwin to 9th Circuit Panel (Apr. 5, 1994) (on file with author) (regarding In re Estate of Ferdinand Marcos, 25 F.3d 1467 (9th Cir. 1994)).

221. Catholic Social Services, Inc. v. Thornburg, 956 F.2d 914 (9th Cir. 1992). See Memorandum from Judge Alfred T. Goodwin to 9th Circuit Panel (Feb. 23, 1990) (on file with author) (indicating that another panel member also agreed). Judge Goodwin’s law clerk, Mary Rose Alexander, in a memorandum to Judge Goodwin (Sept. 5 1990) (on file with author) advised the judge that “Judge Wald’s dissent appears to have the better argument on both the legislative history and the plain meaning of the statute,” and that the Wald dissent “compellingly refutes” cases from other circuits “as inconsistent with Supreme Court jurisprudence”.

222. Memorandum from Judge Alfred T. Goodwin to 9th Circuit Panel (Feb. 11, 1994) (on file with author) (regarding Homeland Stores, Inc. v. Resolution Trust Corp., 17 F.3d 1269 (10th Cir. 1994)).
revise it further to respond directly to the dissent. When the dissent is to a denial of rehearing en banc, one would not expect the panel to respond in public; a concurrence in a denial of en banc rehearing is extremely rare. As any response from the panel would have taken place in the intra-court discussion of the en banc call, one would not expect to see a published response. One can see this in the lack of response to Judge Norris' dissent from denial of en banc rehearing in *Act Up! / Portland v. Bagley*. He first claimed that the majority "repudiates the settled law of several circuits, including our own," and then said that the majority has cited "as the villain" in "inflicting such damage on the fabric of qualified immunity law" a Supreme Court summary reversal, which he said cannot bring about change in the law. A more cynical view for the lack of response is that the calls for rehearing en banc have been heard regularly, and frequently, from the same judges, leading to a "Cry Wolf" reaction.

Even when dealing directly with cases raised by the dissenter's intercircuit conflict claim, the majority may treat them much more briefly than does the dissenter. This may be because the latter, having already failed to persuade panel colleagues, may be attempting to catch the attention of other colleagues who monitor slip opinions; here the dissent paves the way for an en banc call just as a dissenter from the court's failure to grant en banc rehearing may be seeking to attract the Supreme Court's attention.

One might expect that, because of the importance of an en banc decision, claims of intercircuit conflict made by dissenters to an en banc opinion would receive a response. However, even in those situations, such claims by the dissenter may go unanswered. This was true with *Roy v. Gomez.* 167 There the Ninth Circuit en banc majority held it was not harmless error to omit, from instructions on aiding and abetting, the requirement that the jury find that the defendant intended to encourage or facilitate the principal's offense. Although devoting much of his discussion to what he believed was the majority's improper application of Supreme Court opinions, Judge Wallace, in dissent, added his assertion that the majority had created intercircuit conflict by refusing to apply one Supreme Court ruling rather than a Scalia concurrence to which he said it had improperly looked. 168

---

167. 81 F.3d 863 (9th Cir. 1996) (en banc).
168. *Id.* at 870 (9th Cir. 1996) (en banc) (Wallace, J., concurring and dissenting).
Another en banc case in which dissenters received no response also illustrates how intercircuit variation in legal interpretation can affect financial transactions which reach across circuit boundaries yet one circuit is face with having to rule on some aspect of those transactions. A bankruptcy court had applied the law of its own circuit but a contested transaction involved in the bankruptcy had taken place in another circuit which had different law. Claiming an intercircuit conflict, Judges Thomas and Hawkins complained that the Ninth Circuit, "[b]y imposing our view of how option contracts should be treated . . . on a Fifth Circuit bankruptcy, . . . unnecessarily intrudes upon the law of another circuit," and had created an intercircuit conflict with the Fifth Circuit but also "resolved the conflict by declaring Fifth Circuit authority inapplicable to a Texas bankruptcy," counter to the demands of "[c]omity and simple respect for our colleagues in another circuit."169 Despite the strength with which this claim was made, the majority did not mention the case the dissenters had pressed.

There was also no response from the en banc majority which ruled on a district court's power to hear a case without addressing sua sponte whether the appeals court should decline jurisdiction.170 In addition to criticizing the majority for not having considered a Seventh Circuit ruling that came after an earlier Ninth Circuit en banc,171 Judge Alarcon, in dissent, felt that the majority "creates an intercircuit conflict with those circuits that have addressed the question whether Brillhart abstention can be raised sua sponte." His "research ha[d] revealed," he said, "that every court that has addressed the question whether an appellate court can raise abstention sua sponte where the case involves the doctrines of federalism has answered in the affirmative."172 One might have thought that Judge Alarcon's extensive discussion would have been met by


171. Meyers v. County of Lake, 30 F.3d 847 (7th Cir. 1994); Acri v. Varian Assocs., 114 F.3d 999 (9th Cir. 1997) (en banc).
172. 133 F.3d at 1223-34 (Alarcon, J., dissenting).
Ninth Circuit dealt with the district court's designation of a defendant as a career offender, which depended on whether the person was "incarcerated" at a certain time. Here the judges "rejected a Sixth Circuit decision that reached 'the opposite conclusion.'"\footnote{149} In most cases of this type, the dissenter used the other circuit's ruling for support.\footnote{150} In most cases Lindquist examined, in which the majority opinion recognized conflict, "the deviating circuits acknowledged that their decisions would create a conflict but did not spend extensive time agonizing over that fact." Nonetheless, it is clear that conflict was created "knowingly" rather than through ignorance.\footnote{151}

An example of such explicit disagreement came in a case dealing with a statute of limitations question concerning RICO conspiracy. Here Judge Hall stated clearly why she disagreed with the Second Circuit's position interpreting a relevant Supreme Court case and explained the basis for her disagreement.\footnote{152} A slightly more cautiously-stated, but nonetheless direct, disagreement came in a case where Seventh Circuit judges, while claiming their "highest regard for our Sixth Circuit colleagues and the concerns that motivated them to adopt the Justice Department's view" concerning the stay provision of the Prison Litigation Reform Act, could not agree that the statutory language "can be pushed this far."\footnote{153}

Dissenters may also part company with other circuit's doctrine. For example, in responding to a claim that a video conference sentencing hearing violated the Federal Rules, Fifth Circuit Judge Henry Politz rejected reliance on a Ninth Circuit opinion for the proposition such sentencing was prohibited. Quoting from that opinion, he said, "I appreciate our sister circuit colleagues' concerns, but decline to accept their conclusion" because it "fails to recognize" an alternative meaning of the defendant's "presence."\footnote{154}

The presence of a dissent in another circuit's case certainly provides a basis for departing from the intercircuit consensus. It

\footnotesize{149. United States v. Latimer, 991 F.2d 1509, 1515 (9th Cir. 1993).  
150. Hellman, supra note 1, at 1077.  
152. Grimmett v. Brown, 75 F.3d 506, 517 (9th Cir. 1996) (dismissed as improvidently granted, see 519 U.S. 233 (1977)).  
153. French v. Duckworth, 178 F.3d 437, 443 (7th Cir. 1999), rev'd and remanded, see Miller v. French, 120 S.Ct. 2246 (2000)).  
154. United States v. Navarro, 169 F.3d 228, 241 (5th Cir. 1999) (Politz, J., dissenting).}
gives support to a panel that chooses to create an intercircuit conflict. Thus, dealing with the question of whether the statute outlawing movement of firearms in interstate commerce applied to items that were stolen after they had traveled in interstate commerce, the Ninth Circuit panel engaged in ritual deference to another circuit ("While we hesitate to part company"), but found the Sixth Circuit's dissenting judge's "reasoning more persuasive" and adopted his position.\(^{155}\) Drawing on a conflicting circuit's dissenter in this fashion not only serves to legitimate one's own position but shows that someone within the conflicting circuit believes that circuit "got it wrong," even if that is not the specific language used in citing the dissent. Likewise, a dissenting judge may turn for support to the opinion of a fellow-dissenter in another circuit.

**D. Responses to Dissenters' Claims.**

Particularly important are cases in which a dissenter—to the panel opinion or the denial of rehearing en banc—claims that the court is, creating an intercircuit conflict. An example is Judge Graber's claim that the Ninth Circuit majority in *United States v. Fuchs* "creates but does not acknowledge a split with two of our sister circuits" on the issue of plain error as to omitted jury instructions.\(^{156}\) Another, in a case concerning providing aid to a disabled parochial school student, is Judge Kleinfeld's assertion that several other circuits (and the Supreme Court) "have all held to the contrary" of the Ninth Circuit's position with one court doing so "in a case materially identical to this one." Not only was it the case that "[t]he majority puts us at odds with three other circuits to have considered analogous issues," but also "[t]he majority fails to adequately distinguish" the rulings of the other courts of appeals.\(^{157}\)

Because of the importance of such claims, we now examine responses to them. Faced with such claims, how does the majority respond? Does it do so? And if so, minimally or with extended discussion?\(^{158}\) The claims made in a dissenting opinion

\(^{155}\) United States v. Cruz, 50 F.3d 714, 716 (9th Cir. 1995).

\(^{156}\) 218 F.3d 957, 967, 969-970 (9th Circ. 2000) (Graber, J., dissenting). Judge Graber's claim of intercircuit inconsistency was joined with a number of other claimed errors in the majority's position. *Id.*, at 967.


\(^{158}\) See Hellman, *supra* note 1, at 1065-75.
bankruptcy court but the district court that had awarded the fees.\textsuperscript{106} In another instance, a panel dealt with whether the so-called “cause and prejudice” requirement was to be applied when a defendant challenged his guilty plea. The judges first noted “that a conflict exists in the circuits” and then observed that Ninth Circuit cases “appear to be more consistent with the answers reached by the Second and Third Circuits” than the Seventh Circuit.” However, the court still managed to sidestep resolution of the conflict because, said the court, that requirement did not prevent review of a defendant’s jurisdictional claim.\textsuperscript{107}

The stance of acknowledging-without-resolving does not mean the court will not later revisit the conflict issue and resolve it. One can see this with respect to the question of whether bankruptcy courts had jurisdiction to award attorney’s fees. The Ninth Circuit first noted that “[e]xistence of both an intra- and inter-circuit split was previously recognized by this Circuit” in a ruling which “did not address the issue.” Then, providing an extensive discussion and giving six reasons, the court adopted the Fourth Circuit’s view and rejected that of the Eleventh Circuit.\textsuperscript{108} In a 1999 case, the panel noted that the court had earlier “noted a conflict among the other circuits on [the] question of whether, under the provision of Rule 60(b) that a judge may vacate a judgment “on motion,” there must be a motion from a party or whether the judge may do so sua sponte, but that the court “did not resolve” it. Now, however, the court would “conclude that the Fourth and Fifth Circuit position” allowing a judge to act on his or her own “makes better practical sense.”\textsuperscript{109}

\textsuperscript{106} In re Cascade Roads, 34 F.3d 756, 767 n.12 (9th Cir. 1994).

\textsuperscript{107} Chambers v. United States, 22 F.3d 939, 945 (9th Cir. 1994) (en banc). The court even added, in a note, “Our analysis has been consistent with the approach the Second Circuit took.” Id., at 945 n. 11. In a later case, the court cited to Chambers as having noted an intercircuit conflict but not resolved it. See Gonzalez v. United States, 33 F.3d 1047, 1949 (9th Cir. 1994). See also Benjamin v. Jacobson, 172 F.3d 144, 188 n.28 (2nd Cir. 1999) (en banc) (Calabresi, J., concurring). Second Circuit Judge Guido Calabresi, in a separate concurring opinion, suggested that a disagreement between the circuits was one between “conflicting obiters” and thus his court should not decide the issue until it was fully presented. Id. at 188 n.28.

\textsuperscript{108} In re Yochum, 89 F.3d 661, 666 n.3 (9th Cir. 1996).

\textsuperscript{109} Kingvision Pay-Per-View v. Lake Alice Bar, 168 F.3d 347 (9th Cir. 1999); the earlier case noted was Clifton v. Att’y Gen. of Cal., 997 F.2d 660 (9th Cir. 1993).
3. Resolved Conflicts.

Related to responding to a claim of conflict by saying there is none, because cases can be distinguished, is to say that the conflict has been resolved. Here judges acknowledge that an intercircuit conflict exists but go on to argue that an intervening Supreme Court ruling has disposed of it. For example, in *Chan v. Society Expeditions*, the Ninth Circuit noted the Supreme Court's resolution of a conflict in *Conrail v. Gottschall*. Because the Supreme Court takes some cases to resolve intercircuit conflicts, it is not surprising that courts of appeals judges talk of whether the justices have resolved such conflicts, even if such mention at times seems to be fairly routine.

Even when the justices do not rule directly on an intercircuit conflict, one of their decisions addressing an issue on which several courts of appeals have ruled prompts attention because it affects the work of those courts of appeals which then come to the issue. Thus, in a case on whether liquidated damages under the Age Discrimination in Employment Act (ADEA) were excludable from taxable income, the Ninth Circuit panel first indicated that "[u]ntil recently" the case law had "firmly established." It then noted that this prior analysis was changed by a Supreme Court ruling, although the author observed that courts had continued to reach the same result "even under the Supreme Court's more restrictive test."

Congress' resolution of intercircuit conflicts is also mentioned from time to time. In one such instance, the Ninth Circuit, sitting en banc to review the criminal conviction of Judge Robert Aguilar, noted that Congress had obviated a conflict the Ninth Circuit had earlier created with the Second Circuit over the witness-tampering statute "by amending section 1512 to cover specifically non-coercive witness tampering." As Judge Hug observed for the court, "in removing the conflict . . ., Congress indicated what type of noncoercive conduct was meant to be proscribed . . .." In another case, after noting that there

113. *United States v. Aguilar*, 21 F.3d 1475, 1485 (9th Cir. 1994), *rev'd en banc*. The earlier Ninth Circuit case was *United States v. Lester*, 749 F.2d 1288 (9th Cir. 1984) (in conflict with *United States v. Hernandez*, 730 F.2d 895 (2nd Cir. 1984)). See also the discussion of this conflict, and of the resolution by Congress, in the subsequently-vacated
had been intercircuit conflict over the application of Rule 35(a) of the Federal Rules of Criminal Procedure, the Ninth Circuit held that as a result of Congress' amendment of the Rule, "it is now clear that a district court is divested of jurisdiction once a notice of appeal has been filed from the original sentence."\textsuperscript{114} Congress is not the only non-judicial policy-making body providing resolution of intercircuit conflicts that the courts then mention in passing. The courts have noted the U.S. Sentencing Commission's resolution of some conflicts when it amends the Sentencing Guidelines.\textsuperscript{115}

Court of appeals judges have a particular interest in instances in which a Supreme Court ruling has undercut the cases which have created a circuit split, as this eases the task of those courts of appeals which might otherwise have to choose one position over another. For example, a district court relied on a Third Circuit case but the Supreme Court resolved a conflict between the Third and Fourth Circuits and impliedly overruled the Third Circuit case. As a result, the Ninth Circuit felt required to reverse the district court.\textsuperscript{116} A case on sentencing for conspiracy also illustrates this point. Judge Goodwin noted that the defendant "points to an apparent conflict among circuits" and an earlier Ninth Circuit case supposedly supporting her position, and cases from other circuits "which she contends support [its] logic." However, he said, "recent Supreme Court precedent appears to defeat" defendant's argument, with the \textit{Edwards v. United States} "holding undercut[ting] the vitality" of the cases on which defendant had relied.\textsuperscript{117}

Supreme Court resolution of an intercircuit conflict is particularly likely to receive attention by the court whose earlier panel opinion, United States v. Aguilar, 994 F.2d 609, 639 (9th Cir. 1993).

\textsuperscript{114} United States v. Ortega-Lopez, 988 F.2d 70, 72 (9th Cir. 1993). The Federal Rules are developed by the Judicial Conference of the United States, promulgated by the Supreme Court, and go into effect if Congress does not disturb them. Thus, one could argue that the judiciary, although not the Supreme Court itself, had been the prime actor resolving this intercircuit conflict.

\textsuperscript{115} See the acknowledgment of Amendment 484, which "addresses an inter-circuit conflict regarding the meaning of the term ‘mixture or substance’" in Section 2D1.1 of the Guidelines. U.S.S.G.App.C, Amend. 84, referred to in United States v. Innie, 77 F.3d 1207, 1209 (9th Cir. 1996), and United States v. Millican, 68 F.3d 482 (9th Cir. 1995)(Table), 1195 WL 623436.

\textsuperscript{116} Saari v. Smith Barney, Harris Upham & Co., 968 F.2d 877, 879 (9th Cir. 1992); see also Nicholson v. CPC Intl Inc., 899 F.2d 221 (3rd Cir. 1989); and Gilmer v. Interstate/Johnson Lane Corp., 895 F.2d 195 (4th Cir.1990), aff'd, 500 U.S. 20 (1991).

\textsuperscript{117} United States v. Jackson, 167 F.3d 1280, 1284-1285 (9th Cir. 1999); see \textit{Edwards v. United States}, 523 U.S. 511 (1998).
disposition the justices considered. We see this in the Ninth Circuit’s mention in *Wilson v. Drake* that the Supreme Court had resolved an intercircuit conflict in reversing one of the court of appeals rulings in *United States v. Smith*. There was also a mention in a subsequent immigration case of the Supreme Court’s resolution of a conflict that the Ninth Circuit had created with the D.C. Circuit.

At times the Ninth Circuit’s reference to Supreme Court action on intercircuit conflicts occurs when its position has been vindicated, as when, after the Supreme Court affirmed the Ninth Circuit in *Hallstrom v. Tillamook County*, the Ninth Circuit applied that ruling to Clean Water Act regulations. However, Ninth Circuit judges are particularly likely to comment on Supreme Court action when the justices have dealt adversely with a position taken by the Ninth Circuit itself. In a sentencing case where the Supreme Court had undercut the Ninth Circuit, Judge Rea (of the Central District of California, sitting by designation) observed that *United States v. Niven*, a Ninth Circuit ruling on concurrent or consecutive sentences for aggregate losses from separate offenses, had "been criticized by at least one other circuit" and a "number of circuits... have not adopted the *Niven* rationale." He then observed "that the law has undergone a significant change since our decision in *Niven*," with "the precedential force of our holding in *Niven*... severely undercut, if not eliminated, by the Supreme Court's recent decision in *Witte v. United States*," which resolved the intercircuit conflict, as well as by post-Witte Ninth Circuit decisions.

---

United States Army, when the judges observed, "We are unable to avoid an intercircuit conflict, because the Sixth Circuit has rejected the First Circuit's position."\(^{130}\)

Despite the apparent need to choose, the court may still be able to avoid doing so. It did so, for example, in a case on exclusion of a defendant's confession because of deliberate delay between arrest and arraignment. The Ninth Circuit noted it had "never expressly chosen between an approach that requires suppression of non-safe harbor confessions if the court determines the delay to have been unreasonable (McNabb-Mallory) and an approach that allows admission of some non-safe harbor confessions given during an unreasonable delay in arraignment if the court believes that, on balance, suppression is not warranted," but the panel found that either way the confession should be excluded. However, it reached this result only after extensive discussion of other circuits' competing positions and after coming close to choosing between the standards when it observed that "most of our cases are more consistent with the Seventh Circuit balancing test than with the Second Circuit McNabb-Mallory bright line approach."\(^{131}\)

When an intercircuit conflict cannot be finessed in some way, a court must choose one competing position over another. However, the presence of even one court on each side provides the panel with material to support either position.\(^{132}\) When faced with another question which the Ninth Circuit had not previously addressed—"whether the Coast Guard has 'exercised' statutory authority over the 'working conditions' on board uninspected vessels"—a panel said it "must turn to sources outside of our circuit law to answer the question." Yet, when it found that one circuit went one way, two the other, with another "less clear," it had to choose. The outcome was that "[w]e agree with the Secretary, the Commission and the Second and Eleventh Circuits" that the Secretary had the requisite authority and providing a reason for not adopting the reasoning

---

130. 125 F.3d 1296, 1302 (9th Cir. 1997). In the same case, the court rejected the Army's claim that a certain construction "would set up an intercircuit conflict with a Fifth Circuit case," explaining why the claim was "incorrect." Id. at 1301.

131. United States v. Alvarez-Sanchez, 975 F.2d 1395, 1396-1404 (9th Cir. 1992).

132. For an instance of a dissenting judge agreeing that "[t]he creation of a conflict is justified" while disagreeing with colleagues over the majority's invalidation of the statutory provision at issue because a Sixth Circuit judge's separate opinion properly found the relevant statute constitutional. See French v. Duckworth, 178 F.3d 437, 448 (7th Cir. 1999) (Easterbrook, J., dissenting).
of two other circuits.\textsuperscript{133}

When a conflict exists and more courts of appeals have adopted one of the competing positions, there may be a pull from the majority position. This is like the situation discussed earlier in which a court, rather than creating a conflict, goes along with circuits that had already decided an issue. At times, the court simply notes that its own view is “in accord with the majority view”\textsuperscript{134} or that its caselaw “has been adopted by most of the circuits that have addressed the issue.”\textsuperscript{135} In deciding to follow the prevailing view, the judges may nonetheless take the time to demonstrate the weakness of the minority position. A Tenth Circuit majority did this when it criticized the one circuit that had adopted a higher standard than “reasonable belief” as to whether a prospective arrestee lived in a residence, saying the Ninth Circuit “provided no rationale for adopting” its standard.\textsuperscript{136}

5. Creating a Conflict.

If joining one side or the other in a pre-existing conflict is not easy, creating a conflict (being the “bad guy”) is far more difficult. Yet at times court of appeals judges are willing to “take the bull by the horns,” they do so because they believe their position “is the better one.” As a Ninth Circuit judge, who said, “I never felt intercircuit conflict should be avoided,” observed recently, “If three conscientious judges after full consideration decide that if the rule from another circuit is not a good rule for the Ninth Circuit, they have their own duty and intellectual responsibility to decide the case.”\textsuperscript{137}

Judges are often quite direct in acknowledging that they are

\textsuperscript{133} Herman v. Tidewater Pacific, Inc., 160 F.3d 1239, 1245 (9th Cir. 1998). This case also contained an instance of an acknowledgment that the court was creating a circuit split on another, subsidiary question – whether “the waters at issue here are within the boundaries of Alaska.” Id., at 1243. For another example, where a court “respectfully disagree[d] with one circuit’s position” and “instead align[ed] with another circuit,” see Drew v. United States, 217 F.3d 193, 202-203 (4th Cir. 2000).

\textsuperscript{134} United States v. One Toshiba Color Television, 213 F.3d 147, 156 (3rd Cir. 2000)(en banc) (“The majority of courts of appeals to consider the fate of a prior forfeiture proceeding that violated notice requirements agree that a judgment issued without proper notice to a potential claimant is void.”).

\textsuperscript{135} United States v. Gandia-Maysonet, 227 F.3d 1, 5 (1st Cir. 2000) (standard in Rule 11 cases; also noting agreement with Rules and advisory committee notes).

\textsuperscript{136} Valdez v. McPheeters, 172 F.3d 1220, 1224-25 (10th Cir. 1999). The court also noted, “The actual status of law in the Ninth Circuit is open to question.” Id. at 1225 n.1.

\textsuperscript{137} Interview with Senior Judge Alfred T. Goodwin, Pasadena, Cal. (Jan. 25 2000).
cases (from the Tenth Circuit, the more recent Eighth Circuit case, and the panel majority) "reaching the same result semi-independently." The last communication before the vote on rehearing en banc (which did not succeed) pointed to "a series of judicial and administrative pronouncements" which shared Judge Norris's view of the statute. It concluded, "Most recently, Chief Judge Lay or the Eighth Circuit and Judge Posner of the Seventh Circuit have explicitly stated the apparent purpose of §4205 'is to allow release on parole before the earliest date allowed by subsection (a).'

A somewhat later case, Federal Labor Relations Authority v. U.S. Department of the Navy, illustrates extensive use of other circuits' rulings and the effect of action by the Supreme Court during the pendency of a case. Under federal labor law and the Freedom of Information Act (FOIA), a divided Ninth Circuit panel had enforced a Federal Labor Relations Authority order that government employees' home addresses should be revealed. After a petition for rehearing which claimed an intercircuit conflict, two off-panel judges who were members of another panel with a similar issue "stopped the clock." They argued that the panel majority had misapplied the FOIA as recently interpreted by the Supreme Court and that the majority was also in conflict with a Second Circuit decision which had "intelligently disposed" of an argument made by the Ninth Circuit panel.

The panel majority responded to explain that "the split existed before our decision was filed," with "divided panels and en banc reconsiderations . . . common" on the issue." Thus, they argued, taking the case en banc "will not create national uniformity," something "[o]nly the Supreme Court or Congress can do . . . now," with it "likely that the Supreme Court will grant certiorari in one or more of the cases," which they said "it certainly should." In their extensive discussion of the merits, the two judges noted their agreement with the Third Circuit's en banc opinion on the subject.

A judge who had earlier called for en banc reconsideration was "not convinced that a circuit split currently exists" and thus did "not find . . . persuasive" the argument that en banc rehearing would not create national uniformity. This judge found the Third Circuit case on which the panel majority had relied to be based on a different FOIA exemption from the one

---

235. 958 F.2d 1490 (9th Cir. 1992).
used in the current case, so "there is currently uniformity on the
issue of disclosure of federal employees' mailing addresses." Arguing that the possibility of Supreme Court consideration
should not preclude further court of appeals examination of the
issue, the judge said not taking this case en banc "will disrupt
this uniformity" and "will result in a split within this circuit and
among all the circuits." This memorandum resulted in a
further response from the majority. While acknowledging what
had taken place in the Third Circuit, they noted agreement with
their position by the Fifth Circuit—a decision they examined
extensively, quoting from it at length—and indicated that
several other circuits had the issue at various stages of
consideration, with a Fourth Circuit en banc opinion to be
issued.

Another judge, who had also made an en banc call in this
case, provided additional consideration of the Fifth Circuit case.
He felt it was "most useful because it serves both to sharpen and
narrow the points of disagreement" he had with the position
taken by the panel opinion's author. He drew heavily on that
case in a comparison with the panel opinion, and he argued that
the Ninth Circuit's ruling should be based on it. He also argued
that the multi-factor test used by the Ninth Circuit "should be
replaced by the approach followed in the Second, Seventh, and
D.C. Circuits."

Prompted by this analysis, some time later the panel author
agreed that "the Fifth Circuit analysis is principled and
completely sustainable and one that I could embrace," which
would allow avoidance of the problems the judge's colleagues
had raised. Shortly thereafter, the Supreme Court granted
certiorari to the Fifth Circuit case, and, after some intracourt
communication, the decision was made to await the Supreme
Court's ruling. "Ultimately," argued the author of the panel
opinion, "the Supreme Court's guidance will resolve the issue for
the many cases which have been litigated in every circuit in the
country," but withdrawing the panel's already-filed opinion was
said to be "inappropriate because the Fifth Circuit relied, to
some extent, on our opinion in its decision." (The Supreme
Court, ruling that the names and addresses should not be made
available, reversed the Fifth Circuit's ruling.)

236. "Moreover, even if the Supreme Court does grant certiorari, this should not
prevent us from giving this issue the type of consideration that it deserves and that the
other circuits have afforded it."

In a case dealing with whether an incarcerated prisoner who had committed an offense leading to deportation was entitled to a prompt deportation hearing, discussion of other circuits' cases also included exchanges both within the panel and throughout the larger court. Although deciding that the alien had stated statutory causes of action, the panel itself was initially unsure of the direction to take. Both before and after requested supplementary briefing, it was "inclined to follow the Eighth Circuit" and "tentatively inclined to affirm on the basis of the 8th Circuit's holding" that the Immigration and Naturalization Service could not be required to hold such hearings on an alien's request. However, on the basis of other statutes, the majority upheld the alien's claim. This led Judge Rymer, citing the Eighth Circuit case without suggesting an intercircuit conflict, to dissent on the ground that the immigration statute was intended to benefit federal prisoners.

The government's suggestion for rehearing en banc claimed conflict with both the Seventh and Eighth Circuits. The majority responded that they had not decided on an implied right of action (the possible basis for an intercircuit conflict) but instead had used a statutory basis "consistent with Eighth Circuit precedent in an analogous situation." That did not satisfy an off-panel judge who first asked the panel to reconsider its opinion and then called for en banc rehearing. Asserting an intercircuit conflict, that judge said, "the result conflicts with decisions of four other circuits;" those courts "unanimously agreed" of the relevant statute and none had "allowed an incarcerated alien to maintain such an action." The judge did concede, however, "that none of these conflicting decisions explicitly addressed the issue of standing under the APA or the Mandamus Act," on which the panel majority had relied.

The response reiterated the assertion that there was no conflict with other circuits. However, the judges also argued that the case was not worthy of en banc rehearing, and that the Supreme Court could take the case if it felt the panel had misinterpreted its recent rulings on standing under the APA. The off-panel judge then further urged a positive vote on rehearing en banc. That led the panel author to assert that the

238. Soler v. Scott, 942 F.2d 597, 606 (9th Cir. 1991). One judge's clerk had recommended reversing the district court's judgment for the INS, the position ultimately adopted, but Judge Goodwin's law clerk, finding the Eighth Circuit's "reading... is sound," had recommended affirmance. Memorandum from Ira Daves to Judge Alfred T. Goodwin (Sep. 25, 1990) (on file with author).
opinion in the case, which did involve “interesting legal questions upon which reasonable judges could differ,” “does not conflict with any decision in any other circuit.... does not conflict with any decision from this circuit.... [and] is based upon a reasonable reading of current Supreme Court precedent.” Thus, en banc rehearing was not warranted. (After en banc rehearing was voted down, the case went to the Supreme Court, which granted certiorari, vacated, and remanded with directions to dismiss as moot.)239

Still another case further illustrates the situation in which there is no public evidence that a possible conflict was examined, but where intercircuit conflict has been raised only after the panel has issued its opinion, and, with an off-panel judge involved, the matter is examined and the opinion stands. The case, under the Sentencing Guidelines, concerned the time from which a term of supervised release should be measured.240 After receiving the government’s PFR, the panel author suggested that, “because there is an apparent conflict between our opinion and the Eighth Circuit, we call for a response to the petition.”241 Another member of the panel, while saying, “I am not sure there is a conflict with the Eighth Circuit because the issues were presented differently,” nonetheless agreed that a response should be obtained. After the response was filed, he continued in that view: “I don’t think there is a true conflict with the Eighth Circuit.”

At this point, with the panel having denied rehearing, an off-panel judge “stopped the clock” to inquire, “before the mandate issues, whether the panel has considered the conflict its opinion seems to create with the Eighth Circuit.” The panel author responded, assuring his colleague “that the panel carefully considered the Eighth Circuit’s decision and made a studied and calculated decision to reject it.”242 The off-panel judge responded, indicating his understanding why the case did not appear in the panel’s opinion; it was, after all, “decided just weeks before our opinion issued;” however, he argued that the government “persuasively points out the conflict.” He now wished to know “and I suspect future defendants in analogous

240. United States v. Blake, 88 F.3d 824 (9th Cir. 1996).
situations may like to know" whether the panel had found the Eighth Circuit ruling "distinguishable, or just flat out rejected [its] analysis of the legal issue." He also raised the question of whether litigants should know the panel's basis for rejecting the out-of-circuit ruling. The author's response to the off-panel judges and the remainder of the court suggested that the panel had followed an earlier circuit ruling rather than the Eighth Circuit.\textsuperscript{243} Declining to place an explanation of the reasoning in the opinion, he said, "We have already published our opinion along with our reasoning in the case. I assume that our differences with the Eighth Circuit are apparent to all readers." The off-panel judge then withdrew his stopclock, concluding the matter.

2. Modes of Reacting.

We now turn to look more specifically at particular aspects of judges' dealing with other circuits' cases and intercircuit conflict. At times the judge claiming an intercircuit conflict is a dissenter on the panel initially deciding the case; perhaps more frequently, off-panel judges make the claim of intercircuit conflict. The panel itself may even seek en banc hearing in connection with a matter implicating intercircuit conflict, as when a panel made an en banc call because the judges wished to overrule a part of an earlier case "that is in conflict with our sister circuits"; that case was heard en banc.

The \textit{United States v. DeSantiago-Martinez} case,\textsuperscript{244} commenting on the standard for a defendant's appropriate waiver of the right to appeal a sentence, provides an example of a judge raising the issue of intercircuit conflict in support of calling for an en banc court subsequent to his dissent from the panel. Saying that the panel majority's holding "has been explicitly disapproved of by one of our sister circuits," he examined the Eleventh Circuit's case on the subject and also noted the Fourth Circuit's adoption of a rule like that of the Eleventh Circuit. When the panel majority responded that the Eleventh Circuit had responded to the panel's earlier, rather than later amended, opinion which contained additional information, an off-panel judge insisted "there is an intercircuit

\textsuperscript{243} "We decided to follow the lead of our own court instead of that of another circuit on a petition for rehearing." Memorandum from Judge Alfred T. Goodwin to Associates on 9th Circuit (November 5 1996) (on file with author).

\textsuperscript{244} \textit{United States v. DeSantiago-Martinez}, 980 F.2d 581 (9th Cir. 1992).
conflict."

*United States v. Vea-Gonzales*\(^{245}\) is an example of an off-panel judge claiming intercircuit conflict. That judge felt that the panel’s opinion, with its holding that a defendant sentenced as a career offender could challenge prior convictions at sentencing, “puts us at odds with every other circuit which has considered the [relevant Sentencing Guidelines] amendment.” Joining that judge and recognizing that the Ninth Circuit might yet be right, a colleague said “If all the other circuits are wrong, then we should stand our ground,” but concluded, “[I]n this case, they are not wrong.” Another example, with the claimant saying the panel had opted for the “wrong” position, was *Reynolds v. Martin*.\(^{246}\) There, in calling for en banc rehearing, a judge said that the court had once again done just that in applying the Civil Rights Act of 1991 retroactively, and, “Once again, the justification for a holding [was] contrary to six other circuits.” (Having failed to persuade his colleagues to go en banc, this judge and three others dissented from the denial of rehearing en banc.\(^{247}\)

In a case on upward departures from the Sentencing Guidelines,\(^{248}\) debate within the court about cases from other circuits began early because the panel circulated its opinion before filing. The principal problem in the case was one of intracircuit conflict, but the work of other circuits was implicated because, as one off-panel judge put, the issue was said to have “caused problems in other circuits,” and the panel author was said to have relied on a Second Circuit case that had been undercut by later cases there. The mention of cases from other circuits continued without mention of “intercircuit conflict” for over a year until another off-panel judge raised the issue after the panel had amended its opinion.\(^{249}\) The amendment, which noted a conflict with the Second and Tenth Circuits and rejected the position of those courts, prompted an ultimately inconclusive dispute over the panel’s duty to inform the court of creation of the conflict, and the panel’s amended opinion stood.

---

245. 968 F.2d 321 (9th Cir. 1993).
246. 985 F.2d 470 (9th Cir. 1993).
247. Estate of Reynolds v. Martin, 994 F.2d 690 (9th Cir. 1993)(dissent from denial of rehearing en banc).
248. United States v. Castro-Cervantes, 911 F.2d 222 (9th Cir. 1990), amended, 927 F.2d 1079 (9th Cir. 1991).
249. United States v. Castro-Cervantes, 927 F.2d 1079 (9th Cir. 1991)(amending 911 F.2d 222 (9th Cir. 1990)).
Another instance came in a criminal case where the disputing judge made the panel’s treatment of sufficiency of the evidence his principal concern. In addition to saying that the panel’s action was “inconsistent with the precedents of the Supreme Court and this court,” the judge asserted that “the panel’s maverick approach is inconsistent with that of every other circuit.” He argued, “I see no reason for us to be the first court to create a circuit split over what until now was thought to be such a clear-cut rule.” The panel responded after another judge had chimed in by saying “the new standard puts us out of step with the rest of the country” and there was some further communication. Saying that “The so-called intra- and intercircuit conflicts identified... are based on an extravagant misinterpretation of our opinion,” the panel judges believed that the off-panel judge’s principal concern was his disagreement with the panel’s result; they did not think that warranted en banc reconsideration. Further discussing the claimed intercircuit conflicts, they defended their action by saying that their formulation of the rule “is consistent with the law in all circuits, and has been explicitly employed in at least one other circuit.” As a result, they said, “Thus, far from ameliorating an inter-circuit conflict, [the] en banc call, if successful, may well create one.”

Other instances of off-panel judges claiming a circuit split appear in several of the calls for en banc hearings by one of the circuit’s more liberal judges. These also serve to illustrate the relation between intercircuit conflicts, en banc hearings, and the Supreme Court; they also illustrate the fact that a judge may appear to be seeking en banc rehearing not because of opposition to intercircuit conflict in principle but because of the results the judge seeks. Among the judge’s efforts were a call for en banc rehearing of two Sentencing Guidelines cases, which he felt “create a split between our circuit and the only other circuit to have decided the issue,” and his call for review of two Superfund cases concerning legal fees as part of clean-up costs because the panel’s rulings in both cases250 “create a circuit split” with the Eighth and Sixth Circuits. In the latter instance, the judge called for en banc “in the hopes of sparing the Supreme Court some unnecessary work... resolving the

250. See United States v. Sanchez, 967 F.2d 1383 (9th Cir. 1992); United States v. Harrison-Philpot, 978 F.2d 1520 (9th Cir. 1992).
conflict with the Sixth and Eighth Circuits."\(^{251}\)

This judge could, however, also seek such conflicts out of the belief that the correct position was the one stated elsewhere. The *Wong* Sentencing Guidelines case is one such instance.\(^{252}\) This judge said that the Ninth Circuit ruling “brings the Ninth Circuit into line with four other circuits, two of which... decided the issue en banc” so that “I cannot as yet claim a conflict in the circuits as a reason for taking *Wong* en banc,” the judge wished to join “a number of impassioned dissents” in those other cases. He stated that he was “not hesitant to create an intercircuit conflict,” instead of trying to avoid work for the Supreme Court. Instead, the judge said directly, “Because of the exceptional importance of this issue, I have no reluctance to put pressure on the Supreme Court by creating a conflict in the circuits” because the matter “has ‘percolated’ in the circuits long enough [and] it is time for the Supreme Court to resolve it once and for all.” Illustrative of the position that judges of the courts of appeals have to make choices concerning intercircuit conflicts, he declared, “the Ninth Circuit should step up to the plate and take our cuts at playing a leadership role.”\(^{253}\)

Still another instance of an off-panel judge raising the issue of an intercircuit conflict came in a case concerning a Christmas display held by the panel not to be a violation of the Establishment Clause.\(^{254}\) Here a judge, drawing on the panel dissent, contended that the panel majority “creates a split among the circuits on the question of whether or not the guarantee of free expression can trump the Establishment Clause,” as “[t]wo other circuits have addressed this precise question and have reached the opposite conclusion.” Then, in the middle of the Ninth Circuit’s debate over whether to rehear the case en banc, the Supreme Court handed down its decision in the *Lamb’s Chapel* case.\(^{255}\) The dissenter believed that case “if anything, reinforces my dissent.” However, the two judges in the panel majority asserted that the Supreme Court decision “resolves the inter-circuit conflict that long preceded it” and they

\(^{251}\) *Cf.* Key Tronic Corp. v. United States, 30 F. 3d 1105 (9th Cir. 1993); Stanton Road Associates v. Lohrey Enterprises, 984 F.2d 1015 (9th Cir. 1993).

\(^{252}\) United States v. Wong, 2 F.3d 927, 929 (9th Cir. 1993).

\(^{253}\) In a footnote, he added, “While I agree that we should generally be cautious about creating conflicts in the circuits, we should avoid being overly cautious.”

\(^{254}\) Kreisner v. San Diego, 988 F.2d 883 (9th Cir. 1993).

further contradicted the claim by the off-panel judges that the panel had created a circuit split by saying, "The split by saying it existed before our decision."

As this last rejoinder indicates, instead of claims that the panel has created an intercircuit conflict, there are assertions that the panel has continued such a conflict. In a case on qualified immunity, a judge claiming an intercircuit conflict said that in misreading a Supreme Court decision, the panel had gone against both earlier Ninth Circuit precedent and "the law of at least seven other circuits." However, he also noted several circuits that had taken a contrary position. It was to those three circuits that the panel turned for support in responding. 256

There was at least implicit agreement in this last case that an intercircuit conflict already existed. However, the judges may dispute whether a split exists or would, or might, be created and thus should be avoided. In asking the panel to rethink its opinion in a sentencing guidelines case, 257 a judge stated "there is already a conflict in the circuits" caused by a Third Circuit case which "[t]he parties apparently failed to cite to the panel." With a circuit split already present, the judge argued that the panel "should amend its opinion and discuss the Third Circuit case and base its choice between that approach and the Second Circuit's on the merits of the respective alternatives rather than upon a no longer applicable need to avoid an already existing inter-circuit conflict."

In a case on the availability of injunctions in labor cases, which the court did hear en banc, 258 when a judge "stopped the clock" to tell the panel that its ruling "appears to conflict squarely with... other circuit courts of appeals," the panel opinion's author responded both that "The circuit split over this issue pre-dated our opinion" and that the conflict "aligns the Ninth Circuit with the majority of other circuits to consider this issue." And we have already seen discussion of the question of the existence of an intercircuit conflict arising in the extended debate over whether to give en banc rehearing in Federal Labor Relations Authority v. United States Department of the Navy decision. 259

256. ActUp!/Portland v. Bagley, 971 F.2d 298 (9th Cir. 1992), amended, 988 F.2d 868, 880 (9th Cir. 1993).
258. Miller ex rel. NLRB v. California Pac. Medical Ctr., 991 F.2d 536 (9th Cir. 1993), rev'd en banc, 19 F.3d 449 (9th Cir. 1994) (en banc).
259. 958 F.2d 1490 (9th Cir. 1992).
Determining whether an intercircuit conflict exists is, of course, only preliminary to deciding whether to adhere to the new position that is alleged to create the conflict or to join the other circuits' case law. Where there is a preexisting conflict, the question becomes which available position to adopt; here within-circuit disagreements are likely to overlay positions that differ among other courts of appeals. An example of this latter situation can be found in the *Federal Labor Relations Authority* case. Faced with what they claimed was disagreement among the circuits, the Ninth Circuit panel majority replied to another panel working on a similar case by drawing on cases from other courts of appeals, particularly the Third and Fifth Circuits, to support positions in its own opinion. However, its arguments were met in turn with claims that the Third Circuit case was based on a different FOIA exemption and that the proposed opinion went beyond the Fifth Circuit's ruling.

An instance in which judges suggested that the Ninth Circuit should adopt the position of other circuits was the *Gaudin* case, on whether the materiality of false statements was a jury question or a matter of law.\(^{260}\) The situation in this case was somewhat complex because two judges who had signed onto the panel opinion made the argument that other circuits' law should be adopted; despite their initial vote, they voted to accept the parties' en banc suggestion, and who, and after an off-panel judge's en banc call, argued that "Every other circuit with an opinion on the issue has disagreed with *Valdez,*" the pre-existing Ninth Circuit precedent.\(^{261}\) They also pointed to an important subsequent Supreme Court ruling on the matter,\(^{262}\) which they said made *Valdez* "no longer good law" and which required that the *Gaudin* panel ruling be reheard en banc "so that we may overrule *Valdez* and bring our law in line with that of every other circuit, the Court, our own precedent in analogous areas, and common sense." In fact, the court did grant en banc rehearing; the en banc court adopted the same position as the panel, and the Supreme Court granted review and affirmed the en banc court.\(^{263}\)

---

\(^{260}\) United States v. Gaudin, 997 F.2d 1267 (9th Cir. 1993).

\(^{261}\) United States v. Valdez, 594 F.2d 725 (9th Cir. 1979).


If judges can urge the adoption of other circuits’ positions they can also argue against using out-of-circuit caselaw. Thus, when an off-panel judge, alleging the creation of a circuit split, sought en banc review of two Superfund cases,264 the author of the panel’s rulings argued to his court colleagues that the conflict was “unavoidable.” This he said was because the ruling of one circuit was contained in only one paragraph and the majority was “unable to accept the Eighth Circuit’s shallow analysis of this statutory interpretation.”

In another case, an off-panel judge, agreeing with the panel dissenter, implicitly argued for adoption of the Second Circuit’s position. He said that the majority had created a circuit split and that its “attempt to distinguish the Second Circuit case by minor intervening changes” produced by a statute “is unavailing.” The response by the panel opinion’s author was that there was “no conflict between the majority’s opinion and the Second Circuit’s” because the Congress had mandated a change and thus the Ninth Circuit faced a different situation. And where a Ninth Circuit judge argues for adopting the position of another circuit’s dissenter, by definition the argument is that the majority position there should not be adopted. Thus, during the debate on whether the Gwaltney sentencing case265 should be reheard en banc, the dissenter from the panel opinion argued for adopting the position of dissenting Judge Lay in an Eighth Circuit case the panel had missed and not to adopt the position of the Eighth and Tenth Circuits.

PART VI. CONCLUDING COMMENTS

This article adopts the perspective of judges of the U.S. courts of appeals rather than a perspective focused on the U.S. Supreme Court to present an initial picture of how judges of the U.S. courts of appeals treat cases from other circuits, and particularly how they deal, or fail to deal, with claimed or actual intercircuit conflicts; this includes whether they acknowledge the existence of such conflicts and, if they do, how they confront them.

Examination of opinions primarily from the U.S. Court of Appeals for the Ninth Circuit and of communication among the judges prior to release of opinions demonstrates several things.

264. Key Tronic Corp. v. United States, 30 F.3d 1105 (9th Cir. 1993); Stanton Road Assoc’s v. Lohrey Enterprises, 984 F.2d 1015 (9th Cir. 1993).
265. United States v. Gwaltney, 790 F.2d 1378 (9th Cir. 1986).
One is that, in the absence of an existing intercircuit conflict, courts of appeals judges will often go along with existing rulings on an issue, although at times they are willing to create a conflict. When an intercircuit conflict is claimed to exist, the judges respond in several ways. They may do no more than acknowledge the conflict. However, at times they do more. They distinguish cases claimed to conflict; they suggest that the conflict has been displaced by a Supreme Court ruling or congressional action; and, most directly, they take sides in the dispute. When a dissenter claims the presence of such a conflict, the majority at times makes no response. Yet there are numerous instances in which majority and dissenter, meeting normative expectations that judges will address each other's concerns, engage in an explicit discussion of the purported comments. And there are still other cases containing an implicit dialogue in which a "conflict" as such is not addressed but both sides discuss the same cases.

Intercircuit conflicts, real or perceived, are seldom the only issue in a case, and quite often they are far from being the core matter under discussion. Most frequently, circuit splits are often discussed in a case along with intracircuit conflicts and with conflicts that arise between court of appeals rulings and the Supreme Court. In short, it appears that seldom does a stop-clock or en banc call appear to rest on an intercircuit conflict alone. The varied elements in the mixture include claims that the panel has misread prior circuit precedent, created a within-circuit conflict, created an intercircuit conflict, and has decided a case contrary to ruling Supreme Court precedent. Indeed, intracircuit conflicts and alleged conflicts with Supreme Court precedent appear to receive higher levels of priority, and perhaps more attention, than intercircuit conflicts.

Not only are questions of intercircuit conflict piled atop claims concerning intracircuit conflict and about tension between Supreme Court precedent and court of appeals rulings. At other times, these matters are linked. There is, for example, a clear linkage between the presence of intercircuit conflict and taking cases en banc, as some judges feel that intercircuit conflicts are sufficiently important to make a case "en banc-worthy." This connection is related to the more general question of whether a court of appeals should sit en banc to deal with issues before they go on their way to the Supreme Court or should avoid expending resources because the cases will go to the Supreme Court in any event and will reach the justices
faster without an en banc hearing.\textsuperscript{266} If other circuits have decided cases in such a way that intercircuit conflict exists and those cases have been brought to the Supreme Court, the conflict-with-Supreme Court and intercircuit conflict claims may be intermixed.

While intercircuit conflict claims may become mixed with other issues, it is clear from this examination that potential and actual intercircuit conflicts do receive the attention of the courts of appeals. They do not either wantonly manufacture them or pass them on willy-nilly to the Supreme Court. While some individuals or panels of judges are not faint of heart with respect to creating such conflicts, for the most part the judges go along with other circuits' views rather than create conflict, and efforts are made to minimize the extent of intercircuit conflict.

The picture presented here, while extensive, is nonetheless preliminary. More attention to the perspective of court of appeals judges is needed. One could, for example, focus on how courts of appeals have dealt with the cases the Supreme Court cites when it grants review to resolve intercircuit conflicts, and how the justices deal with cases in which intercircuit conflict has already been discussed.

One could further add to our store of information by using any specific circuit as the focal point to examine questions like the following:

(1) How does the Supreme Court treat intercircuit conflict in those cases where the possibility of a conflict has been raised by a lower court judge and perhaps debated in that judge's court? Does the Supreme Court grant review to resolve those conflicts which have been discussed by the court of appeals?

(2) When the Supreme Court accepts a case from a court of appeals to resolve an intercircuit conflict, or, while taking another circuit's case, mentions ruling from the former court, are the cases the lower court considered when it dealt with a claim of real or putative intercircuit conflict the same cases the Supreme Court cites or do the justices refer to cases that the lower court has not discussed? The latter may be the situation if there is a lag between the lower court ruling and the granting of review, or if the court of appeals ruling to which cert is granted has simply applied earlier circuit precedent where intercircuit

\textsuperscript{266} This matter is explored in Stephen L. Wasby, The Supreme Court and Court of Appeals En Bancs, 33 McGEOGE L. REV. (forthcoming), originally presented to the American Political Science Association, Washington, D.C. (2000).
differences were discussed. Timing is important. At times, most or all of the cases creating a purported conflict are decided within a short span of time and are brought to the Supreme Court almost simultaneously, while other cases involved in the conflict are much older, with certiorari having perhaps been denied in those cases.

(3) Conversely, did the lower court consider the cases the Supreme Court cited as creating an intercircuit conflict, and, if so, how did the lower court deal with those cases? How does that treatment compare with the Supreme Court’s treatment? Whether the lower court did deal with the cases cited by the justices will be a function of timing—of when those cases were decided in relation to when the court of appeals being studied created circuit precedent on the issue.

The data and analysis that such studies would provide would add immeasurably to our knowledge of the operation of the federal court system. In particular, it would help redress the disproportionate attention to how the Supreme Court treats intercircuit conflicts. More important, it would serve to minimize the portray of the Supreme Court as always acting on the lower courts and would better demonstrate the continuing reciprocal interaction between the courts of appeals and the Supreme Court.

267. Compare the “cert. pending” status for some cases cited as part of a conflict.
SEARCHING FOR THE MONTANA OPEN RANGE: A JUDICIAL AND LEGISLATIVE STRUGGLE TO BALANCE TRADITION AND MODERNIZATION IN AN EVOLVING WEST

Ryan M. Archer*

INTRODUCTION

On January 16, 2001, the Montana House of Representatives Committee on Agriculture convened to hear testimony on a bill proposing to clarify the reach of the Montana open range. On the table was House Bill 246, which sought to exempt livestock owners from any liability for damages caused by motor vehicle accidents with livestock wandering public roads.1 Ultimately, amended legislation provided that a livestock owner is not liable for livestock-vehicle collisions unless “grossly negligent or engaging in intentional misconduct.”2 On March 1, 2001, House Bill 246 was signed into law, and later codified under Title 27, Chapter 1, Section 7 of the

* B.A. Montana State University, 1998; expected J.D. University of Montana, 2003. Special thanks to Montana rancher Jim Brady for asking the questions that started this project — sorry it took so long to answer.


Montana Code Annotated.

This legislation was a rapid and direct response to the holding of the Montana Supreme Court in *Larson Murphy v. Steiner*, and significantly lessened the impact of the court’s broad scale re-interpretation of Montana’s open range law. The legislation, however, had a limited scope that only addressed the civil liability statutes imposed on livestock owner-motorist relationships by *Larson-Murphy*. Much broader in scope, *Larson-Murphy* focused on clarifying the intent and purposes of the Open Range Doctrine embodied in the “no duty rule” of the open range, and its application to herding districts and the legal fence statute. Thus, although the Legislature altered the court’s ultimate holding, its interpretation of open range law remains pertinent to Montana practitioners dealing with modern range issues. For these reasons, this note is divided into two sections: the first section covers the facts, background, holding, reasoning and analysis of the *Larson-Murphy* decision; the second section focuses on the legislative reaction to the decision, comments on its possible implementation through a series of hypotheticals, and compares the outcome with other western states.

I. LARSON-MURPHY V. STEINER

In *Larson-Murphy v. Steiner*, the Montana Supreme Court overturned a 33-year-old precedent and redefined the meaning of the “open range doctrine” embodied in the Montana “Containment of Livestock” statutes. The court held that while the law of the open range doctrine remains the law of this state, the “no duty rule” described by the doctrine does not apply to the relationship between livestock owners and motorists traveling Montana highways used by the public. Weaving a web of seeming contradiction and refined interpretation, the Montana

---

3. See Larson-Murphy v. Steiner, 2000 MT 334, 303 Mont. 96, 15 P.3d 1205; See also Clarify Liability for Damages to Property Caused by Livestock on Highways: Hearing on H.B. 246 Before House Comm. on Agric., 57th Leg. Sess. 3 (2001) (statement of Rep. Keith Bales, “the reason for addressing HB 246 is the recent Montana Supreme Court decision which reversed some long standing precedence of the open range law”).
4. Larson-Murphy, ¶ 92-93, 98.
5. Id. ¶ 25-26.
7. Larson-Murphy, ¶ 27 (citing State ex. rel. Martin v. Finley, 227 Mont. 242, 245, 738 P.2d 497, 499 (1987)).
8. Id. ¶ 26.
court unraveled a legal history characterized by confusion, emotion and mythical western stereotypes. In its struggle to rectify past errors, the court uncovered inherent weaknesses in the twenty-first century application of nineteenth century law, but ultimately created a rule of law that was significantly altered by subsequent legislation, and would have been difficult to implement consistently throughout the state.

A. Facts

Just after 11:30 p.m. May 8, 1993, Plaintiff Mary Larson-Murphy (Larson-Murphy) was traveling southbound on Hoskin Road outside Billings, Montana. As she crested a small rise created by a culvert, Larson-Murphy struck a bull in the middle of the paved, two-lane county road. The bull rolled onto the hood of Larson-Murphy's car and through the windshield, causing her life threatening injuries that required an immediate tracheotomy due to swelling and multiple fractures. The accident broke significant portions of Larson-Murphy's mid-face and mandible, and caused permanent damage to her eyesight, sense of taste and smell.

At the time of the accident, it is unquestionable that Larson-Murphy had been driving in a lawful manner, and a highway patrolman estimated her speed at just over 34 miles per hour. The patrol officer indicated that under the circumstances, the accident was unavoidable and any driver on the road at that time would have struck the bull.

On the evening of the accident, the bull was in a triangular fenced pasture located within a larger fenced pasture, and escaped through two fences to access the county road. The pastures were within a statutory herd district leased by Defendants Edwin and Violet Steiner (Steiner) from Defendant Dr. August Zancanella. In their lease agreement, the Steiners assumed responsibility for fence maintenance and carried liability insurance for damages caused by escaped livestock. The highway patrolman and Defendant Darin Steiner, the bull's owner, inspected the fence the night of the accident and the following morning, but found no signs of damage.

At trial, Larson-Murphy suggested the bull escaped through

9. Id. ¶¶ 5, 8.
10. Appellant's Brief at 5, Larson-Murphy (No. 98-441).
11. Larson-Murphy, ¶ 7.
12. Id. ¶¶ 9-10.
a gap between the fence and an irrigation ditch adjacent to Hoskin Road. She claimed the Steiners and Zancanellas negligently failed to uphold their duty to control livestock within a herd district and maintain the fence in accord with statutory requirements. Larson-Murphy also argued the open range doctrine is "anachronistic," and the Montana court should seize the opportunity to overrule its application to motorist and livestock owner relationships. Although the Steiners admitted the bull was capable of jumping the fence, they asserted that Montana remains an open range state and livestock owners owe no duty to motorists to prevent livestock from accessing or wandering county roads.

Before trial both Zancanella and Steiner were denied summary judgment, but upon request for reconsideration the district court granted Zancanella's motion. Nearly one year after their initial motion, the court denied the Steiners' second motion for summary judgment. The district court determined an issue of fact remained as to whether a county road in a herd district constitutes open range. Subsequently, the Montana Supreme Court denied the Steiners' motion for a writ of supervisory control. At the close of Larson-Murphy's case, the court denied the Steiners' request for a directed verdict. However, after four witnesses testified on behalf of the Steiners, and Larson-Murphy moved for a mistrial, the court reversed its prior order and granted a directed verdict in favor of the Steiners. The court issued no opinion explaining its reasoning.

B. Holding

The Montana Supreme Court concluded that the "no duty" rule under the open range doctrine does not apply to the legal relationship between livestock owners and motorists traveling Montana highways. However, the court subsequently

15. Larson-Murphy, ¶ 12.
16. Response Brief of Respondents/Cross-Appellants Steiner at 7, Larson-Murphy (No. 98-441) (citing Martin, 227 Mont. at 244, 738 P.2d at 498, which held that Montana has been an open range state since before entrance into the Union).
17. Larson-Murphy ¶¶ 15-17. See also Appellant's Brief at 3, Larson-Murphy (No. 98-441).
18. Appellant's Brief at 4, Larson-Murphy (No. 98-441). See also Larson-Murphy, ¶ 18.
determined that "the law of the open range remains the law of this state," and open range includes all highways outside private enclosures and used by the public.\(^\text{20}\)

To arrive at this rule, the court concluded the open range doctrine has little or nothing to do with the legal relationship between livestock owners and motorists under a theory of negligence.\(^\text{21}\) Instead, the open range doctrine purely expresses that livestock owners owe no legal duty to other landowners to prevent accidental livestock trespass on unfenced property.\(^\text{22}\) The main thrust of Larson-Murphy thus concludes that the open range doctrine was never about controlling conflict between livestock owners and motorists, but was a burden-shifting statute concerning who was required to fence property to protect it from wandering livestock.\(^\text{23}\)

According to this decision, both a livestock owner and a motorist have a legal right to occupy a highway in the open range, but each owes the other "a legal duty to use such roads so as not to injuriously interfere with the other's right of use."\(^\text{24}\) Thus, both the motorist and livestock owner must act in a "reasonable manner" when lawfully using a public highway—failing to do so may impose liability for negligence.\(^\text{25}\) In this way, the law of the open range remains the law of this state, and cattle may lawfully wander public roadways in the open range. Livestock owners, however, are subject to a subsequent standard of reasonable care toward motorists and other lawful occupants of the highway.\(^\text{26}\) Whether such a duty is imposed is a fact

---

\(^{20}\) Id. \(\$\) 27 (quoting Martin, 227 Mont. at 245, 738 P.2d at 499). See also MONT. CODE ANN. \$ 81-4-203 (2001) (stating "all highways outside of private enclosures and used by the public whether or not the same have been formally dedicated to the public" are part of the open range). But see MONT. CODE ANN. \$ 81-4-306 (2001) (stating an exception to Section 81-4-203 of the Montana Code Annotated when a herd district has been implemented); MONT. CODE ANN. \$ 60-7-201 (2001) (stating an exception to Section 81-4-203 of the Montana Code Annotated concerning highways designated part of the national system of interstate and defense highways and federal-aid primary system).

\(^{21}\) Larson-Murphy, \$ 28.

\(^{22}\) Id. \$ 29.

\(^{23}\) Personal Interview with Justice James C. Nelson, Montana Supreme Court, in Missoula, Mont. (Feb. 9, 2001).

\(^{24}\) Larson-Murphy, \$ 96. But see exceptions cited supra note 20.

\(^{25}\) Larson-Murphy, \$ 98.

driven question unique to the circumstances of the particular incident. This duty is governed by Section 27-1-701 of the Montana Code Annotated which states everyone is responsible for using "ordinary care or skill in the management of his property or person."  

Ultimately the court arrived at this holding to remedy the problematic history of Montana's interpretation of the Containment of Livestock statutes so it could address the issues specific to this case. In addressing case specific issues, the court additionally held: highways within a herd district are not open range, and livestock owners may not allow their animals to "run at large" on any public roadways in the district; and the legal fence statute does not create a statutory duty for livestock owners to "fence in" their cattle, but only applies to landowners establishing an action for trespass by fencing cattle out. Thus, the court constructed a consistent foundation from which it developed a more finite structure pertinent to the specific issues in Larson-Murphy.

C. Background

"The inroad from the east was a new and sudden outbreaking of a people" celebrated James Fennimore Cooper and his fellow romantics when they discovered the vast open spaces of the North American great plains and ignited a cultural migration toward the West. So intense was this migration that historian Walter Prescott Webb declared that men, cattle, and horses "held almost undisputed possession of the region" constituting an "empire of grass" by the 1860s and 1870s. The exodus toward cattle country led Montana Senator Mike Mansfield to reflect that "[w]hile some dug into Montana's earth

27. Larson-Murphy, ¶ 96.
29. Larson-Murphy, ¶¶ 29, 32-33.
30. Id. ¶ 61. Here the court overruled Williams, 235 Mont. 137, 766 P.2d 247, to the extent it held the "no duty" rule applied to livestock owners and motorists within a herd district.
31. Larson-Murphy, ¶ 85. Here the court overruled Indendi v. Workman, 272 Mont. 64, 899 P.2d 1085 (1995), to the extent it held failure to comply with the legal fence statute may provide a basis to find negligence. See MONT. CODE ANN. § 81-4-101 (2001) (defining a legal fence).
32. See James Fennimore Cooper, The Prairie 10 (Airmont Pub'l'g Co. 1964) (1827).
for wealth, others sought it from what grew out of the earth. Stockmen filled the rolling grass-covered High Plains of central and eastern Montana with cattle and sheep.\footnote{34} Like all western booms, the enthusiasm for Montana rangeland brought the cattlemen in force with their belief that "to be downright honest about it, Montana's a hell of a lot better stock country... Y'see you got more grass, more everything."\footnote{35}

To fairly govern such a massive influx of cattlemen, Montana and other western territories were forced to address legal relationships between ranchers, their neighbors, and the lawful use of public lands.\footnote{36} Traditionally, English common law imposed a duty upon livestock owners to prevent their cattle from running at large and held owners strictly liable for trespass on private land whether fenced or not.\footnote{37} Most jurisdictions throughout the eastern United States implemented this common law tradition.\footnote{38} The arid western landscape, however, demanded a much larger area to graze cattle than eastern states, and vast tracts of public land combined with sparse population to make the western ranching ideal incompatible with common law traditions.\footnote{39}

Recognizing these unique circumstances, Congress commissioned Major John Wesley Powell to survey western lands, and he published his report in 1879.\footnote{40} To create better land division practices, Powell suggested a method of dividing

\footnotesize
\begin{itemize}
\item \footnote{34}{Mike Mansfield, special collection 1237, ts., Montana Historical Society, Helena, Mont.}
\item \footnote{35}{J.K. Ralston, oral history #49, "Montana History," Montana Historical Society, Helena, Mont.}
\item \footnote{36}{See, eg., Valerie Weeks Scott, The Range Cattle Industry: Its Effect on Western Land Law, 28 MONT.L.REV. 155, 178-181 (1967).}
\item \footnote{37}{See \textit{e.g.}, \textit{3} WILLIAM BLACKSTONE, \textit{COMMENTARIES ON THE LAWS OF ENGLAND} *211 (stating a cattle owner is liable for damages resulting from trespass when he negligently allows cattle to stray "and they tread down his neighbors herbage"). \textit{See also}, \textit{e.g.}, \textit{3} WILLIAM BLACKSTONE, \textit{COMMENTARIES ON THE LAWS OF ENGLAND} 1197 n.22 (William D. Lewis ed., Rees Welsh & Co. 1900) (stating "At common law, the owner of cattle is required to take care of them. If they trespass on a neighbors land, he is responsible, though there is no fence"); W. PAGE KEETON ET AL., \textit{PROSSER & KEETON ON THE LAW OF Torts} § 76, at 539 (5th ed. 1984) (stating "it remains the common law in most jurisdictions that the keeper of animals of a kind likely to roam and do damage is strictly liable for their trespasses").}
\item \footnote{38}{See Roy H. Andes, A Triumph of Myth Over Principle: The Saga of the Montana Open-Range, 56 MONT.L.REV 485, 486 (1995) (citing RESTATEMENT (SECOND) OF Torts § 504 cmt. f (1977)). \textit{See also} BLACKSTONE, \textit{supra} note 37, at 1197 n.22.}
\item \footnote{39}{See, \textit{e.g.}, Andes, \textit{supra} note 38, at 486. \textit{See generally} JOHN WESLEY POWELL, \textit{REPORT ON THE LANDS OF THE ARID REGION OF THE UNITED STATES} (Harv. Univ. Press 1962) (1879).}
\item \footnote{40}{\textit{See generally} WALLACE STEGNER, \textit{BEYOND THE HUNDREDTH MERIDIAN} (1992).}
\end{itemize}
land according to topographical districts surrounding river drainages.\textsuperscript{41} Congress did not act upon these suggestions,\textsuperscript{42} and the general belief was that open spaces should be freely used to support the livestock industry since “[t]he commons are now owned principally by the State and by the general government, and if the grasses which grow thereon are not depastured, they will waste and decay.”\textsuperscript{43} Thus, the open range doctrine was born in the West.

The open range doctrine was not statutorily codified until after it had been practiced in the West as a matter of custom and culture. In 1890, the United States Supreme Court first recognized the existence of the open range doctrine and stated:

\begin{quote}
[T]here is an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals shall be free to the people who seek to use them where they are left open and unenclosed, and no act of government forbids this use.\textsuperscript{44}
\end{quote}

In 1865, Montana’s First Territorial Legislature at Bannack codified the custom of the open range doctrine.\textsuperscript{45} In this statute, the Territorial Legislature provided double damages for livestock trespassing on another’s land, but only if a “lawful fence” enclosed the property.\textsuperscript{46} Thus, the Legislature statutorily immunized livestock owners from liability for stock wandering on another’s land unless there was a “legal fence” around it. This immunization established the rule that a livestock owner has “no duty” to fence livestock in or prevent them from wandering the range. Although the Legislature has implemented many additions to the “Containment of Livestock Statutes” over the years, the essence of this statute remains preserved in the current Montana Code Annotated.\textsuperscript{47} Significantly, the Legislature never specifically included public roadways or byways as a part of the open range doctrine “no

\begin{footnotes}
41. \textit{See} Powell, supra note 39.
42. \textit{See} Stegner, supra note 40, at 334-338.
45. \textit{Acts Resolutions and Memorials of the Territory of Montana} § 1, at 351-352 (Bannack 1864) [hereinafter \textit{Acts}].
46. \textit{Id}.
\end{footnotes}
duty" rule. Thus, the Montana Legislature never addressed the common law rule of mutual forbearance between livestock and highway occupants in the Containment of Livestock statutes. 48

As the West grew, both the courts and Legislature recognized the need to further limit the application of the open range doctrine. The United States Supreme Court began the evolution of the open range doctrine when it limited its application to strictly accidental trespass in Lazarus v. Phelps. 49 Subsequently, in 1897 Congress passed legislation requiring grazing leases on federal forest preserves. Fourteen years later, the United States Supreme Court held the open range doctrine had no application to land within these preserves. 50 By 1900, every western state except Colorado, Montana and Wyoming had passed legislation enabling herd districts to exempt designated areas from the open range. 51 As western society continued to develop, many states were faced with increasing conflicts between highway users and livestock owners. As a result, legislation barring livestock from wandering certain highways further restricted the open range. 52 If livestock wandered restricted highways, courts occasionally imposed ordinary negligence standards on livestock owners. 53

Initially, the Montana judiciary embraced the statutory open range doctrine and provided for its fullest application. In Smith v. Williams, the Montana Supreme Court concluded a plaintiff was required to completely enclose land with a legal fence in order to bring a trespass action. 54 Subsequently, the court upheld a jury instruction immunizing a livestock owner from herding cattle on another's land unless done with malice. 55 Like other areas around the country, Montana also felt the

49. 152 U.S. 81, 85 (1894).
51. Scott, supra note 36, at 180.
54. 2 Mont. 195, 201 (1874).
55. Fant v. Lyman, 9 Mont. 61, 22 P. 120 (1889).
changing western landscape. In 1900, Montana was the first state court to follow *Lazarus* and limit the open range doctrine to accidental trespass.56 Further, the Montana Legislature adopted herd district statutes in 1917,57 and restricted certain animals from "running at large."58 Additional limitations removed municipal areas59 and state and federal highway right-of-ways from the open range.60

From 1900 to 1967, the Montana Supreme Court developed a consistent open range jurisprudence specifically limiting its scope to cases involving accidental trespass.61 This changed in 1967 when the court first applied the "no duty" rule to livestock wandering public highways in *Bartsch v. Irvine Co.*62 The court built upon this precedent63 and ultimately found the open range doctrine no duty rule applicable to motorists using highways within herd districts in *Williams v. Selstad.*64 Finally, in *Indendi v. Workman,* the court analyzed the primary state and federal highway exclusion and expanded application of the legal fence statute to require stock owners to fence stock off highways.65

Thus, the open range doctrine grew from the unique custom and culture of the American West, and evolved by judicial interpretation and legislative initiative throughout the

56. See Monroe v. Cannon, 24 Mont. 316, 61 P. 863 (1900).
57. 1917 Mont. Laws 102 (current version at MONT. CODE ANN. §§ 81-4-304 to –326 (2001)).
58. See MONT. CODE ANN. §§ 81-4-201, 202, 204, 210 (2001) (limiting swine, sheep, llamas, alpacas, bison, ostriches, rheas, emus, goats, male equine and non-purebred bulls from wandering the public range).
60. MONT. CODE ANN. § 60-7-201 (2001). The precursor to this statute was enacted in 1951.
61. See, e.g., Thompson v. Mattuschek, 134 Mont. 500, 333 P.2d 1022 (1959); Hill v. Chappel Bros. Inc., 93 Mont. 92, 18 P.2d 1106 (1932); Herness v. McCann, 90 Mont. 95, 300 P. 257 (1931); Long v. Davis, 68 Mont. 85, 217 P. 667 (1923); Dorman v. Erie, 63 Mont. 579, 208 P. 908 (1922); Chilcott v. Rea, 52 Mont. 134, 155 P. 1114 (1916); Herrin v. Sieben, 46 Mont. 226, 127 P. 323 (1912); Musselshell Cattle Co. v. Woolfolk, 34 Mont. 126, 85 P. 874 (1906); Beinhorn v. Griswold, 27 Mont. 79, 69 P. 557 (1902); *Monroe,* 24 Mont. 316, 61 P. 863.
64. 235 Mont. at 141, 766 P.2d at 249.
65. 272 Mont. at 73, 899 P.2d at 1090.
twentieth century. Although the present statutory open range doctrine retains basic language passed down from the 1865 statute, legislative amendments and case law greatly altered its application. Bartsch and Williams judicially expanded the modern application of the open range doctrine, while the Legislature restricted it in legally defined areas. Additionally, Indendi broadened the legal fence statute as it relates to the open range doctrine. In Larson-Murphy the court explicitly overturned each of these judicial expansions.

D. Reasoning

Much like the background of the open range doctrine described in this discussion, Larson-Murphy traced the origins of the doctrine in order to interpret its present day application. Based on this history, the court concluded the original purpose of the open range doctrine was “to determine the rights and remedies arising from the relationship of livestock owners and landowners in actions involving the accidental trespass on private property of livestock lawfully occupying the open range.”66 The court found this interpretation of the open range doctrine received consistent application from its origin in the 1874 Smith decision until the 1967 Bartsch decision.67

A case of first impression in Montana, Bartsch initiated a new era in the application of the open range doctrine “no duty” rule. Specifically, Bartsch concluded Montana is open range country, and since a livestock owner has no duty to prevent stock from wandering open range “he cannot be said to be negligent if the livestock do wander—even if such wandering takes them onto a highway right of way. . . .”68 Larson-Murphy rejected this reasoning as inconsistent with the historically narrow application of the open range doctrine, and criticized Bartsch for broadcasting the doctrine’s scope beyond statutory authority.69

In support of its reasoning, the Montana Supreme Court examined the extensive case history of the open range doctrine’s application and its limitation to trespass actions on “another’s

67. Id. See also, Andes, supra note 38.
69. Larson-Murphy, ¶¶ 74-78.
unenclosed land.” The court reasoned that this limited application should remain the extent of the open range doctrine because the Legislature has not addressed the common law duty between livestock owners and highway users. The court was unmoved by the argument that Section 60-7-201 of the Montana Code Annotated, or any other modification to the open range doctrine statutes, were enacted to “balance the costs of imposing a duty on livestock owners with the damages suffered others due to wandering livestock.”

Based on this historical analysis and a strict interpretation of the open range doctrine, the court concluded that any assertion of legal duties arising from the relationship between livestock owners and motorists is beyond the scope of Montana’s statutory open range doctrine. This reasoning rejects the argument that the Larson-Murphy holding modifies current statutory law. Instead, it places the interpretive error on Bartsch for “ignoring the fundamental purpose of Montana’s open range doctrine by taking a statutory body of law that pertains to one particular legal relationship and applying it to another.”

Upon reaching this conclusion, the court refocused its analysis on rights bestowed motorists and livestock owners lawfully occupying Montana highways. Once again the court found the historical evolution of English common law throughout the West determinative of the rights and duties owed to highway users. Specifically, the court inspected the common law rule that unless an animal was of “unruly disposition” the “mutual respect and forbearance rule” should apply; thus, “[t]he motorists must put up with the farmer’s cattle: the farmer must endure the motorist.”

Contrary to other western states, the court found Montana has not statutorily affirmed or modified the common law rule

---

70. *Id.* ¶¶ 34-45, 74 (citing Montgomery v. Gehring, 145 Mont. 278, 400 P.2d 403 (1965); Thompson, 134 Mont. 500, 333 P.2d 1022; Shreiner v. Deep Creek Stock Ass’n, 68 Mont. 104, 217 P. 663 (1923); Beinhorn, 27 Mont. 79, 69 P. 557; Smith, 2 Mont. 195).

71. Larson-Murphy, ¶ 69.

72. *Amicus Curiae* Brief of David Baum, Barbara Baum, and Baum Ranch, LLC at 10, Larson-Murphy (No. 98-441). See also Larson-Murphy, ¶¶ 132-133 (Gray, J., dissenting).

73. Larson-Murphy, ¶ 70 (overruling Bartsch, 149 Mont. 405, 427 P.2d 302, and following cases, see supra note 29).

74. *Id.* ¶ 78.

75. *Id.* ¶ 86 (quoting Searle v. Wallbank, 1 L.R.App.Cas 341, 361 (1947) (L. du Parq, concurring)).
governing the legal relationship between livestock owners and motorists as equal, lawful users of the highway.\textsuperscript{76} Instead, Montana's only limitation on the common law prohibits certain types of animals from "running at large" on the roadways, and exempts certain roadways and herd districts from common law application.\textsuperscript{77} Thus, in the absence of specific statutory guidelines determining the rights and duties of highway users and livestock owners, the Montana court implemented Sections 27-1-701 and 28-1-201 of the Montana Code to govern such relationships.\textsuperscript{78}

Once the court laid the foundation determining rights and duties of highway users and the limitations of the open range doctrine, the door was open to address case specific issues interpreting herd district and legal fence statutes. The court began its reasoning by implementing the historic definition of the open range doctrine and finding the "no-duty" rule cannot apply to livestock owners and motorists within a herd district.\textsuperscript{79} The court further defined a herd district as an area that restricts any application of the open range doctrine. As such, livestock may not run at large, and livestock owners may not intentionally allow cattle to wander highways within a district. This essentially creates a duty for livestock owners to contain their cattle within a herd district, and rejects any application of the open range doctrine therein.\textsuperscript{80}

Similarly, the court relied on the open range doctrine's traditional definition to determine the extent of the legal fence statute. Because livestock owners owe no duty to keep cattle from wandering the open range, the legal fence statute defines

\begin{itemize}
\item \textsuperscript{76} Id. ¶ 88. See, e.g., \textit{IDAHO CODE} § 25-2118 (Michie 2000) (stating that "no person owning...any domestic animal running on open range, shall have the duty to keep such animal off any highway...and shall not be liable for damage to any vehicle or for any injury to any person riding therein, caused by the collision between the vehicle and the animal"); \textit{NEV. REV. STAT.} § 568.360(1) (1999); \textit{N.M. STAT. ANN.} § 66-7-363(C) (Michie 2000).
\item \textsuperscript{77} See supra note 58; see also supra note 20.
\item \textsuperscript{78} \textit{Larson-Murphy}, ¶¶ 92-93, 98. See also \textit{MONT. CODE ANN.} § 27-1-701 (2001); \textit{MONT. CODE ANN.} § 28-1-201 (2001) (stating everyone is bound to refrain from injuring another's person or property).
\item \textsuperscript{79} \textit{Larson-Murphy}, ¶ 61.
\item \textsuperscript{80} Id. (overruling \textit{Williams v. Selstad}, 235 Mont. 137, 766 P.2d 247 (1988); see supra note 26). Significantly, the herd district statutes make no mention of fencing, so court does not impose a duty to fence cattle in. However, House Bill 418 was passed by the 2001 Montana Legislature and places an affirmative duty on herd district members to fence property according to the legal fence statute. The H.B. 418 amendment to the herd district statute is now codified at \textit{MONT. CODE ANN.} § 81-4-310 to -311 (2001).
\end{itemize}
the standard required by a landowner to sustain an action against trespassing cattle by fencing them out. The legal fence statute never applied to confining livestock, and cannot be used to define a standard of reasonable care required to fence livestock off a public highway. Rather, standards of reasonable care are fact-specific questions, not measured by conformance to the legal fence statute.

E. Analysis

Adeptly unraveling the confusion surrounding the open range doctrine, the Montana court accurately delineated its limited historical application as a burden shifting statute between landowners and fencing responsibilities. Likewise, the court necessarily concluded the legal fence statutes do not create a duty to fence in cattle, but only apply to landowners striving to establish a condition precedent for a trespass action by fencing cattle out. However, the court prematurely dismissed legislative modifications that manifest an effort to address livestock owner-motorist relationships. Additionally, the court’s reasoning failed to address a conundrum latent within a practical application of its holding. As a result, Larson-Murphy toppled a house of cards constructed on decades of semi-stable legislation and precedent, but created a rule of law that would have been difficult to implement.

The inherent problem within a twenty-first century application of an open range doctrine retaining nineteenth century characteristics stems from a legal lineage both pre- and post-Bartsch. Specifically, all cases regarding the open range preceding Bartsch were strictly landowner trespass actions. Thus, Bartsch first attempted to balance two competing doctrines: (1) the legal mandate that every person is responsible

---

81. Larson-Murphy, ¶ 42-43, 84.
82. Id. ¶ 86 (overruling Indendi v. Workman, 272 Mont. 64, 899 P.2d 1085 (1995); see supra note 31).
83. Id. ¶ 96.
84. See Fant v. Lyman, 9 Mont. 61, 62, 22 P. 120, 121 (1889) (holding an early statutory provision to immunize livestock owners when their animals “stray on unenclosed lands in quest of food or pasturage”).
85. See Beinhorn v. Griswold, 27 Mont. 79, 89, 69 P. 557, 558 (1902) (stating that a livestock owner did not owe a landowner “the duty to fence his cattle in”).
86. See Amicus Curiae Brief of Montana Trial Lawyers Ass’n at 10, Larson-Murphy (No. 98-441) (stating that “[b]efore Bartsch, all cases of this Court interpreting the open range doctrine involved disputes between owners of livestock and neighboring property owners”).
to act with reasonable care in the management of his or her property, and (2) the rule that livestock owners have no duty to prevent livestock from wandering open range including public highways. To choose the former over the latter would seemingly reduce the latter to mere words since a livestock owner would perceivably have a duty to keep stock off the road in certain circumstances. To choose the latter over the former would reduce the former to mere words when relating to livestock owners and motorists. Lacking legislative direction, *Bartsch* protected the livestock owner's privilege to allow stock to wander the open range.  


88. *Bartsch*, 149 Mont. at 410, 427 P.2d at 305.

89. MONT. CODE ANN. § 60-7-103 (2001) provides fencing requirements for state highways.


92. See Martin v. Finley, 227 Mont. 242, 245, 738 P.2d 497, 499 (1987) (stating "[t]he law of the open range remains the law of this state. The exceptions enacted by the Legislature have been carefully crafted").
intended this statute as a potential modification to the open range doctrine. Instead, the court strictly relied upon the historical origin of the open range doctrine and the failure of the Legislature to explicitly modify language within its statutory construction.\textsuperscript{93}

To avoid the \textit{Bartsch} conundrum, the court shrewdly granted the motorist and livestock owner equal rights to highway use, but imposed a subsequent duty on each.\textsuperscript{94} Thus, the seeming conflict between a general duty of care and a livestock owner's right to run cattle at large on the open range is balanced by requiring each user to "exercise a degree of care commensurate with the danger of the agency that he himself is using,"\textsuperscript{95} measured on a "case-to-case basis."\textsuperscript{96} This conclusion works well in theory because it balances the rights of each party by applying the open range doctrine as it was initially intended, \textit{and} maintaining a cause of action for an injured motorist.

This conclusion, however, will be much more difficult to implement in rural Montana courts where the open range doctrine is most applicable. According to \textit{Larson-Murphy}, the rancher has no statutory duty to fence livestock in or keep them off the road, and the motorist has no other duty than to be a conscientious, lawful driver. Instead, liability for damages is a factual question addressed by a jury of peers. To answer this question, the jury may look to many factors to give form to an otherwise nebulous legal guideline. Such factors may include the population, habits and culture of the area, prior behavior and/or warnings to the rancher, or the reasonableness of fencing otherwise open range. Based on these factors, different standards would likely apply to different areas of the state. Perhaps juries would require more diligent fence maintenance in urban-interface rangeland than rural Montana where such a duty would be unreasonable and overly burdensome. Development of such a rule could make liability commensurate with the threat of injury. Although this may be an appropriate way to apportion liability, the inconsistent method by which it will be attained leaves both ranchers and motorists wondering

\begin{itemize}
  \item \textsuperscript{93} \textit{See Larson-Murphy,} \textit{\textsuperscript{69}}.
  \item \textsuperscript{94} \textit{Id.} \textsuperscript{\textsuperscript{96}}.
  \item \textsuperscript{95} \textit{Id.} \textsuperscript{\textsuperscript{93}}. Traditionally, the court was reluctant to implement a foreign statute bearing on the open range doctrine, see \textit{Martin}, 227 Mont. at 245, 738 P.2d at 499 (commenting that "[t]he use of a statute, external from the statutory livestock chapter, to impose an additional duty upon livestock owners is suspect").
  \item \textsuperscript{96} \textit{Larson-Murphy,} \textsuperscript{\textsuperscript{30}}.
\end{itemize}
what their rights and duties really are.

Twenty three of Montana's fifty six counties, nearly half Montana's total geographic area, are designated "frontier" with less than two persons per square mile. This defines a large portion of Montana that will face an identical hypothetical: a conscientious motorist lawfully driving a rural county road through a private open range pasture, cresting a hill and sustaining injuries from impact with a cow lawfully grazing the range. These competing rights to the roadway will ultimately reach an impasse, and the individual juror will be left to decide whose is the greater right. Even if judicial theory evades the conundrum of competing rights, it will lurk in the shadows of Larson-Murphy's application.

II. LEGISLATIVE RESPONSE TO LARSON-MURPHY

A. House Bill 246

The December 15, 2000, Larson-Murphy decision became an item of first priority for the House of Representatives Committee on Agriculture when the 57th Legislature convened in January 2001. During Conference, Representative Keith Bales stated that "this supreme court decision has caused much turmoil and concern." The committee received letters from ranchers, county commissioners, insurance agents and stock growing organizations around the state expressing concern over the court ruling. Concerns addressed issues of increased insurance rates unduly burdening ranching operations, and the excessive costs required to fence miles of remote open range county roads. Further apprehension related to the infinite number of ways fences can be damaged, the impossibility of diligent fence repair before cattle escape, and the need to keep roads unfenced to allow stock to graze and water efficiently.

In response to these concerns, the initial draft of House Bill 246 sought to "put back into effect what the court history

97. Brief of Amicus Curiae Montana Stock Growers Ass'n at 8, Larson-Murphy (No. 98-441) (citing data from Montana Department of Commerce, Census and Economic Information Center).

98. See Clarify Liability for Damages to Property Caused by Livestock on Highways: Hearing on H.B. 246 Before House Comm. on Agric., 57th Leg. Sess. 3 (Mont. 2001) [hereinafter House Hearing].

99. Id. at 3-8. See also Clarify Liability for Damages to Property Caused by Livestock on Highways: Exhibits on H.B. 246 Before House Comm. on Agric., 57th Leg. Sess. 1-6 (Mont. 2001) [hereinafter Exhibits].
was . . .” before the Larson-Murphy decision. This draft completely immunized livestock owners from any liability to motorists colliding with livestock on the roadway in open range and herd districts. The draft also extended the no duty rule to livestock and motorist relationships excepting federal aid and state primary highways under Section 60-7-201 of the Montana Code Annotated. This proposal was significant because it sought to directly amend and expand the definition of open range in the Containment of Livestock Statutes. However, during the committee meeting, several concerns were raised regarding such broad immunity. These concerns focused mainly on the immunity of irresponsible livestock owners and the need for a balance protecting lawful motorists and responsible livestock owners, while allowing liability for unsafe and irresponsible ranching practices. Striving to achieve this compromise, the House Committee on Agriculture amended the bill to “raise the bar from [the] standard of ordinary negligence,” to gross negligence and intentional behavior.

On March 1, 2001, House Bill 246 was signed into law to be codified under Title 27, Chapter 1, part 7 of the Montana Code Annotated. Unlike its initial draft, the bill did not make any direct amendment to the open range doctrine as codified in the Containment of Livestock Statutes. Instead, the bill clarified the duty owed between livestock owners and motorists, and altered the common law duties between highway users and livestock owners relied on by Larson-Murphy. Specifically, the statute provided that unless the road qualifies as a highway per Section 60-7-201, a livestock owner has:

no duty to keep livestock from wandering on highways and is not subject to liability for damages to any property or for injury to a person caused by an accident involving a motor vehicle and livestock unless the owner of the livestock . . . was grossly negligent.

---

100. House Hearing, supra note 98, at 15.
102. House Hearing, supra note 98, at 8-10; see also Exhibits, supra note 99, at 7-8.
103. House Hearing, supra note 98, at 13; see also Clarify Liability for Damages to Property Caused by Livestock on Highways: Executive Action on H.B. 246 Before House Comm. on Agric., 57th Leg. Sess. 3 (Mont. 2001) [hereinafter Executive Action].
or engaged in intentional misconduct.105

B. Application of House Bill 246

As amended and signed by the governor, House Bill 246 does not change either the open range or herd district statutes codified in the Containment of Livestock provisions. Instead, the bill creates a new limited liability under Montana's Title 27 liability statutes.106 The practical effect of this legislation leaves the reasoning and interpretation of the Larson-Murphy decision untouched as it relates to the open range, herd district and legal fence statutes. The bill does, however, change the result of the court's decision by defining the relationship between livestock owner and motorist, and by imposing liability only if there is intentional misconduct or gross negligence.

While this legislative standard further defines the rights and duties between livestock owners and motorists, it remains unclear what exactly constitutes “gross negligence.” As passed by the House Committee on Agriculture, the term was understood to be “not exercising even slight care,” whereas negligence is a simple lack of ordinary care. As an example, the House Committee analogized gross negligence to that of a property owner's liability for a fallen tree: if a property owner was aware that a tree was in a weakened condition, had been told the tree was going to fall down and did not act, gross negligence may apply if the tree fell and was struck by a motorist.107 Similarly, the Senate Committee understood that gross negligence may apply to a situation where livestock occupied the road seven times in three months after being warned by police and neighbors to keep them off the roadway.108 Although this provides no judicial or statutory guideline as to when gross negligence may impose liability upon a rancher, it illustrates how the Legislature understood the term upon referring the bill to the Governor.

Although the gross negligent standard is liberally scattered throughout the Montana Code Annotated limited liability

106. See, e.g., Executive Action, supra note 103, at 2.
107. See Executive Action, supra note 103, at 3.
statutes, it remains unclear what exactly constitutes gross negligence in a limited liability setting. The Montana court has addressed this heightened negligence standard many times, but has failed to clarify its meaning beyond a vague test determined on a case by case factual analysis. In *Rusk v. Skillman*, the court acknowledged scholarly criticism of the difficulties involved in the attempt to create “degrees” of negligence. The court eventually held the proper standard for gross negligence is “failure to use slight care,” and “something more than negligence.” The court noted, however, that distinguishing ordinary from gross negligence “places the task upon the courts to define the indefinable.” Defined by the Restatement (Second) of Torts, gross negligence used in statutes may be “construed as equivalent to reckless disregard.” Prosser and Keeton acknowledge that gross negligence is “somewhat nebulous in concept.” They note that some courts have equated gross negligence with reckless disregard, but most courts traditionally hold it “short of a reckless disregard for consequences...[differing]...from ordinary negligence only in degree, not in kind.” Prosser and Keeton conclude that there is no ultimate definition of the term, but that it may be considered “more than ordinary inadvertence or inattention.”

None of these definitions help establish a clear guideline determining when liability may be imposed upon a livestock owner for managing livestock in a grossly negligent manner. Perhaps the best direction afforded is the legislative intent indicating that a rancher must know of some inherent or repeated problem with livestock on the roadway and fail to remedy that problem before a collision. However, even this

109. See, e.g., MONT. CODE ANN. § 27-1-714(1) (2001) (limiting good Samaritan liability in the care for others to damages caused only by gross negligence); MONT. CODE ANN. § 27-1-721 (2001) (hunter safety instructors are not liable for conduct, acts or omissions of a student handling firearms unless exhibiting gross negligence giving rise to causation of damages); MONT. CODE ANN. § 27-1-736 (2001) (limiting liability of health care providers and dental hygienists to damages caused by gross negligence in specified situations when providing services without compensation and the patient has been notified of the limited liability).


112. Id.


115. See Executive Action, supra note 103, at 3; see also Senate Hearing, supra note
standard fails to address the many situations where a public road runs through private unfenced open range pastures. Thus, although the Legislature developed a more discernable line guiding the livestock owner and motorist relationship, the extent of the rights and duties of both parties will depend on the facts and circumstances surrounding each incident. In essence, this standard provides no clearer view of the rights and duties of livestock owners and motorists than Larson-Murphy’s application of an ordinary negligence standard.

C. Applying the Gross Negligence Standard

When analyzing a dispute between a motorist and a livestock owner in open range country, the first step should be to determine the type of road upon which the incident occurred. Such a determination can establish duties between the parties, and the standard of culpability required. If the collision giving rise to the conflict occurred on a state highway designated as part of the national system of interstate and defense highways, or on a state highway designated as part of the federal-aid primary system, a general negligence standard will apply.\(^1\) Note that highways defined by Title 60, Chapter 7, Part 2 are the only specific exception from the gross negligence standard established in Section 27-1-724.

Another significant consideration is the date when the road was constructed or reconstructed. If constructed before 1969, and designated as an area where livestock present a hazard to motorists, the state may have a statutory duty to fence the roadway.\(^1\)\(^7\) Other factors of consideration include whether the incident occurred in a herd district or a municipal area pursuant to the Containment of Livestock statutes.\(^1\)\(^8\) While, presumably, none of these classifications will change the gross negligent standard of liability,\(^1\)\(^9\) they will be important in considering

\(^{108}\), at 4.

\(^{116}\) MONT. CODE ANN. § 60-7-201 (2001). See also Ambrogini v. Todd, 197 Mont. 111, 121, 642 P.2d 1013, 1019 (1982) (stating that a cattle owner has a legal duty to exercise due care to prevent livestock from wandering onto a highway falling under the statutory definition of Title 60, Chapter 7, Section 201). See also Larson-Murphy, ¶ 65.

\(^{117}\) MONT. CODE ANN. § 60-7-103 (2001). See also Ambrogini, 197 Mont. at 117, 642 P.2d at 1017.

\(^{118}\) See MONT. CODE ANN. §§ 81-4-401 to -410 (2001) (statutory limitations on livestock in municipal areas); MONT. CODE ANN. §§ 81-4-301 to -328 (2001) (Montana herd district statutes).

\(^{119}\) Only MONT. CODE ANN. §§ 60-7-201 to -204 (2001) is excepted from the limited liability enunciated in MONT. CODE ANN. § 27-1-724 (2001).
whether there is a duty to fence livestock in. As a result, such classifications will be an important factor in the overall factual analysis determining whether gross negligence exists.

To begin a gross negligence analysis once the roadway is properly classified, remember that gross negligence differs from ordinary negligence only by degree and not kind. Thus, an ordinary negligence analysis, including the elements of duty, breach, causation, scope of liability and damages, should be relevant to determine gross negligence. In ordinary negligence, each person has a duty to exercise "ordinary skill in the management of his property or person." Duty is breached if the tortfeasor's act creates both a foreseeable and unreasonable risk of harm. An unreasonable risk of harm can be measured by weighing the "likelihood of harm, the seriousness of injury and the value of the interest to be sacrificed." Additional factors taken into account when determining whether a risk of harm is unreasonable include "the customs of the community, or of others under like circumstances."

Section 27-1-724 of the Montana Code Annotated explicitly exempts livestock owners from a duty to exercise "ordinary skill" to keep livestock from wandering highways. By imposing a gross negligence standard, however, there is an inferred duty that a livestock owner cannot act with intentional misconduct or gross negligence when allowing livestock to wander. Determining whether such a duty is breached perceivably creates a stepped up analysis requiring the tortfeasor’s act to create both a foreseeable and grossly unreasonable risk of harm. Presumably, the likelihood of harm, seriousness of injury, value of the interest sacrificed, and local community customs may still be applied to this stepped up analysis. Additionally, legislative intent should factor into the analysis since gross negligence is a legislatively limited liability per Section 27-1-724 of the Montana Code Annotated.

Consider the following hypotheticals that apply a gross negligence analysis to relationships between motorists and livestock owners. For purposes of this illustration, assume that none of the special highway classifications discussed above apply to the following situations.

120. See Prosser, supra note 114.
123. Restatement (Second) of Torts § 295A (1965).
HYPOTHETICAL 1: A rancher in Petroleum County, Montana, grazes livestock on several thousand acres of rangeland. Seasonal grazing patterns include rotating the cattle between several large pastures divided according to water sources and rangeland productivity. The summer pasture, located far from any development, consists of over 1500 acres of land fenced from adjoining pastures. An unfenced road accessible to the public runs through the middle of this pasture, but is controlled at the perimeter fence line by a cattle guard. One summer evening, a fisherman wanders off the main county road leading to Fort Peck. While driving attentively at a reasonable speed, the driver crests a hill and collides with a heard of cows crossing the road. The driver is seriously injured and evacuated to a Billings hospital.

This hypothetical represents a classic open range issue that may occur in rural Montana counties devoted primarily to agriculture. The issue presented here is whether the rancher acted with gross negligence or intentional misconduct by not fencing the road through his pasture. Implementing the stepped up negligence analysis requires assessing whether the rancher created a grossly unreasonable risk of harm measured by the likelihood of the harm occurring, the seriousness of the harm, the value of the interest sacrificed, as well as community customs. Legislative intent will also be a factor since the Legislature contemplated a comparable situation before imposing the gross negligence limited liability to the general rule that livestock owners have no duty to "keep livestock from wandering."\textsuperscript{124}

To implement a gross negligence analysis in this hypothetical, significant facts may include the location of the accident with respect to population density and residential development, local community standards, and knowledge of risks posed by livestock wandering the road. In this scenario, Petroleum County has one of the lowest population totals in the state, just over 510 people,\textsuperscript{125} and is devoted primarily to open range ranching activity. Although the accident occurred on a road used by the public, traffic is infrequent and the road is located far from any municipal or residential area. The outer pasture is fenced, controlled by a cattle guard and, while the road is not fenced, the fencing strategy conforms to common

\textsuperscript{124} See MONT. CODE ANN. § 27-1-724 (2001); see also Senate Hearing, supra note 108 at 4 (statement in response to a question by Senator Holden).

community customs. Based on these facts, it is evident that the risk of the harm is not high, and the rancher demonstrated adherence to local community customs. Additionally, the value of the interest sacrificed in such a situation is quite large. Imposing liability would require every road used by the public in Petroleum County to be fenced. The costs imposed upon local ranchers and the county government in such a rural area greatly outweigh the likelihood of an accident occurring.

Legislative intent also acts to exempt the livestock owner from liability in the present situation. Specifically, when contemplating the gross negligence standard, Senator Holden asked how the standard would impact county roads with cattle guards. In response to this inquiry, Representative Bales noted the specific language in the bill that the landowner has no duty to keep stock off the road. Thus, gross negligence should not apply in rural areas where people know cattle are likely to be in the road. This indicates that the legislature did not contemplate liability in obviously rural open range unfenced areas when they implemented the gross negligence standard.

In summary, although there remains some chance of harm, and serious injuries did result in this hypothetical, the motorist must overcome a heavy burden in order to establish a gross negligence standard. In light of these facts, it is evident that the rancher's conduct was not grossly unreasonable and no gross negligence exists. The outcome here is reasonable because a motorist in such an area should be expected to take greater precaution, while landowners should not have to protect against every hazard in remote open range areas throughout the state.

HYPOTHETICAL 2: A rancher outside of Kalispell in Flathead County, Montana, grazes a small herd of cattle on just under 1000 acres of rangeland. While the ranch used to be fairly isolated, increased residential development is beginning to encroach as neighboring land is subdivided and sold. Additionally, traffic on the county road has increased steadily due to a popular recreational site established on Flathead Lake. Despite increased traffic and residential development, the rancher has refused to maintain his fences. Neighbors continually call him to retrieve livestock from their yards and the police have even herded livestock off the road and issued reprimands to keep fences properly maintained to avoid any further conflict. One Saturday night a neighbor drives home from a day at the lake and, while

126. See Senate Hearing, supra note 108 at 4 (statement in response to a question by Senator Holden).
driving attentively and lawfully, rounds a corner and sustains serious injuries from impacting a cow on the road.

Hypothetical 2 presents the issue of whether a livestock owner's conduct is grossly negligent when he fails to maintain fences in an area of increased residential growth and recreational traffic after repeated warnings that cattle were escaping. By applying the same analysis as Hypothetical 1, this activity seems to constitute gross negligence. First, the likelihood of harm is great since there is both increased residential traffic on the road as well as recreational traffic to Flathead Lake. Second, serious injuries resulted from the impact. Third, the interest sacrificed is low. Requiring ranchers in urban-interface areas to maintain their fences is far less a burden than requiring entire counties far from urban centers to fence every road. Fourth, in such growing residential areas, ranchers customarily maintain fences to avoid neighboring conflict and animal nuisance. Finally, legislative intent indicates that when a livestock owner was aware of the hazard, had been warned of the hazard, and failed to act, gross negligence may be established. Here, the livestock owner was aware of increased traffic, had been notified several times by neighbors that cattle were escaping, and had been reprimanded by the police. By failing to take any action to contain the livestock, this conduct may be considered grossly unreasonable, thus implying liability based on gross negligence.

HYPOTHETICAL 3: A livestock owner grazes 50 cows on 500 acres in Chestnut Valley just outside of Cascade, Montana. Cascade is a small town with a population of 600 people, but Chestnut Valley remains rural in nature. There are no residential subdivisions, but the land is unevenly apportioned between large cattle ranches, irrigated farmsteads and ranchettes. Traffic on the road remains mostly local. For the most part, fences on this particular 500 acres are well kept, but cows have been known to escape from one corner of the land. Thus, neighbors have occasionally had to notify the rancher that cows were wandering the roadway. Although the rancher shored up some fence posts and used baler twine to patch the trouble spot, no major re-fencing was done. One night while traveling to visit a family friend, a motorist driving lawfully on the county road strikes a cow and is rushed to the Great Falls emergency room for reconstructive surgery.

HYPOTHETICAL 4: A livestock owner grazes 50 cows on 400 acres in Gallatin Valley just outside of Bozeman, Montana. Bozeman is a mid-sized town and growing rapidly. While much of the Gallatin
Valley remains agricultural, residential and ranchette development is beginning to encroach upon traditionally isolated agricultural areas. Traffic on the county roads has increased slightly due to local residential growth and some tourist flow during the summer. While the livestock owner is attentive to his cattle, and fences are mostly well kept, there is a gap in one corner where the cattle repeatedly escape. Neighbors often notify the rancher that his cows are on their land or in the road. One summer evening a tourist is lawfully driving the county roads looking for a nice ranchette and sustains serious injuries from striking a cow in the road.

Hypothetical 3 and 4 present similar issues in different locales and demonstrate the difficulty of distinguishing between an ordinary negligence and gross negligence standard. In both hypotheticals the harm caused is equally severe, and the value of the interest sacrificed is similarly small. Requiring either livestock owner to re-fence a small portion of land to contain livestock is hardly a burdensome procedure when weighed against the nuisance of wandering livestock and the possibility of harm in either scenario. Additionally, the livestock owner in each hypothetical resides in a community that customarily keeps cattle fenced off the roads and out of neighboring land. A final similarity is evident in the livestock owner’s knowledge that livestock escape and wander neighboring fields and roadways.

The distinguishing facts between the two hypotheticals revolve around the general locality of the landholding and the relative degree of negligence exhibited. Hypothetical 3 demonstrates a reduced likelihood of harm posed by livestock on the roadway because of its more agricultural location. The setting in a rural valley, intermixed with large ranches and irrigated farmsteads outside a small town, poses less of a traffic risk than a traditionally rural, but increasingly residential valley outside a rapidly developing mid-size community. Additionally, Hypothetical 4 demonstrates greater tourist traffic adding to an increased likelihood of harm caused by a collision with livestock on the road. Relating to the degree of negligence, Hypothetical 3 indicates that cattle only occasionally escape and the rancher at least attempted to repair the problematic sections of fence. Hypothetical 4 indicates that cattle escaped more often through a gap in the fence and, although known to the rancher, no measures were taken to constrain the cattle from wandering.

Both Hypothetical 3 and 4 probably meet an ordinary negligence standard, but distinguishing facts indicate that only
Hypothetical 4 will likely rise to the level of gross negligence. While both scenarios illustrate similar facts and circumstances, determinative differences include the frequency of escaped cattle, the locality of the land, the likelihood of the harm posed by wandering cattle, and the existence of remedial measures. Balancing these fundamental differences indicates that the evidence is most likely sufficient to distinguish between differing degrees of negligence. Thus, Hypothetical 4 is most likely an example of gross negligence, while Hypothetical 3 fails to meet such an increased standard of negligence.

In conclusion, liability for livestock wandering the highway will be an extremely fact intensive analysis based on a nebulous gross negligence standard. Since gross negligence varies from ordinary negligence only by degree, a stepped-up negligence analysis helps to conceptualize factors useful for determining when gross negligence may apply. Instrumental to this determination will be the location of the accident, the surrounding community customs, remedial measures, and prior knowledge of wandering or hazard livestock. Consideration of these factors creates good policy throughout a mostly agricultural state like Montana. Careful application of the gross negligence standard may impose some measure of liability in more heavily trafficked developing urban and residential centers, while maintaining an open range tradition in dominant agricultural counties where stringent fencing standards are less practicable.

**D. Livestock Owner-Motorist Relationships Around the West**

Montana is not the first state to struggle with judicial and legislative application of the open range doctrine in a changing western environment that mixes growing urban centers with traditional rural lifestyles. Other western state courts have arrived at conclusions similar to *Larson-Murphy*, while legislatures have attempted to mitigate the impact on the livestock community. A review of open range policies in some of these states provides insight into the open range developments spurred by both *Larson-Murphy* and House Bill 246. There are generally three categories western states tend to fit under when dealing with open range issues: (1) states that statutorily or judicially apply the open range no duty rule to livestock-motorist relationships and provide complete immunity for stock owners in the open range; (2) states that apply ordinary negligence to livestock-motorist relationships by judicial interpretation; (3)
states that judicially interpreted an ordinary negligence relationship to apply, but have legislatively increased the standard from ordinary negligence.

Idaho and Nevada have both implemented legislation that exempts livestock owners from liability for damages caused by livestock wandering the highway in designated open range areas. Section 25-2118 of the Idaho Code provides that no livestock owner “shall have the duty to keep such animal off any highway on such [open] range, and shall not be liable for damage to any vehicle or for injury to any person riding therein, caused by a collision between the vehicle and the animal.”127 Nevada has codified similar legislation exempting livestock owners from liability for stock wandering public roads in the open range; however, Nevada does impose liability on livestock owners negligently allowing domestic animals to enter a fenced highway right of way.128 While these states have legislatively imposed immunity for livestock wandering roadways in the open range, the Oregon court has refused impose any duty upon livestock owners to control stock in the open range. In Kendall v. Curl, the Oregon Supreme Court held that “if cattle and horses have a right to be on the road, their owner is not negligent in allowing them on the road.”129 Not unlike Montana open range development, the Idaho and Nevada statutes are similar to House Bill 246 before revision, while the holding of the Oregon court parallels the Bartsch holding prior to Larson-Murphy.130

While Nevada, Idaho and Oregon provide complete immunity for livestock on the roadway in open range, Colorado and Arizona apply general negligence standards to livestock owner-motorist relationships. In Millard v. Smith, the Colorado court held that the open range doctrine does not limit a motorist’s claim for liability. Specifically, the court stated that the statute does not bar a negligence action and “should not be enlarged by construction...to operate as such a bar.”131 The Colorado court continued by clarifying that cattle on the roadway do not raise a presumption of negligence; instead, the plaintiff has the burden to demonstrate that the livestock owner committed a specific act of negligence to breach a duty of

127. IDAHO CODE § 25-2118 (Michie 2000).
128. NEV. REV. STAT. ANN. 568.360(2) (Michie 2001).
reasonable care.\textsuperscript{132}

Similarly, in \textit{Carrow v. Lusby}, the Arizona court held that the open range statute was developed to govern relationships between "owners and occupiers of land...the statute does not govern the liability of a livestock owner to a motorist injured by cattle crossing a highway."\textsuperscript{133} Upon this conclusion, the court turned to common law traditions to determine whether a livestock owner owes a duty of care to motorists traveling public roadways. Finding that common law does not impose a duty on livestock owners to keep livestock off the highway, the court interpreted this in light of the "natural and physical conditions of our state." The court concluded that this did not preclude livestock owners from owing a subsequent duty of care to motorists in a "modern Arizona."\textsuperscript{134} While implementing a negligence standard, the court further stated that in open range country, the mere failure to fence cattle off the roadway did not establish breach of a duty of reasonable care. Instead, the plaintiff motorist must prove specific acts or omissions of the livestock owner.\textsuperscript{135} In this way, while similar to Montana's \textit{Larson-Murphy} holding, the Arizona court provided direction defining the standard of proof required by a plaintiff motorist before liability may be imposed upon a livestock owner.

Finally, New Mexico and Montana occupy a similar category of open range development created by legislatively implementing an increased standard of negligence after a judicial decision applying ordinary negligence. In \textit{Grubb v. Wolfe}, a New Mexico livestock owner sued a motorist for killing a cow on the road in open range country.\textsuperscript{136} The motorist claimed the owner was contributorily negligent, while the owner claimed he had no duty to act reasonably to keep cattle off the roadway in open range.\textsuperscript{137} In reaching its holding that the

\begin{footnotesize}
\textsuperscript{132} Id. at 235-36.
\textsuperscript{133} 804 P.2d 747, 750 (Ariz. 1990).
\textsuperscript{134} Id. at 751-53. In their conclusion, the Arizona court found a Ninth Circuit case implementing California law persuasive: see Galeppi Bros. v. Bartlett, 120 F.2d 208, 210 (9th Cir. 1941) (holding that the common law rule was made before the extensive highway and motor vehicle traffic and "changed conditions compel adoption of a different rule. There is no reason for exempting cattle owners from the same duty applicable to other people to use 'ordinary care or skill in the management of [their] property'". The California Legislature has also reacted to urbanization by restricting open range designation only to the few counties "devoted chiefly to grazing." See Shivley v. Dye Creek Cattle Co., 35 Cal. Rptr. 2d 238, 243 n.3 (Ct. App. 1994).
\textsuperscript{135} \textit{Carrow}, 804 P.2d at 754.
\textsuperscript{136} 408 P.2d 756 (N.M. 1965).
\textsuperscript{137} Id. at 758
\end{footnotesize}
livestock owner owed a duty of reasonable care, the court concluded that even in open range a livestock owner has a duty to act as a reasonable person, and failing to do so may impose liability on a motorist. Shortly after this decision, the New Mexico Legislature enacted Section 64-18-62(c) of the New Mexico Code pursuant to an emergency clause provision. This legislation altered the standard of care required of a livestock owner from ordinary negligence to "specific negligence other than allowing his animals to range in said pasture." In Dean v. Biesecker, the New Mexico court had an opportunity to apply this "specific negligence" legislation. In this case, a cattle owner grazed livestock on either side of a state highway, there was water on both sides of the road, and increased traffic on the roadway caused repeated damage to both livestock and motorists. In light of these facts, the court maintained that Section 64-18-62(c) did not require the livestock owner to fence the highway or abandon his pastures. Although the livestock owner knew accidents occurred on the highway due to wandering stock, there was no specific act outside of lawful grazing for which the livestock owner could be liable. The court thus ruled in favor of the livestock owner and dismissed the complaint.

Although similar to the recent developments of the Montana open range law, it is not clear whether Montana's "gross negligence" standard is comparable to New Mexico's "specific negligence" standard. Like New Mexico's Grubb opinion, the Montana court in Larson-Murphy established an ordinary negligence standard for livestock owners with cattle wandering the roadway on the open range. Also similar to New Mexico, the Montana Legislature almost immediately altered the standard of care. The Montana Legislature seemed to indicate that "gross negligence" would apply if a livestock owner knew cattle were continually on the roadway, causing accidents, and nothing was done to prevent it. Dean, however, indicated that specific negligence required something more than just allowing cattle to

138. Id. at 759.
142. 534 P.2d 481.
143. Id. at 482-483.
144. Id.
145. See Senate Hearing, supra note 108.
wander the roadway even if the owner knew there was a good chance of collisions with motor vehicles. While similar in theory, the two tests will likely differ in application, and Montana's precise standard of care will only become apparent as it develops on a case by case basis.

When looking at western open range development as a whole, it is perhaps unfair to categorize developments that are more accurately envisioned as a continuum of change. Montana's Larson-Murphy decision and subsequent legislation moved Montana open range development from the first category, through the second and into the third. Other states have various applications around these central themes, and can provide helpful information as Montana strives to define what exactly constitutes "gross negligence" and liability in the livestock owner-motorist relationship.

CONCLUSION

The law of the open range is unique to the American West — it is a law bred for open country. As western society began to change in the late nineteenth and early twentieth century, the law of the open range kept pace with limitations exhibited in Lazarus v. Phelps, statutory herd districts and ultimately the exclusion of statutorily designated state and federal highways. Although the Montana Legislature enacted further limitations on the open range, it failed to crystallize its intent by direct modifications to the open range doctrine statutes. The result established an open range doctrine constructed on judicial initiative and speculative legislative intent — a confusing rule of law wiped clean by Larson-Murphy and returned to its original purity. This constituted a heavy blow to the ranching community that relied on 33 years of judicial protection from liability to motorists, and the bright line rule first established in

---

146. See, e.g., Estate of Shuck, 577 N.W.2d 584, 587 (S.D. 1998) (holding that livestock owners are not liable for damages sustained by motorists unless the owner should have reasonably anticipated injury would result).
147. See Scott, supra note 36, at 181.
148. 152 U.S. 81, 85 (1894).
149. See supra note 57; see also supra note 60.
150. Did the Legislature rely on Bartsch when it developed Section 60-7-101 of the Montana Code Annotated, and did it intend this as the only provision creating a legal duty between motorists and livestock owners? Because this question is unclear, the court has refused to extend the open range doctrine to such relationships in Larson-Murphy.
Bartsch. Thus, the Legislature acted to form a limited liability for livestock owners and cattle on the roadway.

Potentially problematic, however, is that House Bill 246 is codified as a limited liability statute, not an open range amendment. Presumably, this means the statute will limit the liability of livestock owners with cattle on the roads in municipal, urban-interface, herd district and rural open range areas. While this explicitly sets forth the livestock owner-motorist relationship that Larson-Murphy found legislatively non-existent, it codifies the relationship wholly separate from the open range doctrine and Containment of Livestock statutes. While patching the issue at hand, just as with Section 60-7-101, the Legislature addressed an open range problem without changing the open range statutes and expressing their true objective. Perhaps it is time to address the open range in light of a changing twenty-first century Montana, and create a flexible open range doctrine that has the ability to adapt to Montana’s growing urban centers as well as traditional rural communities.

151. See supra note 91.

152. As stated earlier, a majority of Montana counties remain in “frontier status,” as well as being heavily devoted to grazing. Due to a changing regional landscape, however, there is no longer a need for a “blanket” open range doctrine. Through population and traffic surveys, most of which are readily available, it would not be difficult to create standards for expansive grazing districts that maintain open range doctrine customs in established areas. Conversely, growing urban centers could be designated according to herding district standards that enforce more rigorous fencing requirements to control wandering livestock. Such a standard would promote good urban-interface ranching techniques, while maintaining the open range tradition where it is still a necessary way of life.
I. INTRODUCTION

Imagine you are in a tumultuous and abusive relationship. You have finally gathered enough strength and resources to get out. Right before you make your move, however, a violent altercation ensues. Your almost-ex repeatedly slams your head into the stove while he threatens to kill you. You are out of your mind with fear and pain. In the midst of the assault, you catch a glimpse of a knife nearby. Instinctively, you reach for it. Because of your partner's rage and fixation on hurting you, he fails to immediately realize what you are doing. Seconds later, he is on the floor bleeding to death from a stab wound to the chest.

You are in a state of shock and unable to comprehend or accept what has happened. Your only thought is to get out and distance yourself from the situation. You take his car keys and start driving. After traveling several miles, you reach a friend's house. You call your mom on the telephone and, in disbelief and bewilderment, tell her what happened. She arranges for medical and law enforcement personnel to go to the residence
where your former lover lies dying.

After you have some time to absorb what happened and talk through it, you realize that what you did was justified. If you hadn’t noticed the knife at the moment you did, it would probably be you lying on the floor bleeding to death. Since leaving the house, you have been aware of this fact deep inside yourself, and your family is now reassuring you of this. However, you have a difficult time accepting that you had to kill your partner in order to save yourself. Nevertheless, you tell the officers who arrive what happened the best way you can, including the fact that you used the knife because you were in overwhelming fear for your own life.

Can an individual in this situation legitimately argue justifiable use of force? Of course. However, the adoption of State ex. rel. Kuntz v. Montana Thirteenth Judicial Dist. Court stands for the proposition that a person who justifiably uses force to fend off an attacker may be found criminally culpable for failing to summon aid for that attacker. This note addresses the issue of duty and its relationship to the justifiable use of force defense in Montana. Part II of this note describes the facts of Kuntz and the holding of the Montana Supreme Court. Part III sets forth the history of the two relevant duties in the case: the duty based on personal relationship and the duty based on creation of the peril. Part IV analyzes the imposition of a legal duty to aid one’s attacker and examines the Montana Supreme Court’s reasoning behind the controversial decision. Part IV also examines another recent case where the court imposed a legal duty and which the Kuntz decision expanded upon. Finally, the conclusion summarizes the court’s analysis and comments on the possible impact the decision may have on future cases involving the affirmative defense of justifiable use of force in Montana.

1. 2000 MT 22, 298 Mont. 146, 995 P.2d 951. This note will not address the underlying and important issue of domestic violence that is present in the case.
2. Id. at ¶ 38.
II. STATE OF MONTANA, EX REL. KUNTZ V. MONTANA
THIRTEENTH JUDICIAL DISTRICT COURT

A. Summary of Facts

Bonnie Kuntz (Kuntz) and Warren Becker (Becker) were involved in a tempestuous relationship and lived together for approximately six years. They were never married. Verbal and physical altercations transpired between them consistently throughout their relationship. Kuntz sought medical attention at least twice for injuries caused by Becker. There is also evidence that Kuntz injured Becker during a squabble.

At the time of the events at issue, Kuntz and Becker were in the process of ending their relationship. On the morning of April 18, 1998, Kuntz and Becker had an argument, but then parted and did not see each other again that day until Kuntz arrived home shortly before midnight. Upon entering the residence, Kuntz immediately noticed Becker had trashed it: the phone was pulled from the wall and disabled, pictures had been ripped off the wall, and a chair and mementos belonging to Kuntz were placed in the wood burning stove. Kuntz began preparing a pot of coffee prior to cleaning up the mess.

While Kuntz was making the coffee, Becker attacked her. Becker’s appearance and the power of the attack made Kuntz fear for her life. Becker shook her, grabbed her by the hair, and slammed her into the stove. While Kuntz does not clearly remember what happened next, she apparently grabbed a knife nearby and stabbed Becker once in the chest.

---

4. Id.
5. Id.
6. Id.
7. Id.
9. Id.
10. Id.
11. Id.
12. Id.
14. Id.
15. Id.
17. Supplemental Brief of Relator at 3, Kuntz (No. 99-055).
remembers going outside through the back door to "cool off." Becker walked through the living room and out to the front porch. A short time later, Kuntz entered the house and saw blood on the floor that trailed out onto the front porch, where Becker was lying face down. Kuntz rolled him over, but he was unresponsive. Kuntz took Becker's car keys from his pocket and drove to a friend's house several miles away where she called her mother. Kuntz's mother arranged for law enforcement and medical personnel to be notified and advised her to go back to the residence to wait for them, which she did.

On June 23, 1998, Kuntz was charged with negligently causing the death of Warren Becker by stabbing him in the chest. Kuntz entered a plea of not guilty. On November 6, 1998, the State amended the Information to charge Kuntz with the same offense, but added the charge of criminal culpability for failing to call for medical assistance. Again, Kuntz entered a plea of not guilty. On December 18, 1998, Kuntz moved to dismiss the Amended Information, or in the alternative, to strike the allegation that her failure to seek medical assistance constituted negligent homicide.

Kuntz asserted she would rely upon the affirmative defense of justifiable use of force. Because justified use of force is a

18. *Id.*
19. *Id.*
20. *Id.* at 4.
22. *Id.* at ¶ 7.
24. Application for Writ of Supervisory Control and Memorandum of Authorities in Support at 1, *Kuntz* (99-055). A person commits the offense of negligent homicide if the person negligently causes the death of another human being. MONT. CODE ANN. § 45-5-104 (1999). A person acts negligently with respect to a result or to a circumstance described by a statute defining an offense when the person consciously disregards a risk that the result will occur or that the circumstance exists or when the person disregards a risk of which the person should be aware that the result will occur or that the circumstance exists. The risk must be of a nature and degree that to disregard it involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation. "Gross deviation" means a deviation that is considerably greater than lack of ordinary care. MONT. CODE ANN. § 45-5-104 (1999).
26. *Id.*
27. *Id.*
28. *Id.*
29. A person is justified in the use of force or threat to use force against another when and to the extent that he reasonably believes that such conduct is necessary to
complete defense, Kuntz argued it would confuse the issues to allow the jury to consider what happened after the stabbing in terms of criminal negligence, as well as subject her to the unconstitutional risk of conviction for behavior that is not criminal.\textsuperscript{30} By attempting to prove criminal negligence, the prosecution would be able to appeal to the passions, sympathies, and prejudices of the jurors by not only circumventing Kuntz's justifiable use of force argument as a complete defense, but also, by directing the jury's focus on Kuntz's failure to save Becker, asserting Kuntz is criminally liable for her inaction.\textsuperscript{31} The State filed a brief in response, arguing that Becker's death was caused by Kuntz's actions as a whole, that is, both the stabbing and the failure to seek aid.\textsuperscript{32} The State further argued that even if Kuntz was justified in stabbing Becker, "the right to use force in self-defense is extinguished when the threat is ended; a person has no right to sit and watch the assailant die."\textsuperscript{33}

On January 8, 1999, the district court denied Kuntz's motion to dismiss the Amended Information.\textsuperscript{34} The district court concluded that although justifiable use of force is a complete defense, Kuntz had a duty to act as a reasonable person following her use of the defense.\textsuperscript{35} Kuntz then applied to the Montana Supreme Court for a writ of supervisory control.\textsuperscript{36} On March 23, 1999, the Montana Supreme Court accepted original jurisdiction at the request of both parties.\textsuperscript{37}

---


31. Id. at 16.

32. Response to Application for Writ of Supervisory Control at 2, Kuntz (No. 99-055).

33. Id.

34. Application For Writ of Supervisory Control and Memorandum of Authorities in Support at 1-2, Kuntz (No. 99-055).

35. Order and Memorandum at 6, Kuntz (No. 98-531).

36. Application For Writ of Supervisory Control and Memorandum of Authorities in Support at 2, Kuntz No. (99-055). A writ of supervisory control is issued only to correct erroneous rulings made by the lower court within its jurisdiction, where there is no appeal, or the remedy by appeal cannot afford adequate relief, and gross injustice is threatened as the result of such rulings. BLACK'S LAW DICTIONARY 1605 (7th ed. 1999).

B. Holding

The two primary holdings by the Montana Supreme Court are: (1) One who justifiably uses deadly force nevertheless has a legal duty to summon aid for the mortally wounded attacker; and (2) One who justifiably uses deadly force and fails to summon aid for her attacker may be criminally culpable for that failure.

The court stressed the duty to aid one’s attacker is only “revived” after the victim “has fully exercised her right to seek and secure safety from personal harm.” Kuntz argued such a duty should not exist if justifiable use of force is established by the jury because it is a complete defense. As a complete defense, Kuntz argued a finding of justifiable use of force would entail the conclusion that she was warranted to act as she did without peril. However, the court agreed with the State that a duty to aid an attacker should be imposed on a victim after the victim has secured safety.

The court also ruled that a victim who fails to summon aid for her attacker may be found criminally negligent “only where the failure to summon aid is the cause-in-fact of death, rather than the use of force itself” (emphasis added). The dissent states this concept is unworkable and makes poor public policy, for how can a victim be justified in taking an attacker’s life at one point in time, then later be held criminally liable for the attacker’s death for failing to aid him? It will undoubtedly be interesting to see how this rule unfolds in future justifiable use of force cases in Montana, especially when considering that past case law sheds little light on the matter.

III. DISCUSSION OF PRIOR LAW

To find a person liable for a failure to act, there must be a duty to act imposed by the law, and the person must be
physically capable of performing the act.\textsuperscript{46} The "American bystander rule" imposes no legal duty on a person to rescue or summon aid for another person who is at risk or in danger.\textsuperscript{47} This is true regardless of moral obligations in society or "when that aid can be rendered without danger or inconvenience to" the potential rescuer.\textsuperscript{48} However, there are exceptions to the American bystander rule, two of which are primarily relevant to the facts of \textit{Kuntz}: (1) the duty based on a personal relationship; and (2) the duty based on creation of the peril.\textsuperscript{49} Criminal liability may be imposed when one fails to take action and one of these duties is present.\textsuperscript{50} This part of the note discusses past case law regarding these two duties. It is important to point out, however, that there is virtually no authority that addresses whether or not a legal duty arises following an act of self-defense. This issue is one of first impression in Montana.\textsuperscript{51}

\textbf{A. Duty Based on Personal Relationship}

Social policy may justify a duty to rescue when some type of special relationship exists between individuals.\textsuperscript{52} The foremost authority on the personal relationship duty in Montana stems from the case of \textit{State v. Mally}.\textsuperscript{53} In \textit{Mally}, the Montana Supreme Court held that a husband has a duty to summon medical aid for his wife, and a failure to render such aid could make the husband criminally liable if the "failure to act was the proximate cause of the death."\textsuperscript{54} Kay Mally suffered from several physical conditions, including hepatitis, cirrhosis, osteoarthritis, and diseases of the liver and kidney.\textsuperscript{55} One evening, she fractured both bones in her upper arms.\textsuperscript{56} Instead of immediately providing medical attention for his wife, Mally placed her in the bedroom for a few days.\textsuperscript{57} When Mally finally

\textsuperscript{46} MONT. CODE ANN. § 45-2-202 (1999).
\textsuperscript{49} \textit{Id.} at ¶ 15.
\textsuperscript{50} \textit{Id.}
\textsuperscript{51} \textit{Id.} at ¶ 13.
\textsuperscript{53} 139 Mont. 599, 366 P.2d 868 (1961).
\textsuperscript{54} \textit{Id.} at 610, 366 P.2d at 874.
\textsuperscript{55} \textit{Id.} at 600, 366 P.2d at 869.
\textsuperscript{56} \textit{Id.}
\textsuperscript{57} \textit{Id.}
summoned an ambulance for Kay, medical personnel found her unconscious and her head, face, and arms badly bruised and swollen. Kay Mally never regained consciousness and died a few days later from degeneration of the kidneys, brought on by the severe shock she suffered after fracturing both arms.

Mally's conviction of involuntary manslaughter was compatible with the court's previous holding in *Territory v. Manton*. In *Manton*, the court ruled a husband's drunkenness was no excuse for his failure to summon medical aid on behalf of his ill-clad wife, who perished outside in the cold. Manton's manslaughter conviction was also upheld by the Montana Supreme Court because he, like Mally, let his wife languish speechlessly while making no effort to summon medical assistance.

In the more recent case of *State v. Decker*, however, the court concluded a husband was not liable for failing to summon aid for his wife who was passed out on the floor of a bar after being intoxicated and complaining of a headache the previous night. Decker's wife, Hyacinth, like Kay Mally, was generally in poor health and suffered from high blood pressure and cirrhosis of the liver. In this instance, the court determined the defendant husband did not depart “from the conduct of an ordinary and prudent man” by (1) putting his wife to bed after she complained of a headache and fell; (2) putting her to bed a second time after finding her in a bar passed out the next day; and (3) finally, contacting a nurse and ambulance the following morning because of concern for his wife's condition.

Significantly, the personal relationship duty does not only apply to married persons as the above cases have illustrated. In the 1910 case of *State v. Rees*, which involved a couple who was living together, but not married, the Montana Supreme Court declared that, “even if the deceased was not defendant's wife, if

59. *Id.*
60. 8 Mont. 95, 19 P. 387 (1888).
61. *Id.* at 109, 19 P. at 394.
62. *Id.*
64. *Id.* at 365, 485 P.2d at 697-698.
65. *Id.* at 363, 485 P.2d at 697.
66. *Id.*
67. *Id.*
68. 40 Mont. 571, 107 P. 893 (1910).
he was guilty of the assault, the legal duty rested upon him to protect, care for, and shelter her after that act to the same extent as though she had been his wife.” This rule is applicable under the personal relationship exception to the American bystander rule, as well as the next exception I will address, the duty based on creation of the peril.

The notion that unmarried couples in a relationship may still fall under the personal relationship exception was disputed in People v. Beardsley. The Supreme Court of Michigan determined the married defendant did not have a legal duty to assist his “experienced” mistress who had voluntarily ingested morphine and later died. The rule from Beardsley, however, is now generally viewed as outdated, probably because of the increasing number of unmarried couples involved in intimate relationships. Accordingly, in Kuntz, the Montana Supreme Court disregarded the rule from Beardsley and asserted that Kuntz and Becker “owed each other the same personal relationship duty as found between spouses under our holding in Mally.”

B. Duty Based on Creation of the Peril

Courts have consistently held that a defendant who positively acts to carelessly cause physical damage to the plaintiff (or his property) is always held to owe a duty of care to the plaintiff. In other words, when a person puts another in a position of danger, he creates for himself a duty to rescue the person from that danger. The Montana Supreme Court recognized this duty to be more significant to the facts of Kuntz than the duty derived from a personal relationship.

In United States v. Hatatley, the Tenth Circuit Court of Appeals found the defendant criminally liable for failing to

69. Id. at 575, 107 P. at 894.
70. 113 N.W. 1128 (Mich. 1907).
71. Id. at 1131.
72. Id. at 1129.
74. Id. at ¶ 19.
76. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 3.12 n.84 (2d. ed. 1986).
rescue the victim after beating him and leaving him injured and shirtless in the freezing desert. Moreover, a recent Washington court held a husband criminally liable for recklessly causing the death of his wife by injecting her with a lethal dose of cocaine, then failing to summon aid until 10-15 minutes after she suffered a second seizure. The court in the latter case held the defendant "had a statutory duty to provide medical care, a natural duty to provide medical help to his wife, and a duty to summon aid for someone he helped place in danger."

While no pronouncement of the legal duty to summon or render medical aid after using justifiable use of force has been established in Montana or elsewhere in the United States, a few jurisdictions have applied the duty based on creation of the peril in cases where self-defense is an issue. For example, in People v. Fowler, the defendant argued he struck decedent in self-defense, then left him "lying helpless and unconscious in a public road, exposed to that danger." The court stated "[t]his conduct of the defendant would then be criminal or not, according to the character of the blow he gave [the victim]. If it was done in self-defense, it would be justifiable. If it was felonious, it would be murder or manslaughter..." While the court did not expand any further on the defendant's duty or non-duty to rescue his victim from the public street following an act of self-defense, from the court's statement, it appears that if the defendant was justified in using deadly force against the victim, he did not have a duty to rescue him from the busy street.

In King v. Commonwealth, the defendant was deemed justified in shooting another individual, but the jury found him guilty of voluntary manslaughter by unlawfully neglecting to provide or refusing to permit others to provide medical attention for the victim when the defendant should have known the seriousness of the victim's wounds. However, the court declared the particular jury instruction improper on which the

78. 130 F. 3d 1399, 1406 (10th Cir. 1997).
80. Id.
82. 174 P. 892 (Cal. 1918).
83. Id. at 896.
84. Id.
85. 148 S.W.2d 1044 (Ky. 1941).
86. Id. at 1045.
conviction was based. The instruction required the shooting be "unlawful," in order to find the defendant had hastened the victim's death by "willful neglect or willful failure to provide medical attention." Accordingly, the court reversed the defendant's conviction of voluntary manslaughter and stated that the condition precedent to defendant's guilt was not met as required in the instruction because defendant did not unlawfully shoot the victim.

Significantly, exceptions to the American bystander rule are not absolute. For example, a person is not required by law to risk her own life to save another—whether she has a legal duty to rescue another because of a personal relationship or whether she placed another in a position of peril. This point was made decades ago in Yockel v. Gerstadt, where the Maryland Court of Appeals stated, "[u]nder any and all circumstances, the law places upon a man the duty of exercising reasonable care for his own protection." The Montana Supreme Court supports this rule of self-preservation, asserting that "the law does not require that he or she risk serious bodily injury or death in order to perform a legal duty," even though such person may still be held accountable for the peril bestowed on the other.

### IV. ANALYSIS

**A. The Legal Duty to Aid One's Attacker**

The Montana Supreme Court limited its analysis of whether a victim must aid her attacker following an act of self-defense to circumstances when the exception of either a personal relationship or creation of the peril exists. The court relied on Flippo v. State to declare that "whether inflicted in self-defense

---

87. Id. at 1046.
88. Id. at 1045.
89. Id.
90. King, 148 S.W.2d at 1046-47.
92. Id. at ¶ 25-26.
93. 140 A. 40 (Md. 1928).
94. Id. at 42.
96. Id.
97. Id. at ¶ 29.
98. 523 S.W.2d 390 (Ark. 1975).
or accidentally, a wound that causes a loss of blood undoubtedly places a person in some degree of peril, and therefore gives rise to a legal duty to either: (1) personally provide assistance; or (2) summon medical assistance (emphasis added). However, upon a thorough reading of Flippo, there is no mention whatsoever of self-defense by the Supreme Court of Arkansas, nor does the court enunciate or seemingly imply that such a duty would be applicable following the use of self-defense. In Flippo, the court merely found sufficient evidence existed to hold the defendants criminally negligent after unintentionally shooting and killing a man while hunting, then failing to render timely aid after promising the victim's father they would do so. The Montana Supreme Court made it clear that when a person justifiably uses self-defense, she does not have to aid her attacker if doing so would place her in harm's way. This rule logically flows from the basic theory underlying the notion of self-defense, that is, the right to protect oneself. The court compared the person that justifiably uses force to the American bystander rule's innocent bystander. Both the person that justifiably uses force and the innocent bystander have no legal duty to render aid; each simply has the duty to protect herself. Somehow, from this scant analysis that some may argue tends to call for the opposite conclusion, the Montana Supreme Court determined that a duty to summon aid may be "revived" as the State contends, but only after the victim has fully exercised her right to seek and secure safety. The court stressed that imposition of this duty requires: (1) the victim is physically capable of such action; and (2) the victim has knowledge of the facts indicating a duty to act. Accordingly, the court ruled a legal duty may be "revived" after a victim uses self-defense, but the two requirements of knowledge and physical capability must be met first. Moreover, when the legal duty to aid is "revived," the victim may still not be liable for negligent homicide, the charge at issue in Kuntz, because it

100. Flippo, 523 S.W. 2d at 394.
102. Id. at ¶ 32.
103. Id.
104. Id. at ¶ 33.
105. Id.
106. Id.
requires a gross deviation from a reasonable standard of care—a standard that may not be met by failing to render aid—especially under the circumstances generally present in a situation calling for self-defense.\footnote{107}

The Montana Supreme Court wrongly determined that a victim may have a “revived” duty to aid her attacker following her justifiable use of force against him. The dissenting opinion is correct by stating “[t]his result is simply unworkable as a practical matter and makes poor public policy.”\footnote{108} How can justified use of force against an attacker reconcile with a later obligation to assist him? There is no rationale behind this duty. It makes little sense to permit a victim to justifiably use deadly force against another when in a life or death situation, then place a legal duty on that victim to aid the other, who just previously threatened the victim with serious bodily injury or death.

Certainly, one could argue that a \textit{moral} duty may arise when and if the victim feels safe and is physically and emotionally able to call for help if her attacker is in need. However, a moral duty is not the same as a legal duty, as the Restatement makes clear.\footnote{109} A moral duty generally cannot be imposed on one individual to aid another, even if assistance could easily be invoked.\footnote{110} Thus, it follows that such a duty should not be placed on a victim to aid her attacker after the use of self-defense.

Furthermore, the majority’s stipulation that the duty to aid shall be revived only after the victim is “safe”\footnote{111} is, at best, vague. How does a person who is completely removed from such a violent and extreme situation (such as a judge) decide when the victim felt safe enough to elicit the duty to render aid to her aggressor? It would be impossible, as far as I can tell, for someone unrelated to the incident to later determine when (and if) a victim felt safe from her attacker to, at some particular point in time, give rise to a legal duty to rescue her attacker.

Justifiable use of force is authorized only in very limited
circumstances.\textsuperscript{112} It is applicable only when necessary to prevent imminent death, serious bodily harm to oneself or another, or to prevent the commission of a forcible felony.\textsuperscript{113} However, in these limited instances, the use of deadly force is acceptable.\textsuperscript{114} “It is inherently contradictory to provide by statute that under certain circumstances deadly force may be justified, but that having so acted, a victim has a common law duty to prevent the death of her assailant.”\textsuperscript{115} Furthermore, it should not be forgotten that justifiable use of force is a complete defense, which must result in an acquittal if proven.\textsuperscript{116}

\textbf{B. Criminal Liability for Failing to Aid One’s Attacker}

Since the Montana Supreme Court ruled a victim that has justifiably used force may have a “revived” duty of care to her attacker, it follows that the court held a failure to perform this duty can give rise to criminal liability.\textsuperscript{117} A victim under these circumstances, however, may be criminally liable for failing to render aid only if the failure was the “cause in fact” of the aggressor’s death, rather than the justified use of force.\textsuperscript{118} Therefore, if the justified use of force \textit{directly} led to the aggressor’s death, the victim cannot be criminally liable for failing to render aid. To make the rule even more complicated, the court notes that “a breach of the legal duty to summon aid may be the cause-in-fact of death, but is still not necessarily a crime”\textsuperscript{119} under Montana’s negligent homicide statute because a \textit{gross deviation} from an ordinary standard of care must be shown.\textsuperscript{120} Once again, the court has set forth a hazy rule that is difficult to apply.

This rule is impractical for two reasons. First of all, it could be extremely arduous to determine whether or not the failure to summon aid was the cause-in-fact of the aggressor’s death, rather than merely the injuries received from the victim’s

\begin{itemize}
\item \textsuperscript{112} \textit{Id.} at \S 51.
\item \textsuperscript{113} \textit{Mont.} Code Ann. \S 45-3-102 (1999).
\item \textsuperscript{114} \textit{Kuntz}, 2000 MT 22, \S 51, 298 Mont. 146, \S 51, 995 P.2d 951, \S 51.
\item \textsuperscript{115} \textit{Id.} (Trieweiler, J., dissenting).
\item \textsuperscript{116} \textit{Park v. Montana Sixth Judicial Dist. Court}, 1998 MT 164, \S 42, 289 Mont. 367, \S 42, 961 P.2d 1267, \S 42.
\item \textsuperscript{117} \textit{Kuntz}, 2000 MT 22, \S 36, 298 Mont. 146, \S 36, 995 P.2d 951, \S 36.
\item \textsuperscript{118} \textit{Id.}
\item \textsuperscript{119} \textit{Id.} at \S 39.
\item \textsuperscript{120} \textit{Id.}; see also supra text accompanying note 24.
\end{itemize}
justified use of force. In the cases where this information is not easily ascertainable, one could convincingly argue either way. For instance, one may assert the aggressor died simply as a result of the force necessarily used by the victim, and he would have died even if medical aid had been quickly administered. On the other hand, one could argue the aggressor died as a cause-in-fact of the victim’s failure to summon medical aid soon enough (after feeling safe, of course), rather than dying from the injuries received from the victim through the use of self-defense.

The former argument has merit because “where a person is placed in peril by another’s justified use of force it can never be said that the failure to summon aid, rather than the original act of force, is the cause in fact of death, because presumably death would never have occurred but for the original act of self-defense.” The latter argument also appears worthwhile, because is it not true that virtually anytime a person is seriously injured, the lack of immediate medical attention directly contributes to the quicker expiration of that person’s life than if such aid had been readily administered?

The second reason the court’s rule that imposes criminal liability is impractical results from its contradictory nature as it relates to the affirmative defense of justifiable use of force. When self-defense is proven, the victim is justified in taking the attacker’s life. How can the same victim be held criminally liable for failing to render aid to the attacker later, and for the injuries inflicted justifiably by the victim while defending herself? Clearly, the court’s rule in Kuntz and Montana’s self-defense statute are at odds.

The dissent was correct by asserting that a legal duty under the circumstances in the present case should not be capable of being revived, nor should the victim be held criminally liable for failing to render aid to her attacker if such revival has taken place. Kuntz is an unusual case in which imposing liability is troublesome for public policy reasons. In cases such as this, it is recommended that judges screen the plaintiff’s claim under the direction of duty. To illustrate, the Restatement presents a situation where there is an obvious problem in allowing suit

---

121. *Id.* at ¶ 52.
122. *Id.* at ¶ 51; see also supra text accompanying note 29.
against a property owner who is clearly negligent, but a plaintiff
who is injured while deliberately trespassing on the owner's
property. The difficulty with this lawsuit is similar to the
problem faced in *Kuntz*. In both cases, the defendant should
generally not be held liable for the plaintiff's harm because of
the plaintiff's role and the surrounding circumstances. By
recognizing liability in such instances, courts take on a bold task
that is potentially problematic.

C. Another Recent Montana Supreme Court Decision and Future
Implications of Kuntz

The Montana Supreme Court is clearly expanding the
circumstances of when one person owes a legal duty to rescue
another. Prior to *Kuntz*, the court broadened the concept of a
legal duty in *Nelson v. Driscoll*. In *Nelson*, the court held a
police officer had a legal duty of care to a female driver following
a traffic stop. The officer was aware the female and her male
passenger had been drinking alcohol, but the driver did not
appear intoxicated. However, because the officer knew both
the driver and passenger consumed alcohol earlier that night, he
prohibited them from driving home and offered them a ride.
The couple did not accept the ride and stated they would call a
friend for help. The officer then left the area, but
subsequently drove by the couple several times to make sure
they did not attempt to get back into their vehicle. A short
while later, the female was killed after being struck by a car,
and the Montana Supreme Court held the police officer had a
duty to protect her from harm because he affirmatively took
steps to voluntarily provide a service to her.

While there is authority that a special relationship exists
between an officer and a prisoner in custody, which imposes a
duty on the officer to protect the prisoner, this was not the

125. *Id.*
126. *Id.*
128. *Id.* at ¶ 40.
129. *Id.* at ¶ 10.
130. *Id.* at ¶ 38.
131. *Id.*
133. *Id.*
situation in Nelson. In Nelson, the officer did not place the female driver under arrest. The general rule is that a police officer "has no duty to protect a particular individual absent a special relationship." However, the court found the officer assumed a duty to protect the driver merely because the officer took affirmative and voluntary steps to prevent the couple from driving home. The court also concluded the officer's actions constituted a foreseeable risk of harm to the female because of icy conditions, darkness, and the fact the female had been drinking alcohol.

The outcome of Nelson is off the mark. An officer that simply takes away one's driving privileges because of alcohol use should not then be burdened with a duty to protect that person. In this case, the officer offered the couple a ride home and was refused. The couple told him they would call a friend for a ride home, and a pay phone was only a little more than a block away. The officer drove around in the vicinity where the couple was located in order to check on them and make sure they were not driving. How would it be foreseeable to the officer that the female would be struck by a car and killed? She did not display enough characteristics to be charged with a DUI, though she and the passenger admitted drinking. Therefore, regardless of the weather conditions, the officer did what he could to assist the couple and should not be held responsible for any harm to them. After all, the driver and passenger were both adults who were accountable for their own actions.

In both Kuntz and Nelson, the court found a legal duty where there should be none. Certainly, the court has expanded the circumstances in which a legal duty exists. By finding that a police officer owes a duty to rescue a possibly-impaired driver and a victim owes a duty to rescue her attacker, it is hard to say where the court will draw the line in the future. The court is clearly leaning towards applying a legal duty wherever possible instead of enforcing the American bystander rule, an arguably more appropriate precept for cases concerning self-defense and officer discretion.

136. Id. at ¶ 38.
137. Id. at ¶ 39.
138. Id. at ¶ 11.
139. Id.
140. Id. at ¶¶ 8-9.
V. CONCLUSION

The legal duty the Montana Supreme Court applied in *Kuntz* is not supported by existing case law. For the most part, this is because of the lack of any case law on point. However, the court's decision does not logically flow from the few cases the majority did cite in its analysis. The rule that after a person justifiably uses force to fend off an attacker she must then render aid to that attacker, is truly unfeasible. The revival of a duty to rescue under such circumstances cannot legitimately be imposed. If it is determined that an individual justifiably used force to fend off an attacker, the inquiry should stop there. It is simply incomprehensible to imagine a scenario unfolding as the court suggests—that a person would defend herself by wounding an attacker during a vicious struggle, regain composure and feel safe, then personally aid her attacker or call for help in order to save him. One can only hope the current trend by the Montana Supreme Court of imposing a legal duty where there should be none soon will be reexamined, and thus, short-lived.