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CASE COMMENT

DIVERSE MANDATES REGARDING THE ESOP DIVERSIFICATION REQUIREMENT FOLLOWING *FIFTH THIRD BANCORP V. DUDENHOEFFER*

*Thomas V. Bohac Jr.**

Employee participation in Employee Stock Ownership Plans (ESOPs) has increased dramatically since they were statutorily sanctioned in 1974 through various provisions of the Employee Retirement Income Security Act of 1974 (ERISA) and revisions to the Internal Revenue Code (IRC). The National Center for Employee Ownership estimates that 28 million Americans own employer securities through a variety of means, including profit sharing plans, stock options, and their 401(k) retirement plans.[1] Of these, 13.5 million hold employer securities through participation in a qualified ESOP, with assets held in these accounts totaling in excess of $942 billion.[2] Although these plans have significant assets under management, the legal and functional understanding of these vehicles remains a delicate balance of public policy and private utility. Within the realm of public policy, the dual mandates imposed on plan fiduciaries often conflict. Plan fiduciaries are tasked with safeguarding the employee-participants' retirement assets as well as complying with the dictates of the plan documents mandating investment principally in employer securities. Basic portfolio theory implies these requirements are prima facie incompatible in that the optimal Sharpe Ratio[3] would be achieved through diversification of plan assets. The defining feature of the ESOP however is that it holds contributed assets chiefly in one asset (employer securities). This single holding

* J.D. Candidate, University of Notre Dame Law School, 2015; B.B.A. Finance, Loyola University Chicago, 2012. I would like to thank Associate Dean Lloyd Mayer for his guidance and mentorship throughout the writing process as well as my family for their constant support.

1 *A Statistical Profile for Employment Ownership*, NAT'L CENTER FOR EMP. OWNERSHIP, http://www.nceo.org/articles/statistical-profile-employee-ownership (last updated June 2015).

2 *Id.*

3 The risk-adjusted return of the portfolio.

dramatically increases the risk of the fund as compared to a prudently diversified portfolio.

In *Donovan v. Cunningham*,[4] the Fifth Circuit summarized the plight of the ESOP fiduciary:

> On the one hand, Congress has repeatedly expressed its intent to encourage the formation of ESOPs by passing legislation granting such plans favorable treatment, and has warned against judicial and administrative action that would thwart that goal. Competing with Congress' expressed policy to foster the formation of ESOPs is the policy expressed in equally forceful terms in ERISA: that of safeguarding the interests of participants in employee benefit plans by vigorously enforcing standards of fiduciary responsibility. Our task in interpreting the statute is to balance these concerns so that competent fiduciaries will not be afraid to serve, but without giving unscrupulous ones a license to steal.[5]

When contemplating the role of ESOP fiduciaries, the Fifth Circuit expressed its concern that it must seek to "satisfy the demands of [c]ongressional policies that seem destined to collide."[6] This conflict between traditional ERISA jurisprudence and the congressional favor granted to ESOPs came to a head in the recent Supreme Court decision in *Fifth Third Bancorp v. Dudenhoeffer*,[7] where a unanimous Court held that ESOP fiduciaries are not entitled to a presumption of prudence in regard to asset allocation at the pleading stage.

In *Dudenhoeffer*, the Court focused on the ESOP as a retirement benefit plan.[8] However, this is only one function of ESOPs. Viewed in terms of both the original intent of Congress and contemporary corporate finance, the ESOPs are designed to meet several goals, including the alignment of employee and employer interests to facilitate a wider base of capital ownership including the average employee. As the Court has lost sight of these fundamental goals, it has drifted into the fallacy of interpreting ESOPs principally as employee retirement accounts. This has led the Court to apply ERISA fiduciary obligations to the ESOP fiduciaries without regard for the special statutory status of ESOPs. This creates difficulties for plan fiduciaries in seeking to fulfill the underlying purposes of the fund while at the same time complying with the heightened duties imposed upon them by ERISA. Courts have consistently maintained that they are to enforce ERISA fiduciary standards with "uncompromising rigidity"[9] which, when coupled with the recent ruling in *Dudenhoeffer*, results in significant con-

4 Donovan v. Cunningham, 716 F.2d 1455 (5th Cir. 1983).

5 *Donovan*, 716 F.2d at 1466 (footnotes omitted) (citation omitted).

6 *Id.*

7 Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459 (2014).

8 *Id.* at 2463–64.

9 Donovan v. Estate of Fitzsimmons, 778 F.2d 298, 302 (7th Cir. 1985) (quoting NLRB v. Amax Coal Co., 453 U.S. 322, 329–30 (1981)).

cern for ESOP settlors and plan fiduciaries who desire to continue to use these investment vehicles for any of the myriad other purposes for which they have heretofore been employed (with apparent congressional blessing).

I. *DUDENHOEFFER* AND THE FUTURE OF ESOP FIDUCIARY STANDARDS

This past term, the Supreme Court addressed whether ESOP fiduciaries are entitled to a presumption of prudence at the pleading stage when the fiduciary decides to buy or hold employer stock.[10] While the lower courts have generally accepted such a presumption, the circuits split on whether the presumption attached at the pleading stage.

Here, Fifth Third maintained a defined contribution plan for its employees, which included a matching contribution from Fifth Third of up to four percent of an employee's compensation.[11] Participating employees were provided twenty different funds amongst which they would be permitted to allocate their salary withholdings.[12] One of those twenty allowed funds was the Fifth Third ESOP.[13] While the employees were not required to invest in the ESOP, the matching contribution made by Fifth Third would by default be contributed to the ESOP, although the employee could later chose to reallocate the investment.[14] The respondent-plaintiffs in this action were former Fifth Third employees who had participated in the ESOP, and who alleged that the ESOP fiduciaries had violated their duties of loyalty and prudence.[15] The Court focused principally on the duty of prudence claims.[16]

A. The Moench *Standard*

Dudenhoeffer arrived at the Supreme Court after the Sixth Circuit broke from courts in its sister circuits with regard to the proper standard to hold ESOP fiduciaries to when examining their investment decisions. Prior to the Sixth Circuit's decision, courts in most circuits followed the *Moench* standard.[17] This standard permitted a presumption that an ESOP fiduci-

10 *Dudenhoeffer*, 134 S. Ct. at 2463.

11 *Id.*

12 *Id.* at 2463–64.

13 *Id.* at 2464.

14 *Id.*

15 *Id.*

16 *Id.*

17 *See* Kirschbaum v. Reliant Energy, Inc., 526 F.3d 243 (5th Cir. 2008); Lingis v. Motorola, Inc., 649 F. Supp. 2d 861 (N.D. Ill. 2009); Morrison v. Moneygram Int'l, Inc., 607 F. Supp. 2d 1033 (D. Minn. 2009); *In re* Ford Motor Co. ERISA Litig., 590 F. Supp. 2d 883 (E.D. Mich. 2008); *In re* McKesson HBOC, Inc. ERISA Litig., No. C00-20030 RMW, 2002 U.S. Dist. LEXIS 19473 (N.D. Cal. Sept. 30, 2002).

ary's decision to remain invested in, or continue investing in pursuant to an investment plan, employer securities.[18] The plaintiff can then rebut the presumption by "showing that a prudent fiduciary acting under similar circumstances would have made a different investment decision."[19]

This standard is derived from the Third Circuit's decision in *Moench v. Robertson*,[20] which was the first case to expressly state a presumption of prudence for ESOP fiduciaries.[21] *Moench* also recognized an exception to the presumption for actions taken when the employer was in dire financial straits.[22] *Moench* arose out of the voluntary bankruptcy of Statewide Bancorp (Statewide).[23] The plaintiff, Charles Moench, was an employee of Statewide and a participant in Statewide's ESOP.[24] The suit focused on the period running from July 1989 to May 1991, a period which saw dramatic decreases in share valuation, rendering the ESOP holdings virtually worthless.[25] In addition to the adverse market movement, federal banking regulators repeatedly expressed concern to Statewide's board about the state of Statewide's portfolio and financial condition.[26]

In *Moench*, the Third Circuit began their examination by recognizing the general requirement that pension benefit plan fiduciaries are required to "diversify investments of the plan assets 'so as to minimize the risk of large losses'"[27] as well as recognizing the express ESOP exemption from this general rule found at 29 U.S.C. § 1104(a)(2).[28] In effect, the ESOP exemption permits a qualifying plan fiduciary to hold a level of plan assets in employer securities (or other qualifying property) which, under other circumstances, would be deemed imprudent under traditional portfolio theory. The Third Circuit therefore recognizes that "under normal circumstances,

18 Dudenhoefer v. Fifth Third Bancorp, 692 F.3d 410, 418 (6th Cir. 2012), *vacated*, 134 S. Ct. 2459 (2014).

19 *Id.* (quoting Kuper v. Iovenko, 66 F.3d 1447, 1459 (6th Cir. 1995) (internal quotation marks omitted)).

20 Moench v. Robertson, 62 F.3d 553 (3d Cir. 1995), *abrogated by* Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459 (2014).

21 *Id.* at 571.

22 *Id.* at 568.

23 *Id.* at 557.

24 *Id.* at 559.

25 *Id.* at 557 (stating that statewide common stock fell from $18.25 per share in July 1989 to less than 25 cents in May 1991).

26 *Id.*

27 *Id.* at 568 (quoting 29 U.S.C. § 1104(a)(1)(C) (2012)).

28 29 U.S.C. § 1104(a)(2) (""In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).").

ESOP fiduciaries cannot be taken to task for failing to diversify investments, regardless of how prudent diversification would be under the terms of an ordinary non-ESOP pension plan."[29] This exemption is perfectly reasonable given that by their very terms ESOPs are required to invest primarily in qualified employer securities. The Third Circuit went on to explain, however, that "while the fiduciary presumptively is required to invest in employer securities, there may come a time when such investments no longer serve the purpose of the trust, or the settlor's intent."[30]

The settlor's intent, and the purpose of the trust generally, is more than merely safeguarding the employees' assets for retirement. A normal 401(k), or other retirement planning vehicle, would be more efficient at doing that, and would better align employee and employer interests by giving the employee a stake in corporate performance, among other goals. Certain considerations, such as the firm nearing insolvency, would make the continued investment in employer securities run counter to the congressional and settlor goals. It would not be logical to completely exempt ESOP fiduciaries from judicial oversight over their decision to invest in employer securities. Yet because plan fiduciaries are required to invest for a multiplicity of goals, it would not be proper to expose ESOP fiduciaries to de novo review with regard to investment decisions generally. The trust imposed in plan fiduciaries is akin to that placed in corporate fiduciaries who enjoy the protection of the business judgment rule with respect to corporate actions. In both cases, the courts are admittedly less skilled than the appointed managers at determining the proper investment plan and risk thresholds for plan assets.

This deference led the *Moench* court to determine that the proper standard of review for the ESOP fiduciary's investment decisions was abuse of discretion.[31] To defeat the presumption of prudence, the plaintiff must show that there were circumstances that were not known or anticipated by the settlor, and that would defeat or substantially impair the accomplishment of the objective of the fund should the ESOP fiduciary continue to invest in accordance with the plan.[32] The Third Circuit noted that "as the financial state of the company deteriorates, ESOP fiduciaries who double as directors of the corporation often begin to serve two masters."[33] Just as is the case with corporate law generally, when the fiduciary becomes conflicted he no longer is entitled to judicial deference, as even though the

29 *Moench*, 62 F.3d at 568.

30 *Id.* at 571.

31 *Id.* ("[A]n ESOP fiduciary who invests the assets in employer stock is entitled to a presumption that it acted consistently with ERISA by virtue of that decision. However, the plaintiff may overcome that presumption by establishing that the fiduciary abused its discretion by investing in employer securities.").

32 *Id.* at 571 (citing RESTATEMENT (SECOND) OF TRUSTS § 227 cmt. q (1959)).

33 *Moench*, 62 F.3d at 572.

court may be a poor judge of investment policy, the conflicted fiduciary is even worse. The Third Circuit vacated the district court's grant of summary judgment to the ESOP fiduciaries, only permitting the matter to proceed given the possible duty of loyalty concerns arising from the extraordinary financial state of Statewide.[34]

The Third Circuit is not the only court to impose a presumption of prudence at the pleading stage conditioned on the exception for extreme financial duress. In *White v. Marshall & Ilsley Corp.*,[35] the Seventh Circuit required that for the presumption of prudence to be overcome, the plaintiff was required to plead and ultimately prove that "the company faced impending collapse or dire circumstances that could not have been foreseen by the founder of the plan."[36] This case arose out of significant declines in employer stock value during the global financial crisis of 2008–2009. The employee-participants alleged that the continued offering of an ESOP along with several other investment options for employee investment violated the ESOP fiduciaries' duty of prudence.[37] Here, the Seventh Circuit reaffirmed that the defendant ESOP fiduciaries are entitled to a presumption of prudence, even though the court is required to accept all of the plaintiff's allegations as true under the motion to dismiss standard.[38] The court confronted the plaintiff's argument that the dramatic decline in stock valuation would require the fiduciaries to remove the ESOP as an option for employee investment because it would result in large losses.[39] It noted however that there was a possibility of a recovery—at which point the plaintiffs could sue the fiduciaries for the foregone gains that would have been realized had the fiduciaries stayed the course with the ESOP's investment plan.[40] The court determined that:

> If the fiduciaries had chosen to violate the terms of the Plan and had forced a sale of employees' M&I [Marshall & Ilsley] stock at the lowest point, the employees would have lost out on the later increase in value and would seem to have had viable claims under ERISA for the fiduciaries' failure to comply with the terms of the Plan document.[41]

It would be illogical to hold ESOP fiduciaries liable for market movements given the "random walk" of equity prices. Therefore, the protection afforded to ESOP fiduciaries by the presumption of prudence would

34 *Id.*

35 White v. Marshall & Ilsley Corp., 714 F.3d 980 (7th Cir. 2013), *abrogated by* Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459 (2014).

36 *Id.* at 989 (internal quotation marks omitted).

37 *Id.* at 982.

38 *Id.*

39 *Id.* at 987.

40 *Id.*

41 *Id.*

effectively shelter fiduciary decisions while still allowing for liability if they disregard firm specific information that rises to a critical level.

The Ninth Circuit similarly looks to the presumption of prudence tempered by an exception for instances in which the viability of the employer as a going concern are at issue. In *Quan v. Computer Sciences Corp.*,[42] the court expressly embraced *Moench*. The *Quan* court accepted the *Moench* presumption, explicitly adding that "if there is room for reasonable fiduciaries to disagree as to whether they are bound to divest from company stock, the abuse of discretion standard protects a fiduciary's choice not to divest."[43] The Ninth Circuit here clarified that the presumption of prudence did not only apply to purchases of company shares in accordance with the ESOP plan documents, but also to the refusal of plan fiduciaries to divest from those assets if there were some question as to whether or not they would be safe investments for the ESOP to continue holding. Most other federal circuits which have addressed this issue have joined in following the *Moench* standard, and in those which have yet to address ESOP fiduciary duties with regard to fund diversification, the district courts in those circuits have followed the lead of the other circuits in applying *Moench*.[44]

B. The Supreme Court Rejects Moench *at the Pleading Stage*

Justice Breyer, writing for a unanimous court, rejected the application of a presumption of prudence in favor of ESOP fiduciary actions, as embodied in the *Moench* standard, at the pleading stage.[45] In reaching this determination, the Court placed great emphasis on the role of an ESOP fund as a retirement income and wealth preservation device in line with other ERISA-governed plans.[46] In so doing, the Court determined that ERISA's primary purpose of safeguarding the expectancy interests of plan participants in their retirement incomes should be given special weight in the ESOP context. Justice Breyer turned to the prudent man standard of care that is applicable to ERISA plan fiduciaries and quoted directly from 29 U.S.C. § 1104 to reiterate that the ERISA fiduciary is bound to exercise his discretion solely for the benefit of the plan participants and beneficiaries.[47] In so doing, the ESOP fiduciary is held to the standard of care of a prudent man under similar circumstances, must prudently diversify the ac-

42 Quan v. Computer Scis. Corp., 623 F.3d 870 (9th Cir. 2010), *abrogated by* Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459 (2014).

43 *Id.* at 882.

44 *See* DiFelice v. U.S. Airways, Inc., 497 F.3d 410 (4th Cir. 2007); Morrison v. Moneygram Int'l, Inc., 607 F. Supp. 2d 1033 (D. Minn. 2009); Harris v. Koenig, 602 F. Supp. 2d 39 (D.D.C. 2009); *In re* Ford Motor Co. ERISA Litig., 590 F. Supp 2d 883 (E.D. Mich. 2008).

45 *Dudenhoeffer*, 134 S. Ct. at 2463.

46 *Id.* at 2467–68.

47 *Id.* at 2465.

count, and must administer the plan in accordance with the plan documents in so far as such documents do not conflict with the provisions of ERISA.[48] He followed this with the recognition that ESOPs are "designed to invest primarily in the stock of the participants' employer"[49] and are therefore given statutory exemptions from the requirement of prudent diversification.[50] By looking at the exception in this way, Justice Breyer and the Court implicitly limited the latitude given to the plan fiduciary to pursue other aims of the plan which might be adverse to the ultimate safety of the employees' deferred income.

When examining the standard by which to assess ESOP fiduciary conduct, the Court determined that "the same standard of prudence applies to all ERISA fiduciaries, including ESOP fiduciaries, except that an ESOP fiduciary is under no duty to diversify the ESOP's holdings."[51] Special emphasis was placed on the qualifier in the statutory exemption to the prudent man standard permitted for ESOP fiduciaries, which limits deviations from prudent behavior "only to the extent that it requires diversification."[52] The Court pointed to the language of § 1104(a)(1)(B) and delved into the meaning of "an enterprise of a like character and with like aims."[53] This qualifier to the prudent man standard is taken to mean a fiduciary engaged in pursuing the goals enumerated immediately above in § 1104(a)(1)(A), namely to provide benefits to plan participants and their beneficiaries and defray reasonable expenses of plan administration.[54] The Court determined that "benefits" as used in §1104(a)(1)(A)(i) refers only to financial benefits that are intended to accrue to plan participants and their beneficiaries, not to "nonpecuniary benefits like those supposed to arise from employee ownership of employer stock."[55] Section 1104(a)(1)(D), which mandates plan fiduciaries act in accordance with plan documents, does not afford ESOP fiduciaries added protections when engaging in the purchase and holding of qualified employer securities, because the duty of prudence established at § 1104(a)(1)(B) "trumps the instructions of a plan document, such as an instruction to invest exclusively in employer stock even if financial goals demand the contrary."[56]

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48 *Id.*

49 *Id.* (citing 29 U.S.C. § 1107(d)(6)(A) (2012) (internal quotation marks omitted)).

50 *Id.* at 2465 (citing 29 U.S.C. § 1104(a)(1)(C) (an ESOP fiduciary is not obligated to "diversif[y] the investments of the plan so as to minimize the risk of large losses") and 29 U.S.C. § 1104(a)(1)(B) (exempting the fiduciary from the prudent man standard relating to diversification of plan assets)).

51 *Id.* at 2467.

52 *Id.* (quoting 29 U.S.C. § 1104(a)(2) (emphasis removed)).

53 *Id.* at 2467 (quoting 29 U.S.C. § 1104(a)(1)(B)).

54 *Id.* at 2468.

55 *Id.*

56 *Id.*

The Court made a token gesture to their prior recognition that "ERISA represents a 'careful balancing' between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans."[57] Even in this acknowledgement, however, the Supreme Court implicitly equated an ESOP with a traditional ERISA-governed retirement benefit plan. Through focusing on the retirement plan features of ESOPs, the Court held that the presumption of prudence in favor of ESOP fiduciaries at the pleading stage "makes it impossible for a plaintiff to state a duty-of-prudence claim, no matter how meritorious, unless the employer is in very bad economic circumstances."[58] The desire to see meritorious cases move forward through the adjudicative process requires a more detailed examination of the facts on a case-by-case basis to determine whether or not the plaintiffs state a plausible claim which would survive the pleading standard of *Bell Atlantic Corp. v. Twombly*[59] and *Ashcroft v. Iqbal*.[60] This more detailed examination comes at a real cost, however, in terms of both time and money that plans and plan fiduciaries must expend to address the alleged improprieties, even if they ultimately prove meritless. These costs are borne not solely by the fiduciaries, but also by all of the plan participants. The Court determined that this increased cost incurred from the increased number of, and effort expended on, ESOP fiduciary duty claims, as well as the increase in instances of nonmeritorious claims moving forward at the pleading level is worth the reduction in false negatives at the same level.

The Court went on to affirm its acceptance of the efficient market hypothesis in its treatment of the duty of loyalty issues; however, this also has applications to the duty of care issues addressed here. Justice Breyer directly confronted the plaintiff's claim that the ESOP fiduciaries should have known from publicly available information that Fifth Third stock was overvalued, and rejected that claim by relying on the efficient market hypothesis.[61] This usage of the efficient market hypothesis would imply that "where a stock is publicly traded, allegations that a fiduciary should have recognized from publicly available information alone that the market was over- or undervaluing the stock are implausible as a general rule."[62] Because we can assume that all publicly available information is incorporated into the market valuation of publically traded securities, ERISA plan fiduciaries cannot hope to beat the market relying solely on such public information.

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57 *Id.* at 2470 (quoting Conkright v. Frommert, 559 U.S. 506, 517 (2010)).

58 *Id.*

59 Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

60 Ashcroft v. Iqbal, 556 U.S. 662 (2009).

61 *Dudenhoeffer*, 134 S. Ct. at 2471.

62 *Id.*

This led the Court to the second allegation that the plaintiffs raised in the complaint: that the ESOP fiduciaries, by virtue of their position as Fifth Third insiders should have known that the stock was overvalued. Because of insider duties under the federal securities laws, in order for the plaintiff to validly put forth a claim against the fiduciaries for a violation of their duty of prudence to the plan, he must "allege an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it."[63] The duty of prudence under ERISA does not require that a fiduciary take illegal action, even if such action could feasibly be for the benefit of the fund.

The Court ended its analysis by remanding the case for a determination whether the plaintiff had stated a claim sufficient to overcome the *Twombly* pleading standard without recourse to a presumption that the ESOP fiduciaries acted prudently in following the terms of the plan by acquiring and holding qualified Fifth Third equity securities.[64] While the Court gave some protection to plan fiduciaries in their affirmation of the efficient market hypothesis and repudiation of a requirement for plan fiduciaries to improperly use information gained as an insider for the benefit of plan participants and beneficiaries, it has opened up ESOP fiduciaries to increased litigation risk. This may deter qualified fiduciaries from serving in such capacities and may deplete ESOP funds by increasing the likelihood that plan fiduciaries will need to spend time and resources defending their actions after adverse movements in the value of the underlying employer securities. More fundamentally, this decision may have been arrived at through a fundamental misunderstanding of the multifaceted role of the ESOP as a vehicle for capital formation and incentive alignment as well as a retirement planning device.

II. EFFECTS AND ADVISABILITY OF IMPOSING TRADITIONAL ERISA FIDUCIARY REQUIREMENTS ON ESOP FIDUCIARIES

When attempting to effectively regulate ESOPs, it is important to first recognize the primary purpose for these plans. When enacting legislation to effectuate the incentive scheme needed to entice employers to sponsor ESOPs, "Congress expressly intended that the ESOP would be both an employee retirement benefit plan and a 'technique of corporate finance' that would encourage employee ownership."[65] The intent of the employer should also be given weight as ESOP sponsorship is completely voluntary. If the Court or Congress were to alter the legal environment in which

63 *Id.* at 2472.

64 *Id.* at 2473.

65 Martin v. Feilen, 965 F.2d 660, 664 (8th Cir. 1992) (quoting 129 CONG. REC. S16636 (daily ed. Nov. 17, 1983) (statement of Sen. Long)).

ESOPs exist in a way which frustrates the aims of the employers in sponsoring the plan, employers may decide not to sponsor new ESOPs or terminate their plans. It is this possibility that employers may begin to shy away from ESOPs that Congress identified in the Tax Reform Act of 1976:

> INTENT OF CONGRESS CONCERNING EMPLOYEE STOCK OWNERSHIP PLANS.—The Congress, in a series of laws [including ERISA] has made clear its interest in encouraging [ESOPs] as a bold and innovative method of strengthening the free private enterprise system which will solve the dual problems of securing capital funds for necessary capital growth and of bringing about stock ownership by all corporate employees. The Congress is deeply concerned that the objectives sought by this series of laws will be made unattainable by regulations and rulings which treat [ESOPs] as conventional retirement plans, which reduce the freedom of the employee trusts and employers to take the necessary steps to implement the plans, and which otherwise block the establishment and success of these plans.[66]

Due to the unique multipurpose mandate of these investment plans, the practical functionality of the plans, and their position and purpose within the broader corporate capital structure scheme, any changes to ESOP regulation affects a broad array of legal areas including corporate financing, and individual retirement, estate, and tax planning. Because of the many different areas ESOP regulation can impact, treating ESOPs as merely a retirement plan or as a capital formation vehicle would risk doing significant damage to the other structures which rely on ESOPs as integral parts of their overall corporate or personal planning.

When investing in an ESOP, the employees are aware that they are investing in an undiversified asset pool and are thus exposed to the unique risks associated with the underlying securities. If the employer suffers financial difficulties, the employees who are invested in the ESOP will suffer a double blow: on the one hand to the probability of their future employment, and on the other to the money that they have invested in the company through the deferred compensation plan. However, the flip side of this dire situation is important to consider as well. If the firm is to do well, the employee is likely to gain twice over, firstly through the increased health of their employer and arguably safer employment prospects, and secondarily through the appreciation of their interests held by the ESOP.

This alignment of interest between employees and the employer which is achieved through the ESOP's investing primarily in employer securities cannot be matched by a traditional ERISA-governed pension plan which must be managed so as to preserve the participant's retirement income security. While the traditional defined contribution plan's focus on wealth preservation does not actively decouple the interests of the employee from

66 *Dudenhoeffer*, 134 S. Ct. at 2465–66 (citing Tax Reform Act of 1976, §803(h), Pub L. No. 94-455, 90 Stat. 1590).

that of the employer, it does nothing to better align their interests. Basic agency theory shows that the greater the alignment of interests between principal and agent, the lower the transaction costs are which arise from the agent favoring his own interest over the interest of the principal. The decrease in interest alignment between employer and employee caused by the heightened requirements placed on ESOP fiduciaries to deviate from the plan documents in certain critical instances likewise reduces the effectiveness of the ESOP as a means of reducing agency costs in sponsoring corporations.

This decoupling of interest can also impact management's incentive to implement an ESOP from a more self-interested perspective. An ESOP can be viewed as an effective anti-takeover device as the interests of employees and management are better aligned in the case of a hostile tender offer than those of management and the shareholders generally. In a takeover, the shareholders are confronted with the possibility of a current premium. Management alleges that the value of the shares if retained would be worth more than the takeover premium. Management, for better or worse, may be concerned with preserving themselves in office. Even when management is supposedly acting in the interest of the shareholders because they in good faith believe that the securities are substantially undervalued and that, given time, the corporation would generate a return in excess of what the would-be acquirer is offering in the tender bid, they may be suffering from several psychological biases that would overinflate their valuation. In this way, the incumbent directors could at the same time attempt to block a beneficial transaction and yet not be in violation of their fiduciary duties of loyalty and care. The employees would likewise generally be opposed to an attempted takeover of the company. In addition, the ESOP fiduciary is also often a member of management or another high-ranking corporate insider. As such, he would likely fall victim to many of the same heuristics as management generally, which would be reflected in the fiduciary's actions with respect to the assets held in trust.[67]

Employers also consider implementing an ESOP as a tax efficient means of raising capital. The IRC allows a qualified plan to incur debt, secured by the employer, to purchase company stock. The ESOP may collateralize its debt obligations with employer stock acquired with the proceeds from the loan.[68] Beyond access to capital, by using an ESOP the employer can further reduce its tax liability by deducting both payments on principal and interest payments on the debt.[69] When the abandonment of

67 While the use of an ESOP in this situation may not objectively be in the best interest of the shareholders, this does not detract from the attractiveness of an ESOP as an anti-takeover device generally.

68 *See* I.R.C. § 4975(d)(3) (2012); *see also* Treas. Reg. § 54.4975-7(b)(5) (1977).

69 *See* I.R.C. § 404(a)(9)(A) (permitting a deduction for contributions to an ESOP applied to the repayment of the principal of a loan used to acquire qualified securities up to

the *Moench* presumption at the pleading stage does not impact these ESOP mechanics, it does alter the overall risk of these strategies. At the margin, this shift may cause employers to choose to raise capital in other ways which entail their own particular risks and effects on the firm's capital and governance structure.

CONCLUSION

While ESOPs may not be right for every company or every situation, they fill a key role in many firms' capital structures and in the investment portfolios of many employees. ESOP policy walks the narrow edge between seeking to incentivize employee ownership of their employer's security interests (and thus realize gains from incentive alignments) and capital formation on the one hand, and an interest in safeguarding employees' deferred compensation and retirement interests on the other. Because of the precarious balance that must be struck to ensure that the ESOPs meet the various objectives that Congress has set for them, even small changes, such as shifting away from a liability regime that favored the defendant at the pleading stage with a presumption of prudence as the Court recently did in *Dudenhoeffer*, could have significant consequences in the overall employer sponsorship of ESOPs. Important also is the fact that Congress has shown itself to be more than willing to adjust the balance between incentives for employer-sponsors and protections for employee-participants when it determines that the balance is suboptimal. This can be seen in the strong statements made by Congress in the Tax Reform Act of 1967, which effectively halted efforts by the Departments of the Treasury and Labor to tighten regulations on ESOPs and bring them more in line with traditional defined contribution plans. When Congress determined that it needed to increase protections to employee-participants, it did so through the Pension Protection Act of 2006 by mandating that employer-sponsors provide an option for employee-participants to reallocate assets held in an ESOP to one of several alternative investment funds.[70] The proven ability of Congress to act to adjust this policy balance when needed would seem to cut clearly against the wisdom of the Court unilaterally shifting established litigation presumptions. This is particularly true in an area where significant long-term planning is required to adequately achieve the goals of both the plan sponsors and society as a whole.

25% of ESOP participants compensation); I.R.C. § 404(a)(9)(B) (permitting a deduction for amounts paid to an ESOP that are used to pay interest on a loan used to acquire qualified securities). *But see* I.R.C. § 404(a)(9)(C) (stating that the deductions for contributions applied to the payment of interest and principal are not permitted for subchapter S corporations).

70 Pension Protection Act of 2006, Pub. L. No. 109-208, 120 Stat. 780 (codified in scattered sections of the U.S. Code).

Given the careful balance that must be maintained to ensure that the congressionally desired level of ESOP participation is maintained, it would be prudent for Congress to examine the possible significant adverse impact that the shift in presumption of prudence that ESOP fiduciaries had previously enjoyed may have on the overall public policies that ESOPs were authorized to support. If Congress finds that there is a net negative impact on these policies by *Dudenhoeffer*, then it may find it advisable to legislatively reinstate the *Moench* presumption that the industry had heretofore relied upon. While it is up to Congress to determine whether or not it is comfortable with the change handed down by the Court, employer-sponsors too should reexamine their risk exposure in light of the increased possibility of litigation proceeding past the pleading stages.

ARTICLE

TESTING THE GEOGRAPHICAL PROXIMITY HYPOTHESIS: AN EMPIRICAL STUDY OF CITATIONS TO NONBINDING PRECEDENTS BY INDIANA APPELLATE COURTS

*Kevin Bennardo**

INTRODUCTION

It is difficult to gauge with certainty what makes one nonbinding judicial opinion "more persuasive" to a deciding court than another. Advice in this area comes mostly in the form of intuitive guesswork, anecdote, and hearsay. One oft-repeated factor bearing on persuasiveness is the geographical proximity between the court of decision and the court that generated the nonbinding precedent.[1] While instinctively attractive, this testable assertion has largely gone untested. Despite the lack of evidence, many resources list geographical proximity as a consideration when ranking the persuasiveness of nonbinding precedent.[2] With equally slim support, the

* Visiting Associate Clinical Professor of Law, Indiana University Robert H. McKinney School of Law. The author appreciates the input of the members of the IU-McKinney Faculty Writers' Circle, the participants of the 2014 Legal Writing Institute One-Day Workshop at Southern Illinois University School of Law, and the participants of the Fifth Annual Capital Area Legal Writing Conference at William & Mary Law School.

1 The author colloquially refers to this proposition as the "buddy states" hypothesis.

2 *See, e.g.*, DIANA R. DONAHOE, EXPERIENTIAL LEGAL WRITING: ANALYSIS, PROCESS AND DOCUMENTS 31 (2011) ("Also, state courts often look to neighboring states for guidance (the District of Columbia, for instance, might look to Maryland courts)."); CHRISTINA L. KUNZ ET AL., THE PROCESS OF LEGAL RESEARCH 163 (7th ed. 2008) ("In selecting from possible persuasive precedents, you should consider the following factors . . . how geographically close the sister jurisdiction is to yours."); HELENE S. SHAPO ET AL., WRITING AND ANALYSIS IN THE LAW 22 (6th ed. 2013) (noting that some courts may favor "[d]ecisions from states that are geographically close and that have similar social or economic conditions

persuasive weight of geographical proximity has been decried elsewhere as a "popular myth."[3] This Article sets forth empirical research about the citation practices of Indiana appellate courts in order to test the proposition that geographical proximity bears on the persuasive value of nonbinding precedents.

This Article analyzes the citation patterns of the Indiana Supreme Court and the Indiana Court of Appeals from 2012 and 2013. The research underlying this Article involved a study of 1324 opinions from that time period. In those opinions, the Indiana appellate courts cited to out-of-state judicial decisions 738 times. This Article analyzes those citations to test the hypothesis that state courts are more likely to turn to decisions of geographically proximate state courts for guidance when homespun precedent is lacking. The evidence points to the conclusion that, while geographical proximity bears on persuasiveness, it does not cross regional divides. In other words, geographical proximity is important, but works only within groupings of states with shared regional identities. This answer provides a window into judicial decisionmaking that should guide advocates when selecting among a wealth of nonbinding authorities that could be cited.[4] Moreover, it "convey[s] important information about the development of the law."[5]

Part I summarizes existing research into citation patterns of state courts and explains why Indiana provides for a particularly good test sub-

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that relate to the litigation"); NANCY L. SCHULTZ & LOUIS J. SIRICO, JR., LEGAL WRITING AND OTHER LAWYERING SKILLS 303 (6th ed. 2014) ("The law of some states will be more persuasive than that of other states. Generally those states that are geographically closer to your state will have case law that is similar to that of your jurisdiction.").

3 MICHAEL D. MURRAY & CHRISTY H. DESANCTIS, LEGAL WRITING AND ANALYSIS 116 (2009) (dubbing the belief that "if your case is governed by North Carolina law, then cases from Virginia, West Virginia, Tennessee, Alabama, Georgia, and South Carolina should take on special weight because of geographical proximity" to be a "popular myth" unsupported by legal foundation).

4 James Leonard, *An Analysis of Citations to Authority in Ohio Appellate Decisions Published in 1990*, 86 LAW LIBR. J. 129, 129 (1994) ("Successful appellate advocacy depends in part on anticipating how an appellate panel will use legal authorities in resolving issues. . . . To the extent that we can identify patterns in the uses of authority in general and under specific conditions, we can make better informed guesses about how the appellate courts will respond to the different types of authority in various situations."). It is important to remember, however, that judges' citation practices are likely influenced by the authorities cited in the parties' briefs. Thus, while judges' citation practices should guide advocates in selecting precedents, the process is circular to some unknown degree because advocates' selection of precedents no doubt has some impact on judges' citation practices.

5 Ryan C. Black & James F. Spriggs II, *The Citation and Depreciation of U.S. Supreme Court Precedent*, 10 J. EMPIRICAL LEGAL STUD. 325, 326 (2013); *see also* John Henry Merryman, *The Authority of Authority: What the California Supreme Court Cited in 1950*, 6 STAN. L. REV. 613, 615 (1954) (stating that a court's decision of which authority to apply "has a profound effect on the way the law grows and the shape legal doctrines take").

ject. Part II sets forth the methodology underlying this study. Part III sets forth the data, including a number of graphical depictions of citation patterns. More detailed datasets may be found in appendices at the end of the Article. Lastly, Part IV synthesizes the data into a final analysis and conclusion.

I. CITATION PATTERN STUDIES

A. Existing Research

Prior research into citation patterns of state judges has yielded some noteworthy results. The most robust study to date surveyed citation patterns through a sample of 5900 opinions from sixteen state supreme courts over the period of 1870 to 1970 (referred to hereinafter as the "State Supreme Court Study").[6] That study found that state supreme courts were actually more likely to cite to out-of-state precedent than in-state precedent at the end of the nineteenth century.[7] That trend changed dramatically during the twentieth century as state supreme courts became much more likely to invoke in-state precedent than out-of-state precedent.[8] This trend is sensible, as the pool of in-state precedent has grown and modern caseloads have shifted away from common law issues to matters of state statutory interpretation.[9]

The State Supreme Court Study found that courts' references to out-of-state cases was not indiscriminate: "there are favorites, 'stars' of the citation world, and some wallflowers too—courts that other courts rarely cite."[10] In the late nineteenth century, the study found three "stars": New York, Massachusetts, and California.[11] In the latest period studied, 1945–1970, California moved into first place as the most cited state; the courts of New York, New Jersey, Illinois, and Texas were also cited with "special frequency."[12] One reason for the variation is simply the disparity in the

6 Lawrence M. Friedman et al., *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773, 774 (1981).

7 *See id.* at 797.

8 *See id.* However, three of the surveyed states—Nevada, Idaho, and Oregon—continued to cite more out-of-state cases than in-state cases even during the period of 1940–1970. *See id.* at 803.

9 *Id.* at 797–98; *see also* Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131, 174 (2006) ("As states built up their own jurisprudences, there is a reduced need to rely on sister states for relevant information.").

10 Friedman et al., *supra* note 6, at 801.

11 *Id.* at 804. In the study, New York accounted for twenty-six percent of all out-of-state citations in the period of 1870–1880. *Id.*

12 *Id.* at 805.

number of opinions generated by various states' court systems.[13] It has been well-observed that more populous states generally generate more opinions than less populous states; therefore, more populous states are more likely to be cited based on sheer volume of citable opinions alone.[14] The stock of citable precedent has been referred to elsewhere as a jurisdiction's "legal capital."[15] However, the State Supreme Court Study concluded that variation in opinion volume did not explain everything: "[s]ome sort of 'prestige' factor, independent of population, must be involved" in the varying citation rates among states.[16] Over the century surveyed, however, the "star" system faded and individual state courts had less nationwide influence.[17]

Using the same dataset, Peter Harris identified the influence of the West regional reporter system on citation patterns.[18] Devised in the late nineteenth century, the West reporter system divides state court opinions into seven "regions" and publishes bound volumes of state court decisions by region.[19] Harris observed that "[t]he appellate courts and their bars may be especially likely to own and consult the regional reporter that includes their own state's court's opinions. If so, the communication of precedent will tend to be greater within these seven arbitrary [West regional reporter] regions than between them."[20] According to Harris, at least before 1970, state courts exhibited a preference for citing to opinions from other courts

13 *Id.* (noting that larger states produce more state supreme court opinions and are more likely to have an intermediate appellate court that produces citable opinions).

14 *See, e.g.*, Gregory A. Caldeira, *On the Reputation of State Supreme Courts*, 5 POL. BEHAV. 83, 84 (1983) ("[S]tate supreme courts, on balance, refer more often to precedents from counterparts having written the most common law . . . ."); *see also* sources cited *infra* note 31.

15 William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 262–75 (1976).

16 Friedman et al., *supra* note 6, at 806 (noting, however, that "[p]opulation and reputation are probably related"); *see also* Posner & Sunstein, *supra* note 9, at 174 (describing that under the "good state hypothesis" some states seek to "copy the institutions of the more successful states").

17 Friedman et al., *supra* note 6, at 806–07.

18 *Id.* at 807.

19 Peter Harris, *Ecology and Culture in the Communication of Precedent Among State Supreme Courts, 1870–1970*, 19 LAW & SOC'Y REV. 449, 452 (1985). For a contemporaneous (if promotional) account of the genesis of the West reporter system, see W. PUBL'G CO., LAW BOOKS BY THE MILLION: AN ACCOUNT OF THE LARGEST LAW-BOOK HOUSE IN THE WORLD,—THE HOME ESTABLISHMENT OF THE NATIONAL REPORTER SYSTEM AND THE AMERICAN DIGEST SYSTEM (1901), *reprinted in* 14 GREEN BAG 2D 311 (2011). For more modern treatment, see Ross E. Davies, *How West Law Was Made: The Company, Its Products, and Its Promotions*, 6 CHARLESTON L. REV. 231 (2012).

20 Harris, *supra* note 19, at 452–53; *see also* Caldeira, *supra* note 14, at 84 (noting the preference to cite cases from other states in the same geographical area based on "the easy access, in West's regional reporting system, to precedents").

whose opinions were reported in the same West regional reporter as the state of decision.[21] Harris also found a significant correlation in the cultural regionalism of state courts in the form of a preference to cite to courts of neighboring states and a preference to cite to opinions of states from which many of their people had migrated.[22] That cultural regionalism, however, overlapped with Harris's findings regarding the influence of West's regional reporter system.[23]

Looking at cross-citations among all state supreme courts[24] in 1975, Gregory Caldeira used citations to create a reputational ranking of state supreme courts.[25] Caldeira calculated the number of citations each supreme court should garner if each out-of-state citation was made on a purely random basis.[26] Using this method, Caldeira found "a rather substantial skewing in the distribution of prestige among state courts of last resort," as only twenty-one of the fifty-one courts drew more than the expected number of references from other state supreme courts.[27] As a general matter, Caldeira found "that supreme courts in industrialized, populous, and progressive states do quite a lot better than in more agricultural, sparsely populated, and conservative ones."[28] Specifically, the supreme courts ranking highest in the reputational study were from California, New York, New Jersey, Pennsylvania, and Massachusetts.[29] The lowest ranking supreme courts hailed from the District of Columbia, Wyoming, South Dakota, Hawaii, and Vermont.[30]

Other studies have focused on the citation practices of a single court, usually the highest court of a particular state. Looking at the raw number of out-of-state citations, these studies have fairly consistently identified a preference to cite to decisions of courts from populous states.[31] One study

21 Harris, *supra* note 19, at 465–66 (finding no statistically significant correlation from 1870–1900, but a much stronger correlation in the period of 1940–1970).

22 *Id.* at 466–67.

23 *Id.* at 458 ("Other things being equal, one would expect more intermigration between proximate states; and the West's system of regional reporters is organized so that the decisions of proximate states are likely to be collected in the same reporter.").

24 For ease of reference, when this Article refers to states' "supreme courts" as a class, it includes courts of last resort that are not named "supreme courts," such as the New York Court of Appeals and the Maryland Court of Appeals.

25 *See* Caldeira, *supra* note 14, at 89.

26 *See id.* at 88.

27 *Id.* at 90. Caldeira's study included the supreme courts of the fifty states and the District of Columbia. *Id.* at 89.

28 *Id.* at 90.

29 *Id.* at 89.

30 *Id.*

31 *See* A. Michael Beaird, *Citations to Authority by the Arkansas Appellate Courts, 1950–2000*, 25 U. ARK. LITTLE ROCK L. REV. 301, 317 (2003) (leaders in out-of-state citations were New York, California, Texas, Missouri, and Illinois); Joseph A. Custer, *Citation*

of the citation patterns of the Montana Supreme Court concluded that electronic legal research platforms like Westlaw had erased the historical preference to cite to other jurisdictions in the same West regional reporter.[32] Aside from noting that some states generate more opinions than others,[33] commentators have hypothesized that some courts are preferred "based on the mere associative recollection of such names as Cardozo or Holmes," the belief that the "social context" of litigation in the other state is similar to the home state, the belief that some state courts simply do "consistently superior work than is true in other states,"[34] or some measure of deference to the courts of geographical neighbors.[35] In some of these studies, previous researchers have attempted to control for the differences in the number of published opinions among state courts in a rough fashion: by measuring the number of running feet of decisions in bound volumes generated by each state supreme court from its inception.[36]

Practices of the Kansas Supreme Court and Kansas Court of Appeals, 7 KAN. J.L. & PUB. POL'Y, no. 3, 1998, at 121–22 (leaders in out-of-state citations were California and New York); Richard A. Mann, *The North Carolina Supreme Court 1977: A Statistical Analysis*, 15 WAKE FOREST L. REV. 39, 45 (1979) (leaders in out-of-state citations were California, Illinois, New York, and New Jersey); John Henry Merryman, *Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960, and 1970*, 50 S. CAL. L. REV. 381, 401 (1977) (leaders in out-of-state citations were New York, Massachusetts, Illinois, and Texas); Fritz Snyder, *The Citation Practices of the Montana Supreme Court*, 57 MONT. L. REV. 453, 463 (1996) (leaders in out-of-state citations were California and Michigan); *see also* James N.G. Cauthen, *Horizontal Federalism in the* New Judicial Federalism*: A Preliminary Look at Citations*, 66 ALB. L. REV. 783, 793 (2003) (noting that in a multistate study of constitutional decisions, the most cited jurisdictions were Pennsylvania, California, and New York). *But see* William H. Manz, *The Citation Practices of the New York Court of Appeals: A Millennium Update*, 49 BUFF. L. REV. 1273, 1279 (2001) (finding no preference to cite to other large-population states in the years of 1999 and 2000).

32 Snyder, *supra* note 31, at 463 (opining that the use of Westlaw by judges' law clerks "probably accounts for the fact that the out-of-state cases are spread throughout the United States and not concentrated in the states collected within the *Pacific Reporter 2d Series*"). An article based on a later study of Kansas opinions claimed that the West regional reporter factor "can be dispelled," but used dubious data to support the proposition. *See* Custer, *supra* note 31, at 121 (comparing the raw number of citations to state courts not in the same regional reporter in 1965 to 1995 without controlling for other factors such as total number of citations or opinions).

33 Merryman, *supra* note 31, at 403 (dubbing it the "'case-in-point' factor" because "the probability that one will find a case in point in the decisions of the courts of a given state should be a function of the number of its published decisions").

34 *Id.*

35 Custer, *supra* note 31, at 122; Snyder, *supra* note 31, at 463.

36 *See, e.g.*, Caldeira, *supra* note 14, at 95; Merryman, *supra* note 31, at 403–04.

B. Why Indiana?

Indiana is a particularly interesting state to study. Its own supreme court ranks squarely in the middle of the pack in terms of reputation.[37] Neither its population nor its population density is extraordinary.[38] It is undoubtedly a Midwestern state in terms of public perception.[39] The U.S. Census Bureau counts Indiana as one of twelve states in the Midwest region.[40] Three of Indiana's immediate neighbors—Illinois, Michigan, and Ohio—are also in the Midwest region, but one—Kentucky—is not.[41] The Census Bureau's Midwest region is further subdivided into two divisions.[42] The "East North Central" division comprises Indiana, Illinois, Michigan,

37 Reputation-wise, Caldeira's study placed the Indiana Supreme Court twenty-fifth nationally. Caldeira, *supra* note 14, at 89.

38 Indiana ranks sixteenth in both population and population density. Although the data is taken from the U.S. Census (2014 estimates for population and 2013 estimates for population density), the most visually accessible way to view this information in list format is on Wikipedia. *See List of U.S. States and Territories by Population*, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_U.S._states_and_territories_by_population (last visited Mar. 30, 2015); *List of U.S. States by Population Density*, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_U.S._states_by_population_density (last visited Mar. 30, 2015); *see also Population for States and Puerto Rico: July 1, 2012*, U.S. CENSUS BUREAU, https://www.census.gov/popest/data/maps/2012/pop_size2012.pdf (last visited Mar. 30, 2015) (population map by state using 2012 estimates); *Population Density for States and Puerto Rico: July 1, 2012*, U.S. CENSUS BUREAU, https://www.census.gov/popest/data/maps/2012/pop_density2012.pdf (last visited Mar. 30, 2015) (population density map by state using 2012 estimates).

39 Respondents to one (unscientific) online poll ranked Indiana as the "most [m]idwestern" state with 28.06% of the vote. Wisconsin was second with 21.58% of the vote. *See View Poll Results: What is the Most Midwestern State?*, SKYSCRAPERCITY, http://www.skyscrapercity.com/showthread.php?t=415522 (last visited Mar. 30, 2015). The *New York Times* files news briefs from Indiana in the "Midwest" section of its "National Briefing" section. *See, e.g.*, *Indiana: Deal Reached in Suit over Concert Deaths*, N.Y. TIMES, Dec. 20, 2014, at A12.

40 Census regions are groupings of states that subdivide the United States into four regions—Northeast, Midwest, South, and West. *Geographic Terms and Concepts—Census Divisions and Census Regions*, U.S. CENSUS BUREAU, https://www.census.gov/geo/reference/gtc/gtc_census_divreg.html (last visited Mar. 30, 2015) [hereinafter *Geographic Terms and Concepts*].

41 *Census Regions and Divisions of the United States*, U.S. CENSUS BUREAU, http://www2.census.gov/geo/pdfs/maps-data/maps/reference/us_regdiv.pdf (last visited Mar. 30, 2015) [hereinafter *Census Regions and Divisions*]. Kentucky is in the South region. *Id.*; *see also Kentucky: Train Kills 2-Year-Old Wandering with Dog*, N.Y. TIMES, Jan. 20, 2015, at A11 (filed in the "South" region of the "National Briefing" section).

42 Each Census region is subdivided into two or more divisions for a total of nine divisions nationwide. *Geographic Terms and Concepts*, *supra* note 40.

Ohio, and Wisconsin.[43] The other seven Midwestern states form the "West North Central" division.[44]

In West's regional reporter system, opinions of Indiana courts are reported in the North Eastern Reporter along with the decisions of state courts in Illinois, Ohio, New York, and Massachusetts.[45] The North Eastern Reporter is somewhat unique because it contains the opinions of noncontiguous states.[46] Opinions of Indiana's other immediate neighbors—Michigan and Kentucky—are published in the North Western and South Western Reporters, respectively.[47]

II. METHODOLOGY

In this study, the author sought to capture a meaningful dataset of citations by Indiana appellate courts to out-of-state judicial opinions. It was not important to capture every single out-of-state citation during the relevant timeframe, but rather to capture a significantly large and randomized sample. The time period this study covers is calendar years 2012 and 2013. At the time the research was compiled in late 2014, these two years were the most recent complete years of judicial opinions and the opinions from those years had already been published in the North Eastern Reporter.

The author used Lexis Advance to manually count citations in the databases for Indiana Court of Appeals opinions and Indiana Supreme Court opinions.[48] First, in each database, the date range was limited to the relevant two-year span. For the Indiana Court of Appeals, the results were further limited to "reported" opinions because it was thought that reported opinions would be more likely to contain citations to out-of-state precedents than unreported opinions. Within those limits, the search returned a set of 1134 court of appeals opinions.[49]

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43 *Census Divisions and Regions*, *supra* note 41.

44 *Id.* (Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota).

45 *Regional Reporters Map*, WESTLAW, https://lawschool.westlaw.com/userguides/nationalreporter/west_map_reg_v6/reg_reporters_map.html (last visited Mar. 30, 2015). For New York, the North Eastern Reporter only contains decisions of the highest state court; opinions of lower New York state courts appear in state-specific reporters. *United States Legal Research for L.L.M. Students*, UNIV. OF CHI. LIBRARY, http://guides.lib.uchicago.edu/content.php?pid=97392&sid=743112 (last visited Mar. 30, 2015).

46 The Atlantic Reporter also comprises noncontiguous states, but those states are arguably of a more similar character. *Regional Reporters Map*, *supra* note 45.

47 *Id.*

48 The databases are designated "IN Appeals Court Cases from 1891" and "IN Supreme Court Cases from 1817," respectively.

49 The Indiana Court of Appeals opinion set was split between 552 opinions from 2012 and 582 opinions from 2013.

The limitation for only reported opinions was not imposed on the Indiana Supreme Court opinion database. Instead, two filters were put in place to exclude decisions without published opinions and attorney disciplinary matters.[50] The former group was excluded because these decisions literally lack an opinion, and therefore do not contain any citations. The latter group was excluded because, after sampling and trial and error, the author determined that attorney disciplinary matters rarely cite to out-of-state precedents and therefore review of attorney disciplinary opinions would be a time-consuming endeavor yielding very little relevant information. Within those limits, a total of 190 Indiana Supreme Court opinions were included in the study.[51]

Thus, a total of 1324 opinions were analyzed in this study. For each opinion, the author accessed the Table of Authorities through the Shepard's function on Lexis Advance. The author then logged various information about the citations contained in each of the 1324 opinions, including the number of times each Indiana opinion cited to a court of another jurisdiction. For purposes of this study, each reference to a discrete out-of-state opinion in each Indiana opinion was counted as one citation.[52]

Of the 1324 Indiana opinions, 687 cited to only Indiana state court opinions.[53] An additional fourteen opinions did not cite to any judicial opinions[54] and another eighty decisions of the court of appeals lacked an accompanying opinion.[55] In all, the author identified 738 citations to the other forty-nine states.[56] Citations to federal opinions were not counted

50 In combination, the two filters were: "(NOT("decision without published opinion")) and (NOT(NAME("in the matter of" or "failure to satisfy costs")))". With some overlap, those filters excluded 1893 opinions of the Indiana Supreme Court.

51 The Indiana Supreme Court opinion set was split between 109 opinions from 2012 and eighty-one opinions from 2013.

52 For example, imagine two precedents from the Ohio Supreme Court: the *Jones* case and the *Smith* case. Further imagine that opinion #1 of the Indiana Supreme Court cited to the *Jones* case once and the *Smith* case five times. Opinion #2 of the Indiana Supreme Court cited to the *Jones* case three times and did not cite to the *Smith* case. The citation tally for this study would be two Indiana citations to the *Jones* case and one citation to the *Smith* case.

53 In one opinion, the Indiana Court of Appeals managed to cite to fifty-five Indiana judicial opinions without a single citation to an out-of-state precedent. *See* Wagler v. W. Boggs Sewer Dist., Inc., 980 N.E.2d 363 (Ind. Ct. App. 2012).

54 *See, e.g.*, Zavodnik v. Rinaldi, 997 N.E.2d 1044 (Ind. 2013) (per curiam); Ponce v. State, 988 N.E.2d 805 (Ind. Ct. App. 2013) (ordering publication of decision); *In re* Pilot Project for Expedited Transcripts, 977 N.E.2d 1010 (Ind. Ct. App. 2012).

55 *See, e.g.*, Mahler v. State, 985 N.E.2d 79 (Ind. Ct. App. 2013) (affirming without opinion).

56 The District of Columbia Court of Appeals was cited four times, but neither the District of Columbia nor the U.S. territories were not included in this study. Citations to out-of-state authorities were counted toward the total regardless of whether the citation appeared in a majority, concurring, or dissenting opinion and regardless of the type of citation

toward out-of-state citations and were not used in any of the following analyses.[57]

III. THE DATA

A. Raw Citation Counts

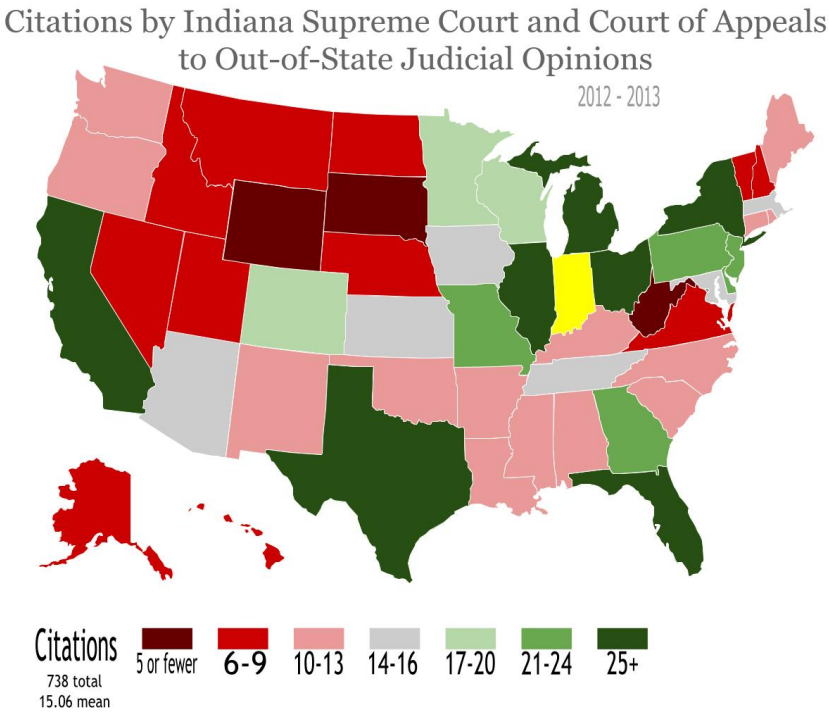
The most straightforward way to report the data is to simply divide the 738 out-of-state citations by state and look for patterns. Using that method, the mean citation rate for the other forty-nine states is 15.06 citations per state over the two-year period. The states to garner the most raw citations were California (43), New York (38), Illinois (35), Florida (32), Michigan (29), Texas (27), and Ohio (26). Notably, three of those states border Indiana. The states which received the fewest raw citations were Wyoming (1), South Dakota (3), West Virginia (4), and Hawaii, Nevada, New Hampshire, North Dakota, and Utah (6 apiece). Figure 1, below, graphically depicts the raw citation data.[58]

within Lexis Advance's classification system (e.g., "following," "citing," and "criticizing"). A study of only "following" citations in majority opinions would provide a clearer picture of what precedents are most persuasive to deciding courts. Less than one-quarter of the out-of-state citations by the Indiana Supreme Court were "following" citations; it would therefore require a much larger sample set of Indiana opinions to capture a significantly large quantity of "following" citations to out-of-state authority. To further compound things, Lexis Advance logs some cited sources in multiple categories (for example, a single source may be cited as both "distinguishing" and "criticizing") and some in no category at all.

57 The federal opinions cited by the Indiana courts were overwhelmingly from the U.S. Supreme Court (1093 citations) and the U.S. Court of Appeals for the Seventh Circuit (213 citations).

58 The raw citation data for each state may be found in Appendix A.

FIGURE 1



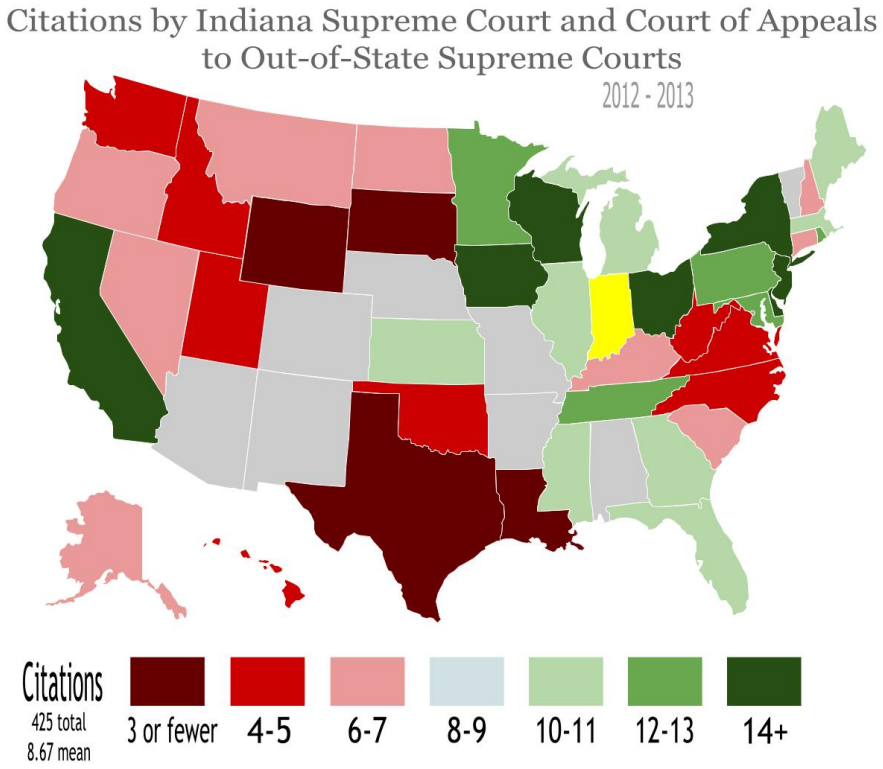
A few observations are worthy of note. First, all of the states in Indiana's Census division—Illinois, Michigan, Ohio, and Wisconsin—are cited above the mean. Kentucky, which borders Indiana but is not in the same Census region or division, is cited below the mean. The rest of the Midwest region shows some geographical favoritism: the three most eastern states of the West North Central division (Minnesota, Iowa, and Missouri) are all cited above the mean while the four more distant states (the Dakotas, Nebraska, and Kansas) are all cited below or very near to the mean. Of the Census Bureau's West region, two states were cited above the mean, ten states below the mean, and one state near the mean. Of the states in the Census Bureau's South region, four states were cited above the mean, ten states below the mean, and two states near the mean. In the Northeast region, three states were cited above the mean, five states were cited below the mean, and one state near the mean. In that region, the three states geographically closest to Indiana—Pennsylvania, New York, and New Jersey—were the only three to garner significantly above-mean citations.[59]

59 Here are the raw citations for those three states: Pennsylvania (23), New York (38), and New Jersey (23).

The majority of out-of-state citations by Indiana courts were to other states' court of last resort (425 out of 738 citations). That preference was not evenly observed at the Indiana Supreme Court and Indiana Court of Appeals levels. For its part, 69% of the Indiana Supreme Court's out-of-state citations were to other states' court of last resort; only 31% were to other states' lower courts. The Indiana Court of Appeals spread its citations much more equally between other states' courts of last resort and lower courts. Indeed the citation split from the opinions of the Indiana Court of Appeals was 50% to other states' supreme courts and 50% to other states' lower courts.

Given the predominance of citations to other states' supreme courts, it is worthwhile to look at only those citations. Raw citations by both Indiana courts to other states' courts of last resort are depicted in Figure 2, below.[60]

FIGURE 2



Some similarities and differences are observable between Figures 1 and 2. A notable similarity is a continued preference to cite to the other states in Indiana's Census division, as well as other geographically proxi-

60 The data underlying Figure 2 is reproduced in Appendix A.

mate Midwest states such as Iowa and Minnesota. The bordering state of Kentucky remains below-average on citations. A notable difference is Texas' dramatic shift from being cited well above the mean in Figure 1 to well below the mean in Figure 2.[61]

Grouping the states by West regional reporter, the North Eastern Reporter has the highest per-state average citation rate both for overall citations and for citations to state supreme court decisions.[62] States in the South Eastern Reporter had the lowest per-state average citation rate under both calculations.

TABLE 1

West Regional Reporter	Average Citations per State (All Out-of-State Opinions)[63]	Average Citations per State (Only State Supreme Court Opinions)
North Eastern	28.8	13.5
South Western	17.2	7
Southern	17.0	7.5
Atlantic	14.6	10.9
North Western	14.6	10
Pacific	11.9	7.1
South Eastern	11.4	6.4

A moment's reflection reveals that raw citation rates are subject to significant interference.[64] Judicial systems in populous states have large dockets. As a general matter, they generate a greater wealth of precedents that could be cited. Returning to the raw citation data for all out-of-state

61 Indeed, the Texas Supreme Court was not cited a single time within the dataset. For purposes of Figure 2, the Texas Supreme Court was considered the sole relevant court of last resort even though the Texas Court of Criminal Appeals is the highest court of appeals in criminal cases.

62 The average citation rate per state is determined by taking the total number of citations to state courts in the West region and dividing it by the number of states in the region. Citations to Indiana courts were not included in this calculation; thus, the North Eastern Reporter region comprises Illinois, Ohio, New York, and Massachusetts for purposes of this analysis.

63 Note that this column includes citations to all state courts, even if the decisions were not reported in a West regional reporter (for example, citations to intermediate appellate courts in New York and California were factored into the average citation rate, even though decisions of those courts are reported in state-specific West reporters rather than the regional reporters).

64 *See* David Blumberg, *Influence of the Massachusetts Supreme Judicial Court on State High Court Decisionmaking 1982–1997: A Study in Horizontal Federalism*, 61 ALB. L. REV. 1583, 1589 (1998) ("Looking solely at raw citations can be deceiving.").

opinions, it takes little probing to realize that the lists of the most and least heavily cited state courts bear striking similarities with a ranking of states by population. All of the seven most heavily cited states are also among the ten most populous states, and five are the five most populous.[65] And the least frequently cited states all rank quite low population-wise.[66] Indeed, only one state in the bottom half of states ranked by population had a raw citation count above the mean. That state, Delaware, presents a special circumstance because of its reputation as a leader in the field of corporate law.[67]

In short, raw citation counts cannot be the end of the inquiry. Perhaps Indiana courts cite to other states in Indiana's Census division because those states are all relatively populous.[68] Perhaps Indiana courts cite more heavily to other states in the North Eastern Reporter because those states are all relatively populous.[69] Perhaps Kentucky is cited below the mean because its population is below the mean.[70] In order for the data to be more useful, population—or more accurately, the number of citable opinions generated by a state's court system—must be controlled for.

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65 As of 2014, the top five states by population are California, Texas, Florida, New York, and Illinois. Ohio is seventh and Michigan is tenth. The only state in the top ten most populous states with a raw citation count below the mean was North Carolina. All state population data referenced in this Part is taken from the Census Bureau's July 1, 2014 estimates. *Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2014*, U.S. CENSUS BUREAU, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk (last visited Mar. 30, 2015) [hereinafter *State Annual Estimates*]. The data may be downloaded as a spreadsheet at http://www.census.gov/popest/data/state/totals/2014/tables/NST-EST2014-01.xls (last visited Mar. 30, 2015). *See also* Press Release, U.S. Census Bureau, Florida Passes New York to Become the Nation's Third Most Populous State (Dec. 23, 2014), http://www.census.gov/newsroom/press-releases/2014/cb14-232.html (accompanying press release listing the ten most populous states).

66 Wyoming is the least populous state; West Virginia is thirty-eighth; South Dakota is forty-sixth. *State Annual Estimates*, *supra* note 65.

67 *See, e.g.*, Donald F. Parsons Jr. & Joseph R. Slights III, *The History of Delaware's Business Courts: Their Rise to Preeminence*, BUS. L. TODAY, Mar./Apr. 2008, at 21, 25 ("Delaware is the forum of choice for resolving complex business and commercial issues"); Omari Scott Simmons, *Branding the Small Wonder: Delaware's Dominance and the Market for Corporate Law*, 42 U. RICH. L. REV. 1129, 1139 (2008) (noting "Delaware's dominance in the corporate charter competition").

68 Here are the relevant population rankings: Illinois (fifth), Ohio (seventh), Michigan (tenth), and Wisconsin (twentieth). *State Annual Estimates*, *supra* note 65.

69 Here are the relevant population rankings: New York (fourth), Illinois (fifth), Ohio (seventh), and Massachusetts (fourteenth). *Id.*

70 Kentucky ranks twenty-sixth in population. *Id.*

B. Controlling for Differing Outputs of Citable Opinions

As mentioned above, some previous researchers have approximated the quantity of published judicial decisions from each state by measuring the number of running feet of decisions in bound volumes generated by each state supreme court from its inception.[71] This approach is inherently flawed, a fact not unnoticed by the method's inventor.[72] It is both imprecise and fails to capture the most relevant information needed to control for differing caseloads. First, the approach is imprecise because of the many factors that influence the physical width of each state's printed reporters, including typesetting, paper stock, binding, and the height and depth of each volume. Second, the approach fails to capture the most relevant data because it seeks to approximate the entire corpus of each state supreme court's jurisprudence. It is well-documented that the value of precedents fades rather quickly.[73] Courts are much more likely to cite to recent opinions than to ancient ones. Thus, to control for caseload differences, the relevant measuring tool is the *recent* output of each state's court system rather than the state's historical reserve of past opinions.

In order to control for recent outputs of citable opinions, the author tallied the published opinions of each state court system from 2012 and 2013. The data was compiled using WestlawNext in late 2014. The author ran the following search in each individual court database in each state. First, the court was selected as a search limit (e.g., "Illinois Appellate Court"). Then, using the advanced search function, the date range was limited to January 1, 2012 to December 31, 2013.[74] This search returned the total number of opinions for the selected court during the two-year time span (e.g., 7457 opinions of the Illinois Appellate Court). The search was then limited to "reported" decisions (e.g., 1609 opinions of the Illinois Appellate Court). The author then sought to exclude memorandum decisions and decisions that were unpublished but nonetheless categorized as reported by WestlawNext. Thus, a filter was applied to exclude decisions containing the words "not reported in" or "(mem.)." For example, that filter excluded fourteen decisions of the Illinois Appellate Court that were not published in the North Eastern Reporter as well as two memorandum deci-

71 *See, e.g.*, Caldeira, *supra* note 14, at 95; Merryman, *supra* note 31, at 403–04.

72 *See* Merryman, *supra* note 31, at 403–04 (noting that the method "requires too many unsupported assumptions to be treated seriously," but "is nevertheless fun").

73 *See, e.g.*, Beaird, *supra* note 31, at 318 (finding that Arkansas appellate courts "predominantly cited cases less than twenty years old"); Black & Spriggs, *supra* note 5 (finding that the likelihood of citation depreciates eighty-one percent and eighty-five percent between the first and twentieth years of age); Landes & Posner, *supra* note 15, at 255 (finding that courts generally cite to Supreme Court and non-Supreme Court precedents that are less than twenty and ten years old, respectively).

74 The search language is "advanced: DA(aft 12-31-2011 & bef 01-01-2014)".

sions.[75] The author then manually confirmed the unpublished or memorandum status of each excluded opinion.[76] For example, in the Illinois Appellate Court, the filter returned two cases that the author did not exclude because they were neither unpublished nor memorandum decisions.[77] Thus, the total number of "citable opinions" generated by the Illinois Appellate Court from 2012 to 2013 was 1593.

For trial-level courts, opinions were included in the total tally of a state's "citable opinions" if the trial-level opinion was both reported and electronically available on WestlawNext. This occurrence only took place in six states, and usually for a small number of opinions.[78] For the other forty-three states, the total number of citable opinions includes only published appellate decisions. Decisions published in state-specific reporters were included, as is the case with intermediate appellate decisions in New York and California.[79]

State courts varied widely in publication practices. Some courts published all opinions while others were quite selective.[80] As a result of these and other factors, the number of citable opinions ranged from a low of 157 in Hawaii to a high of 11,607 in New York. The total number of citable opinions from the forty-nine states over the two year period was 49,709. The average output of each state was therefore roughly 1014 citable opinions over the two-year period. Based largely on publication practices, a

75 For those following along, the two memorandum decisions were *Knox v. Taylor*, 977 N.E.2d 315 (Ill. App. Ct. 2012), and *B. v. Ajradinoski* (*In re Estate of C.B.*), 995 N.E.2d 594 (Ill. App. Ct. 2013).

76 For some courts, large numbers of reported memorandum decisions were excluded through painstaking effort: 5561 decisions of the Appellate Division of the New York Supreme Court, 5329 decisions of the Louisiana Supreme Court, and 4483 decisions of the Michigan Supreme Court.

77 The two decisions were *Patrick Engineering, Inc. v. Old Republic General Insurance Co.*, 973 N.E.2d 1036, 1043 (Ill. App. Ct. 2012) (returned in the search result because the body of the opinion cites to a memorandum decision), and *People ex rel. Madigan v. Kole*, 968 N.E.2d 1108, 1119 (Ill. App. Ct. 2012) (returned in the search result because the body of the opinion contains the words "not reported in").

78 Reported trial-level decisions were included in Connecticut (11 opinions), Delaware (38 Court of Chancery and 16 Superior Court), New Jersey (32), New York (118), Ohio (3), and Pennsylvania (7).

79 The decisions of the Appellate Division of the New York Supreme Court are reported in West's New York Supplement rather than the North Eastern Reporter. *United States Legal Research for L.L.M. Students*, *supra* note 45. The decisions of the California Court of Appeal are published in West's California Reporter rather than the Pacific Reporter. *Id.*

80 The California Supreme Court published all of its 464 decisions (including 280 memorandum decisions) in the two-year time frame, while the same search in the Ohio Supreme Court database returned 51 reported decisions and 3708 unreported decisions.

state's output of citable opinions did not always closely correlate to its population.[81]

New York deserves special mention. As noted above, New York courts published 11,607 non-memorandum decisions between 2012 and 2013. That figure comprises over twenty-three percent of the total number of relevant opinions from all forty-nine states surveyed (49,709) and dwarfs the next closest state court by a factor of three.[82] The number of citable opinions from New York's highest court (363) is above the mean but not especially notable.[83] The vast majority of citable New York opinions (11,126) are intermediate appellate decisions. Relatively few decisions of the Appellate Division are unreported.[84] Thus, the total count of citable opinions includes a disproportionately large number of decisions from New York's intermediate court of appeals. Given the extraordinarily high number of citable opinions, it is not difficult to imagine why New York courts garner so many raw citations.[85]

The number of citable opinions generated by each state is graphically represented in Figure 3, below.[86]

81 For example, Mississippi (thirty-first in population) had an above-average number of citable opinions (1419). Louisiana is twenty-fifth in population but third in number of citable opinions (2703). North Carolina and Michigan, ranking ninth and tenth in population, each had below-average citable opinion counts (971 and 421, respectively).

82 The state with the next highest number of citable opinions was Florida with 3860.

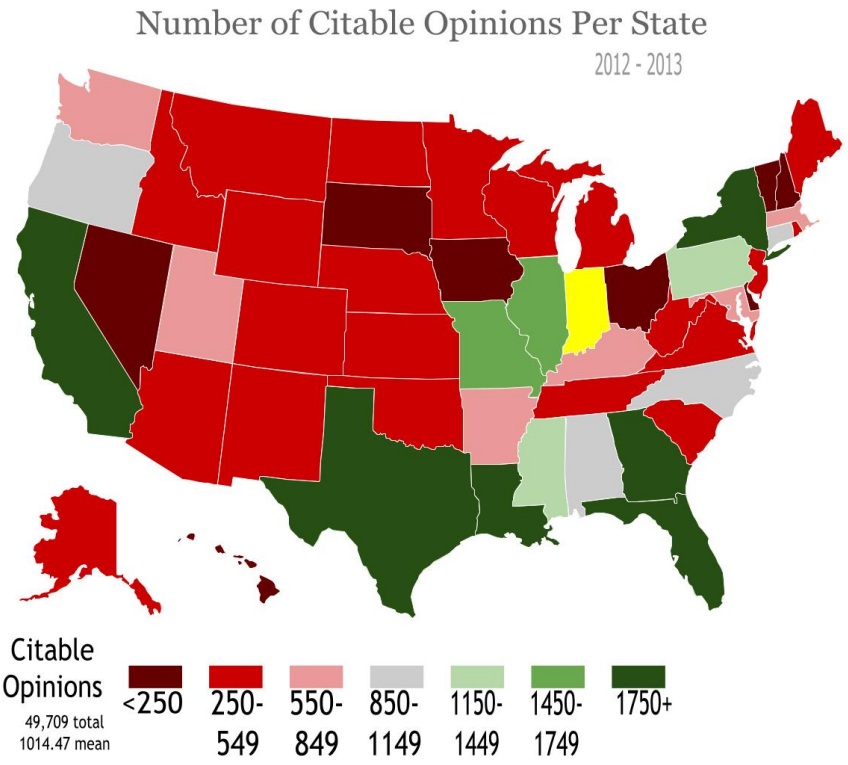
83 The mean number of relevant decisions from a state's highest court was a little under 225.

84 A WestlawNext search of the years 2012 and 2013 returned 16,691 reported decisions and 934 unreported decisions.

85 For a comparison to another state with a high volume caseload, a WestlawNext search of the intermediate appellate court of California for the relevant two-year span returned 1764 reported decisions and 18,032 unreported decisions.

86 The data underlying Figure 3 is reproduced in Appendix B.

FIGURE 3



The number of citable opinions from each state was then compared to the mean number of citable opinions (1014.47) to determine each state's appropriate multiplier. States that churned out above-mean numbers of citable opinions received a sub-one multiplier. States that produced below-mean numbers of citable opinions received an above-one multiplier. Hawaii's multiplier was 6.46,[87] New York's multiplier was 0.09,[88] and all other states fell in between these numbers.

Each state's number of raw citations by Indiana courts was then multiplied by the state's multiplier. The product is the "Adjusted Citation Count." This number represents the number of citations by Indiana appellate courts to out-of-state precedent controlled for the output of citable opinions in each state. The mean number of citations per state after the adjustment was 28.18.

This approach creates a more meaningful pathway to measure citation preferences. For example, in the raw citation count, New Mexico garnered

87 The mean of 1014.47 citable opinions divided by Hawaii's 157 citable opinions, rounded to the nearest hundredth.

88 1014.47 divided by 11,607, rounded to the nearest hundredth.

twelve citations, below the mean of 15.06. But, when the appropriate multiplier (2.96) is applied, New Mexico's Adjusted Citation Count is 35.49, above the mean of 28.18. Likewise, a state that creates a relatively large number of citable opinions may find its positions flipped from above-mean in raw citations to below-mean under the Adjusted Citation Count method.[89] Each state's Adjusted Citation Count is graphically depicted below.[90]

FIGURE 4

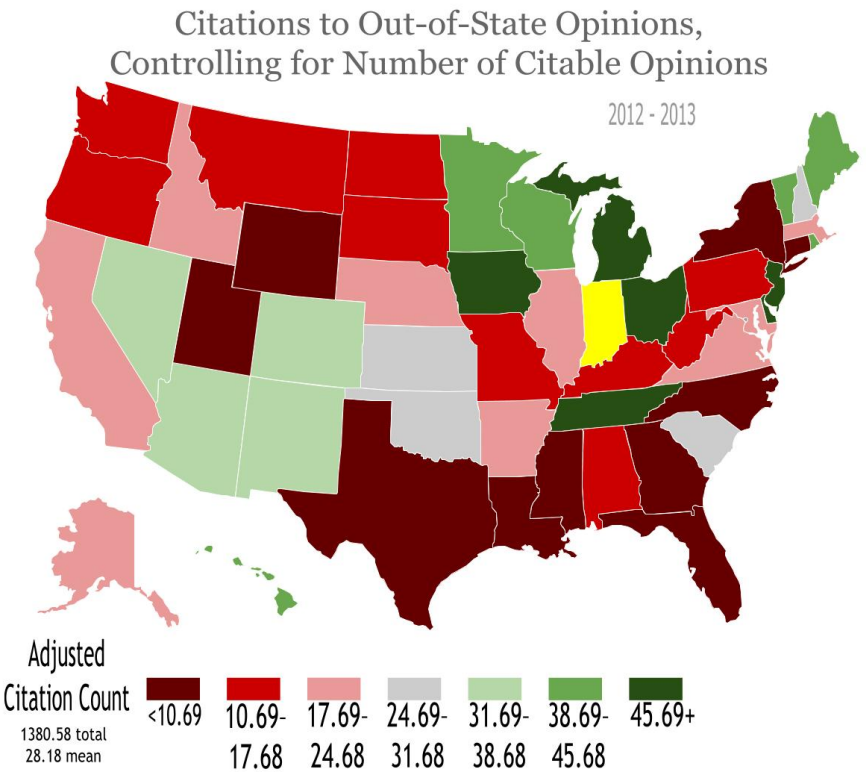


Figure 4 paints a very different picture than Figure 1. One notable observation that has not changed, however, is that Indiana's Census division performs well in this test as well. Michigan, Ohio, and Wisconsin all have

89 See, for example, Missouri, which had 23 raw citations, but an Adjusted Citation Count of 15.51 after the appropriate multiplier (0.67) was applied. Some distortion may occur at the margins for states with either extremely high or low multipliers. Struggling against its miniscule multiplier of 0.09, New York ranks lowest in Adjusted Citation Count with 3.32. States with the most generous multipliers like Hawaii (6.46) often rank above the mean in Adjusted Citation Count (for example, Hawaii's Adjusted Citation Count is 38.77). However, that is not always the case; South Dakota, the state with the third-most generous multiplier (5.37) has an Adjusted Citation Count (16.10) well below the mean.

90 The underlying data is reproduced in Appendix C.

Adjusted Citations Counts that are significantly above the mean (69.88, 117.75, and 40.66), while Illinois is respectable, although below mean, at 20.45. Two other states in the Midwest region, Minnesota and Iowa, garner Adjusted Citation Counts well above the mean (41.07 and 69.07, respectively). While the Dakotas, Missouri, and Nebraska all carry slightly below-mean Adjusted Citation Counts, Midwest states as a whole, and particularly those geographically closest to Indiana, performed extremely well in Adjusted Citation Counts. No comparable cluster of high-citation states can be found elsewhere in the country.[91]

Southern states as a region performed poorly when measured by Adjusted Citation Counts, especially states like Louisiana (4.13),[92] Florida (8.41), Mississippi (8.58), and Georgia (8.83). This result is consistent with a previous suggestion that southern judiciaries lost respect from courts from other regions in the wake of segregationist rulings during the Civil Rights era.[93] Kentucky, a state that borders Indiana, continues to rank below the mean in Adjusted Citation Count (17.12).

The Adjusted Citation Count method could be criticized on the ground that extremely high or low multipliers are produced by the wide variations in published output of states' intermediate appellate courts.[94] New York, with a multiplier of 0.09, would need to be cited over 313 times to simply meet the mean. Hawaii, with a multiplier of 6.46, needs little more than four citations to meet the mean. In order to mediate the effect of extreme multipliers and account for the general preference of Indiana courts to cite to other states' courts of last resort, a multiplier based only upon other states' supreme court opinions provides another window at the data.

Thus, the author prepared a new multiplier (the "Supreme Court Multiplier") for each state using only the number of published non-memorandum decisions by its highest court (the "Citable Supreme Court Opinions").[95] This approach flattened out the range of multipliers aside from one significant outlier. Using this approach, only three states received

91 Nevada, Arizona, New Mexico, Colorado, and Kansas form an interesting stripe of slightly above-mean Adjusted Citation Counts.

92 Perceived differences between Indiana's common law system and the civil law system in Louisiana may contribute to its low Adjusted Citation Count.

93 *See* Caldeira, *supra* note 14, at 93 ("[I]t is probably true that the performance of southern state supreme courts in the 1950s and 1960s in the field of black civil rights did them little good in the eyes of colleagues around the nation.").

94 No state carried a sub-one multiplier and an above-mean Adjusted Citation Count, although two came fairly close: California (0.52 multiplier and 22.42 Adjusted Citation Count) and Illinois (0.58 multiplier and 20.45 Adjusted Citation Count). *See also supra* note 89 (describing the relationship between the number of citable opinions and Adjusted Citation Count).

95 This data is set forth in Appendix B. In the case of Texas, only the Texas Supreme Court was used in this analysis even though the Court of Criminal Appeals is the court of last resort for criminal cases.

multipliers above 3.00: Ohio (the outlier at 11.84), North Carolina (3.17), and Michigan (3.04). The smallest multipliers were Georgia (0.33), Montana (0.51), and Massachusetts (0.58). This Supreme Court Multiplier was then applied to the Indiana courts' citation of each state's highest court. The product is the state's "Adjusted Supreme Court Citation Count." The per-state mean of Adjusted Supreme Court Citations was 13.84. Figure 5 presents a graphical depiction of each state's Adjusted Supreme Court Citation Count.[96]

FIGURE 5

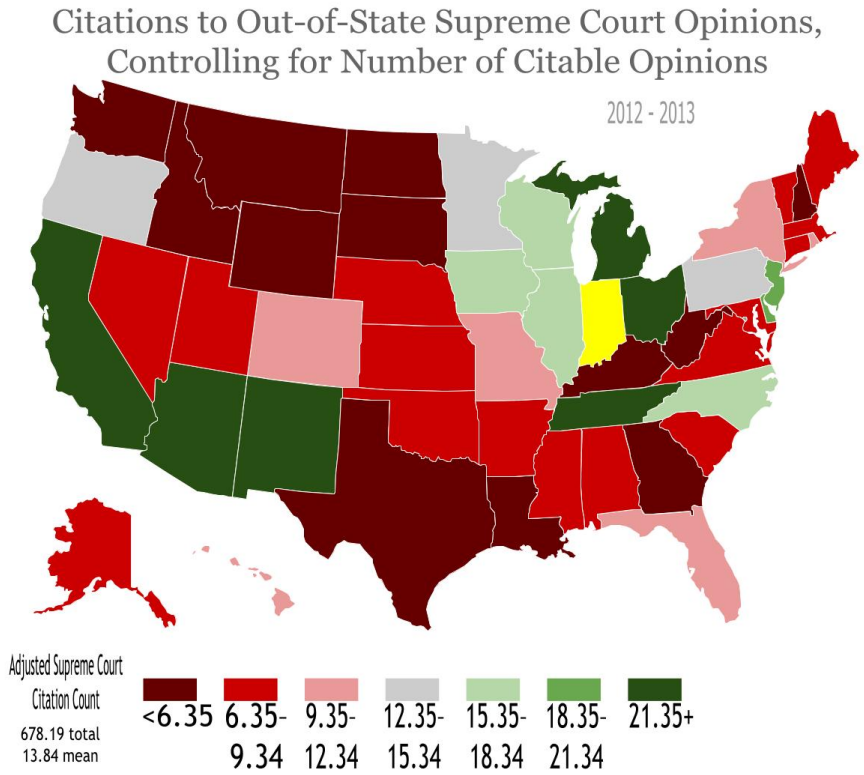


Figure 5 shows some significant shifts again when compared to Figure 4. California has swung from below mean to significantly above mean. New England states have plunged into the red. But an important point of consistency is the above-mean performance of the other states in Indiana's Census division (Illinois, Michigan, Ohio, and Wisconsin) and the respectable, albeit not spectacular, showing of the next closest states in the Midwest region (Minnesota, Iowa, and Missouri). Indiana's other neighbor,

96 The data underlying Figure 5 is contained in Appendix D.

Kentucky, again registers below the mean, and more squarely so in this analysis than the last.

Grouping the states by West regional reporter, the North Eastern Reporter tops all reporters in per-state average Adjusted Citations and Adjusted Supreme Court Citations:

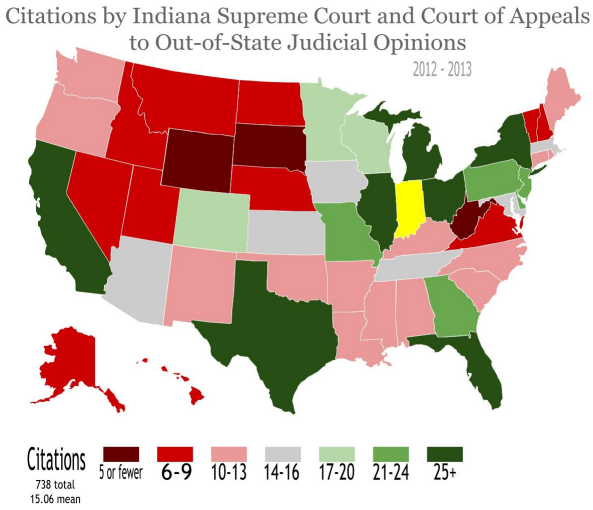
TABLE 2

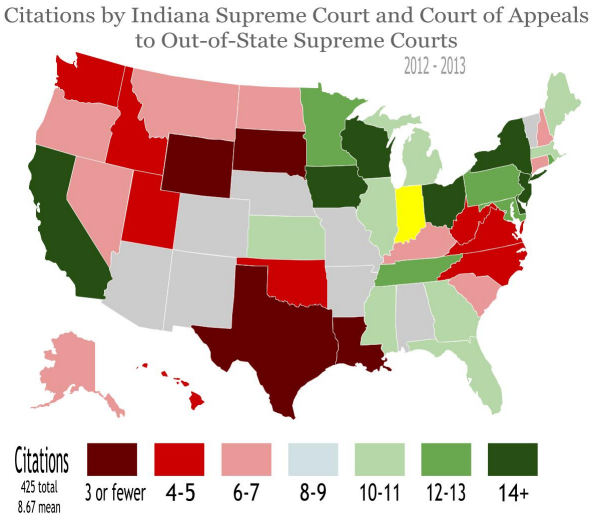
West Regional Reporter	Average Adjusted Citation Count per State	Average Adjusted Supreme Court Citations per State
North Eastern	41	55.5
North Western	39.1	12.8
Atlantic	36.2	11.7
Pacific	23.9	10.3
South Western	23.1	9.3
South Eastern	16.2	7.2
Southern	8.9	6.3

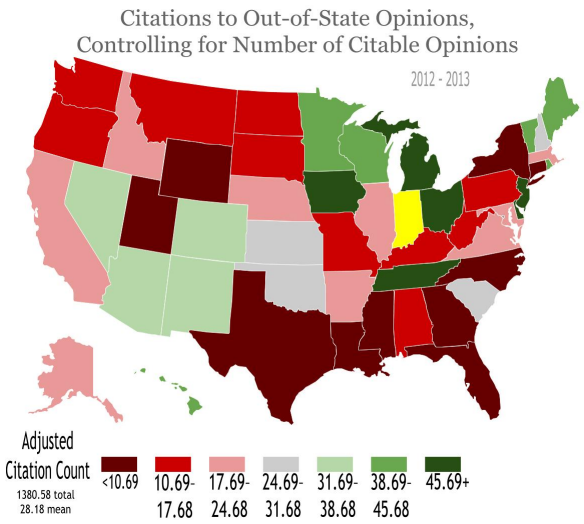
However, the North Eastern Reporter's dominance is propped up by Ohio. All three other North Eastern Reporter states had below-mean Adjusted Citation Counts and two (New York and Massachusetts) ranked squarely below the mean in Adjusted Supreme Court Citation Counts. Removing Ohio from the dataset would drop the per-state average to very pedestrian numbers (15.5 average Adjusted Citation Count and 10.9 average Adjusted Supreme Court Citation Count, respectively). Thus, after controlling for each state's output of citable opinions, inclusion in the same West regional reporter as Indiana did not, on its own, distinguish a state's rate of citation.

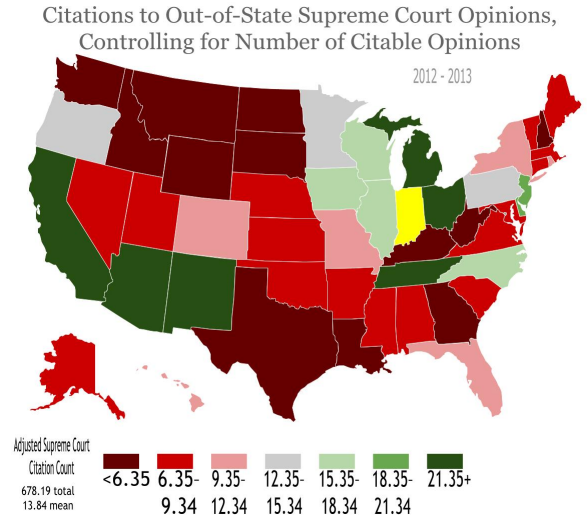
IV. FINAL ANALYSIS AND CONCLUSION

In the final analysis, none of the four approaches to measuring out-of-state citations tells the full story when viewed in isolation. In combination, however, the four analyses paint a telling picture:









The only cluster of states that consistently garners above-mean citations are the Midwest states closest to Indiana, particularly those in Indiana's Census division (Illinois, Ohio, Michigan, and Wisconsin). Indiana's non-Midwest neighbor, Kentucky, is cited below average under all four analyses, along with the contiguous band of West Virginia and Virginia. Some other regions performed uniformly poorly: the Northwest (from the Dakotas to the Pacific Ocean) and the swath of Oklahoma, Arkansas, and

Louisiana.[97] Other performances have less geographic consistency: Connecticut and New Hampshire were always below mean, New Jersey and Delaware were always above mean, and the surrounding states were mixed.

Certainly, caution is warranted when it comes to overstating the significance of these results. This study simply reflects the citations patterns of one state's appellate courts—comprising a mere twenty judges[98]—over a recent two-year period. The data is not broad enough to prove or disprove the geographical proximity hypothesis on a national level. However, it appears clear from this data that geographical proximity has a positive effect on rate of citation. A critical caveat, however, is that the positive effect of geographical proximity does not permeate across regions. Indiana is as proximate to Kentucky as it is to Michigan; it is closer to West Virginia than to Iowa or Minnesota.[99] Yet the more distant Midwest state is the clear winner when it comes to rate of citation under all four analyses. Indiana courts disproportionately cite to the decisions of the surrounding Midwest states of Ohio, Michigan, Illinois, Wisconsin, Iowa, and Minnesota.[100] It is not geographical proximity alone, but rather geographical proximity in conjunction with a sense of regional identity that translates into heightened persuasive value of nonbinding authorities. Thus, when using persuasive precedent, brief writers in Indiana, if not elsewhere, would be well-advised to prefer citing to courts in geographically proximate states *in the same region* as the court of decision.

97 The non-contiguous states (Alaska and Hawaii) generally performed poorly as well.

98 The Indiana Supreme Court has five justices and the Indiana Court of Appeals has fifteen judges. *See Today's Supreme Court*, COURTS.IN.GOV, http://www.in.gov/judiciary/supreme/2367.htm (last visited Mar. 4, 2015); *About the Court*, COURTS.IN.GOV, http://www.in.gov/judiciary/appeals/2336.htm (last visited Mar. 4, 2015).

99 As the crow flies, Lawrenceburg, Indiana, is 132 miles from Kenova, West Virginia. Whiting, Indiana, is 139 miles from Clinton, Iowa, and 244 miles from Caledonia, Minnesota.

100 It is notable (to the author at least), that these seven states contain all of the historic Big Ten universities measured from the Big Ten's founding in 1896 until the its 1990 expansion into Pennsylvania. *Big Ten History*, BIG TEN CONFERENCE, http://www.bigten.org/trads/big10-trads.html (last visited Mar. 4, 2015).

APPENDIX A: RAW NUMBER OF CITATIONS IN INDIANA APPELLATE OPINIONS, 2012–2013

State	Citations to All Judicial Opinions	Citations to Supreme Court Opinions Only
Alabama	13	8
Alaska	7	7
Arizona	16	8
Arkansas	10	8
California	43	18
Colorado	19	8
Connecticut	10	7
Delaware	23	16
Florida	32	10
Georgia	23	11
Hawaii	6	5
Idaho	8	5
Illinois	35	10
Indiana		
Iowa	16	15
Kansas	16	11
Kentucky	11	7
Louisiana	11	2
Maine	10	10
Maryland	15	12
Massachusetts	16	11
Michigan	29	10
Minnesota	20	13
Mississippi	12	10
Missouri	23	8
Montana	7	7
Nebraska	9	9
Nevada	6	6
New Hampshire	6	6
New Jersey	23	14
New Mexico	12	9
New York	38	17

APPENDIX A, CONTINUED

State	Citations to All Judicial Opinions	Citations to Supreme Court Opinions Only
North Carolina	10	5
North Dakota	6	6
Ohio	26	16
Oklahoma	10	5
Oregon	12	7
Pennsylvania	23	12
Rhode Island	12	12
South Carolina	12	7
South Dakota	3	3
Tennessee	15	12
Texas	27	0
Utah	6	5
Vermont	9	9
Virginia	8	5
Washington	10	4
West Virginia	4	4
Wisconsin	19	14
Wyoming	1	1
Totals	738	425
Per state mean	15.06	8.67

APPENDIX B: NUMBER OF CITABLE OPINIONS PRODUCED BY EACH STATE, 2012–2013

State	Court of Last Resort	Intermediate Court of Appeals	Other Court	Total Citable Opinions
Alabama	250	663	0	913
Alaska	236	70	0	306
Arizona	75	354	0	429
Arkansas	227	331	0	558
California	184	1762	0	1946
Colorado	146	390	0	536
Connecticut	216	870	11	1097
Delaware	175	0	54	229
Florida	232	3628	0	3860
Georgia	678	1965	0	2643
Hawaii	97	60	0	157
Idaho	278	137	0	415
Illinois	143	1593	0	1736
Indiana				
Iowa	202	33	0	235
Kansas	312	202	0	514
Kentucky	363	289	0	652
Louisiana	233	2470	0	2703
Maine	252	0	0	252
Maryland	304	323	0	627
Massachusetts	389	327	0	716
Michigan	74	347	0	421
Minnesota	235	259	0	494
Mississippi	351	1068	0	1419
Missouri	159	1345	0	1504
Montana	437	0	0	437
Nebraska	311	159	0	470
Nevada	171	0	0	171
New Hampshire	219	0	0	219
New Jersey	151	325	32	508
New Mexico	94	249	0	343
New York	363	11,126	118	11,607

APPENDIX B, CONTINUED

State	Court of Last Resort	Intermediate Court of Appeals	Other Court	Total Citable Opinions
North Carolina	71	900	0	971
North Dakota	352	0	0	352
Ohio	19	202	3	224
Oklahoma	142	254	0	396
Oregon	120	880	0	1000
Pennsylvania	198	1176	7	1381
Rhode Island	270	0	0	270
South Carolina	225	263	0	488
South Dakota	189	0	0	189
Tennessee	119	158	0	277
Texas	163	2651	0	2814
Utah	167	620	0	787
Vermont	222	0	0	222
Virginia	174	187	0	361
Washington	240	552	0	792
West Virginia	282	0	0	282
Wisconsin	199	275	0	474
Wyoming	312	0	0	312
Totals	11,021	38,463	225	49,709
Per state mean	224.92	784.96	4.59	1014.47

Note: The per-state mean includes the forty-nine states other than Indiana. Future researchers wishing to use a fifty-state mean need only incorporate the following Indiana data: 164 citable supreme court opinions and 1067 citable intermediate court of appeals opinions (1231 total).

APPENDIX C: CITATIONS TO OUT-OF-STATE OPINIONS, CONTROLLING FOR NUMBER OF CITABLE OPINIONS

State	Raw Citations	Multiplier	Adjusted Citation Count
Alabama	13	1.11	14.44
Alaska	7	3.32	23.21
Arizona	16	2.36	37.84
Arkansas	10	1.82	18.18
California	43	0.52	22.42
Colorado	19	1.89	35.96
Connecticut	10	0.92	9.25
Delaware	23	4.43	101.89
Florida	32	0.26	8.41
Georgia	23	0.38	8.83
Hawaii	6	6.46	38.77
Idaho	8	2.44	19.56
Illinois	35	0.58	20.45
Indiana			
Iowa	16	4.32	69.07
Kansas	16	1.97	31.58
Kentucky	11	1.56	17.12
Louisiana	11	0.38	4.13
Maine	10	4.03	40.26
Maryland	15	1.62	24.27
Massachusetts	16	1.42	22.67
Michigan	29	2.41	69.88
Minnesota	20	2.05	41.07
Mississippi	12	0.71	8.58
Missouri	23	0.67	15.51
Montana	7	2.32	16.25
Nebraska	9	2.16	19.43
Nevada	6	5.93	35.60
New Hampshire	6	4.63	27.79
New Jersey	23	2.00	45.93
New Mexico	12	2.96	35.49
New York	38	0.09	3.32

APPENDIX C, CONTINUED

State	Raw Citations	Multiplier	Adjusted Citation Count
North Carolina	10	1.04	10.45
North Dakota	6	2.88	17.29
Ohio	26	4.53	117.75
Oklahoma	10	2.56	25.62
Oregon	12	1.01	12.17
Pennsylvania	23	0.73	16.90
Rhode Island	12	3.76	45.09
South Carolina	12	2.08	24.95
South Dakota	3	5.37	16.10
Tennessee	15	3.66	54.94
Texas	27	0.36	9.73
Utah	6	1.29	7.73
Vermont	9	4.57	41.13
Virginia	8	2.81	22.48
Washington	10	1.28	12.81
West Virginia	4	3.60	14.39
Wisconsin	19	2.14	40.66
Wyoming	1	3.25	3.25
Totals:	738		1380.58
Mean:	15.06		28.18

Note: Rounding the multiplier to two decimal places may create a perceived discrepancy between the product of the first two columns above and the Adjusted Citation Count. For example, North Carolina has ten raw citations and a multiplier of 1.04. The product of those two figures is 10.4. However, the Adjusted Citation Count is 10.45. The perceived discrepancy is the result of rounding North Carolina's true multiplier (something closer to 1.04476828) to two decimal places.

APPENDIX D: CITATIONS TO OUT-OF-STATE SUPREME COURT OPINIONS, CONTROLLING FOR NUMBER OF CITABLE OPINIONS

State	Raw Supreme Court Citations	Supreme Court Multiplier	Adjusted Supreme Court Citation Count
Alabama	8	0.90	7.20
Alaska	7	0.95	6.67
Arizona	8	3.00	23.99
Arkansas	8	0.99	7.93
California	18	1.22	22.00
Colorado	8	1.54	12.32
Connecticut	7	1.04	7.29
Delaware	16	1.29	20.56
Florida	10	0.97	9.69
Georgia	11	0.33	3.65
Hawaii	5	2.32	11.59
Idaho	5	0.81	4.05
Illinois	10	1.57	15.73
Indiana			
Iowa	15	1.11	16.70
Kansas	11	0.72	7.93
Kentucky	7	0.62	4.34
Louisiana	2	0.97	1.93
Maine	10	0.89	8.93
Maryland	12	0.74	8.88
Massachusetts	11	0.58	6.36
Michigan	10	3.04	30.39
Minnesota	13	0.96	12.44
Mississippi	10	0.64	6.41
Missouri	8	1.41	11.32
Montana	7	0.51	3.60
Nebraska	9	0.72	6.51
Nevada	6	1.32	7.89
New Hampshire	6	1.03	6.16
New Jersey	14	1.49	20.85
New Mexico	9	2.39	21.53
New York	17	0.62	10.53

APPENDIX D, CONTINUED

State	Raw Supreme Court Citations	Supreme Court Multiplier	Adjusted Supreme Court Citation Count
North Carolina	5	3.17	15.84
North Dakota	6	0.64	3.83
Ohio	16	11.84	189.41
Oklahoma	5	1.58	7.92
Oregon	7	1.87	13.12
Pennsylvania	12	1.14	13.63
Rhode Island	12	0.83	10.00
South Carolina	7	1.00	7.00
South Dakota	3	1.19	3.57
Tennessee	12	1.89	22.68
Texas	0	1.38	0.00
Utah	5	1.35	6.73
Vermont	9	1.01	9.12
Virginia	5	1.29	6.46
Washington	4	0.94	3.75
West Virginia	4	0.80	3.19
Wisconsin	14	1.13	15.82
Wyoming	1	0.72	0.72
Totals:	425		678.19
Mean:	8.67		13.84

Note: Rounding the multiplier to two decimal places may create a perceived discrepancy between the product of the first two columns above and the Adjusted Supreme Court Citation Count. For example, Vermont has nine raw citations and a multiplier of 1.01. The product of those two figures is 9.09. However, the Adjusted Supreme Court Citation Count is 9.12. The perceived discrepancy is the result of rounding Vermont's true multiplier (something closer to 1.013153153) to two decimal places.

ESSAYS

#ACADEMICFREEDOM: TWITTER AND FIRST AMENDMENT RIGHTS FOR PROFESSORS

*Michael H. LeRoy**

INTRODUCTION

Speech is not "free" in academia. Campus codes regulate disrespectful language.[1] Professors have been disciplined for speech that creates a hostile learning environment for their students.[2] Twitter has extended professorial speech to the Internet. How do campus speech codes apply to a professor's tweets? There is scant information to answer this question; however, some tweets have stirred controversy. Professor David Guth was put on leave by the University of Kansas for tweeting that the children of NRA supporters should be shot dead.[3] The University of Illinois withdrew a job offer with tenure to Professor Steven Salaita because his tweets were viewed as "'harassing, intimidating, [. . .] hate speech."[4] These tweets ex-

* Professor, School of Labor and Employment Relations and College of Law, University of Illinois at Urbana-Champaign; and Lecturer in Law, University of Chicago Law School. I gratefully acknowledge Janet LeRoy, who suggested the #AcademicFreedom title.

1 *E.g.*, CAL. INST. OF TECH., INSTITUTE POLICY ON ACCEPTABLE USE OF ELECTRONIC INFORMATION RESOURCES (2013), *available at* http://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2005/02/Cal-Tech-Acceptable-Use-13-14.pdf (prohibiting communications that discriminate, harass, defame, offend, or threaten individuals or organizations).

2 Bonnell v. Lorenzo, 241 F.3d 800, 803–05 (6th Cir. 2001).

3 John Milburn, *University of Kansas Professor David Guth Suspended Over Tweet Won't Return in 2013*, HUFF POST COLLEGE (Oct. 25, 2013, 1:59 PM), at http://www.huffingtonpost.com/2013/10/25/university-of-kansas-david-guth_n_4164298.html. Prof. Guth tweeted, "'The blood is on the hands of the #NRA. Next time, let it be YOUR sons and daughters. Shame on you. May God damn you.'" *Id.*

4 Interview of Chancellor Phyllis Wise, *in* Nicholas C. Burbules et al., *A Response to the Committee on Academic Freedom and Tenure (CAFT) Report*, (Jan. 6, 2015), at 7,

pressed outrage at Israel's bombing of Gaza, and therefore, voiced a widely held political viewpoint.

This Essay asks: is every tweet from a professor protected as a form of academic freedom by the First Amendment? Professor Salaita's watershed case poses sharply conflicting positions on academic freedom for faculty members. In support of Professor Salaita, a faculty committee at the University of Illinois asserts: "Regardless of the tweets' tone and content, they are political speech—part of the robust free play of ideas in the political realm that the [University] Statutes insulate from institutional sanction, even in the case of ideas we may detest."[5]

To answer my research question, I explore how courts rule on First Amendment claims by faculty members who have been disciplined or lost their jobs for speech that their school considered to be disruptive to its mission or operations. These cases are a small but important part of First Amendment jurisprudence. Two Supreme Courts opinions—*Waters v. Churchill*[6] and *Garcetti v. Ceballos*[7]—provide colleges and universities a clear legal advantage. My conclusion, based on more than forty cases involving disruptive faculty speech, applies to different verbal controversies. No case, however, involves a professor's tweets. I explore how Twitter relates to academic expression, and I conclude that courts are unlikely to grant First Amendment protection to faculty tweets that direct physical intimidation to specific individuals or groups.

I. FIRST AMENDMENT LIMITS ON ACADEMIC FREEDOM

Early cases granted broad protection for the speech rights of teachers.[8] A high point was reached when professors successfully challenged a New

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available at https://archive.org/details/pdfy-uFQikP3A-pCpJj_Z (alteration in original) (quoting COMM. ON ACADEMIC FREEDOM AND TENURE OF THE UNIV. OF ILL. AT URBANA-CHAMPAIGN, REPORT ON THE INVESTIGATION INTO THE MATTER OF STEVEN SALAITA 26 (2015), [hereinafter SALAITA REPORT] *available at* http://www.senate.illinois.edu/af1501.pdf) (internal quotation marks omitted). One tweet implied that Jews bring anti-Semitism on themselves: "By eagerly conflating Jewishness and Israel, Zionists are partly responsible when people say antisemitic [sic] shit in response to Israeli terror." Steven Salaita, TWITTER (July 18, 2014, 1:19 PM), https://twitter.com/stevesalaita/status/490184057054322688. Another tweet implied that every Jewish child grows up to become a murderer: "Zionist uplift in America: every little Jewish boy and girl can grow up to be the leader of a murderous colonial regime." Steven Salaita, TWITTER (July 14, 2014, 7:26 PM), https://twitter.com/stevesalaita/status/488872177257955328. *See also infra* notes 52 & 54 (providing additional examples of anti-Semitic tweets).

5 SALAITA REPORT, *supra* note 4, at 26 (emphasis omitted).

6 511 U.S. 661, 671 (1994) (government as employer has more power to restrict speech than government as sovereign).

7 547 U.S. 410 (2006).

8 *E.g.*, Beilan v. Bd. of Pub. Educ., 357 U.S. 399 (1958).

York law that required them to swear an oath against Communism.[9] The Supreme Court singled out academic freedom as "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."[10] More recently, the Supreme Court has gradually restricted speech rights for public employees.[11] These limits have seeped into academia.[12] According to *Connick v. Myers*, speech of public employees is constitutionally protected if it concerns a matter of public interest or importance.[13] Courts determine if speech is protected under the First Amendment by examining its context, form, and content.[14] These elements are weighed against the employer's interests in a *Pickering* balancing test.[15] Courts also judge whether the disputed speech motivates an adverse employment action.[16]

More recently, two significant restrictions have been added to this balancing approach. *Waters v. Churchill* ruled that a public employer is not required to prove that employee speech is disruptive.[17] All that is required is an employer's reasonable prediction of interference with a governmental function.[18] *Garcetti v. Ceballos* stated that speech for public employees is not protected if it pertains to the internal affairs of government units.[19] These restrictions were forged in a hospital and a state's attorney's office, where employers exert significant control over employee speech.[20] Justice Souter noted in *Garcetti*, however, that the disruptive speech doctrine does

9 Keyishian v. Bd. of Regents, 385 U.S. 589 (1967).

10 *Id.* at 603.

11 *See Waters*, 511 U.S. at 675; *Garcetti*, 547 U.S. at 424.

12 Estelle A. Fishbein, *New Strings on the Ivory Tower: The Growth of Accountability in Colleges and Universities*, 12 J.C. & U.L. 381, 382–85 (1985) (stating that courts and Congress put "colleges and universities on an inexorable march toward academic accountability").

13 461 U.S. 138, 146 (1983).

14 *Id.* at 147–48.

15 Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

16 *Id.*

17 511 U.S. 661, 671 (1994) (holding that the government as employer has more power to restrict speech than the government as sovereign).

18 *Id.* at 673 (holding that public employers are allowed to make reasonable predictions of when speech disrupts operations).

19 547 U.S. 410, 418 (2006).

20 *Id.* at 419 (noting that government employers need significant control over their employees' words and actions).

not translate easily to academia,[21] where intense disagreement can drive inquiry.[22]

How have these precedents affected faculty members who assert a First Amendment right? Eighteen court opinions ruled in favor of schools in the course of discussing disruptive faculty speech.[23] In losing these cases, faculty invoked the First Amendment to justify discussions of personal details about their sex life,[24] inappropriate advances,[25] wanton vulgarity,[26] and required reading about their sexual arousal.[27] Other losing cases involved faculty whose speech was confrontational, degrading, or conducive to an atmosphere of tension.[28]

In contrast, twenty-three opinions specifically referenced disruptive faculty speech and ruled for a faculty member.[29] The greater number of

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21 *Id.* at 438 ("I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to . . . official duties.'") (Souter, J., dissenting) (citing Grutter v. Bollinger, 539 U.S. 306, 329 (2003)).

22 Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (noting that civilization depends on freedom of inquiry for teachers and students).

23 *See* DePree v. Saunders, 588 F.3d 282, 282 (5th Cir. 2009); Trejo v. Shoben, 319 F.3d 878, 878 (7th Cir. 2003); Bonnell v. Lorenzo, 241 F.3d 800, 800 (6th Cir. 2001); Jackson v. Leighton, 168 F.3d 903, 903 (6th Cir. 1999); Scallet v. Rosenblum, 106 F.3d 391, 391 (4th Cir. 1997) (per curiam); Jeffries v. Harleston, 52 F.3d 9, 9 (2d Cir. 1995); Ghosh v. Ohio Univ., 861 F.2d 720, 720 (6th Cir. 1988) (per curiam); Maples v. Martin, 858 F.2d 1546, 1547 (11th Cir. 1988); DePree v. Saunders, No. 2:07cv185KS-MTP, 2008 WL 4457796 at *1 (S.D. Miss. 2008 Sept. 30, 2008), *aff'd* 588 F.3d 282 (5th Cir. 2009); Marinoff v. City Coll. of N.Y., 357 F. Supp. 2d 672, 672–73 (S.D.N.Y. 2005); Scallet v. Rosenblum, 911 F. Supp. 999, 999 (W.D. Va. 1996), *aff'd* 106 F.3d 391 (4th Cir. 1997); Cohen v. San Bernardino Valley Coll., 883 F. Supp. 1407, 1407 (C.D. Cal. 1995), *aff'd in part, rev'd in part*, 92 F.3d 968 (9th Cir. 1996); Wirsing v. Bd. of Regents, 739 F. Supp. 551, 551 (D. Colo. 1990), *aff'd*, 945 F.2d 412 (10th Cir. 1991); Fong v. Purdue Univ., 692 F. Supp. 930, 931 (N.D. Ind. 1988); Landrum v. E. Ky. Univ., 578 F. Supp. 241, 242 (E.D. Ky. 1984); Bradford v. Tarrant Cnty. Jr. Coll., 356 F. Supp. 197, 197 (N.D. Tex. 1976), *aff'd*, 492 F.2d 133 (5th Cir. 1974); Franklin v. Leland Stanford Jr. Univ., 218 Cal. Rptr. 228, 228 (Cal. App. 1985); Mills v. W. Wash. Univ., 208 P.3d 13, 13, 21 (Wash. App. 2009) *rev'd on other grounds*, 246 P.3d 1254 (Wash. 2011) (en banc).

24 *Scallet*, 911 F. Supp. at 1007.

25 *Trejo*, 319 F.3d at 888.

26 *Bonnell*, 241 F.3d at 803–04.

27 *Cohen*, 883 F. Supp. at 1410 n.3.

28 *See Maples*, 858 F.2d at 1554; *Fong*, 692 F. Supp. at 955; *Mills*, 208 P.3d at 21.

29 *See* Hulen v. Yates, 322 F.3d 1229 (10th Cir. 2003); Hardy v. Jefferson Cmty. Coll., 260 F.3d 671 (6th Cir. 2001); Burnham v. Ianni, 119 F.3d 668 (8th Cir. 1997) (en banc); Burnham v. Ianni, 98 F.3d 1007 (8th Cir. 1996), *vacated*, 119 F.3d 668 (8th Cir. 1997); Jeffries v. Harleston, 21 F.3d 1238 (2d Cir. 1994), *vacated*, 513 U.S. 996 (1994), *rev'd on remand*, 52 F.3d 9 (2d Cir. 1995); Levin v. Harleston, 966 F.2d 85 (2d Cir. 1992); Stern v. Shouldice, 706 F.2d 742 (6th Cir. 1983); Daulton v. Affeldt, 678 F.2d 487 (4th Cir. 1982); Kim v. Coppin State Coll., 662 F.2d 1055 (4th Cir. 1981); Trotman v. Bd. of Trus-

these cases, compared to the group that favored schools, suggests that disruption does not work against faculty in speech cases. However, only eight opinions ruled for instructors after 1994 when *Waters* gave public employers latitude to predict institutional disruption.[30]

Nonetheless, one significant precedent ruled against a school that asserted a disruptive speech argument. In *Hardy v. Jefferson Community College*, a college instructor who taught a communication course devoted a class period to language that marginalizes minorities.[31] Students offered words such as "'girl,' 'lady,' 'faggot,' 'nigger,' and 'bitch.'"[32] After their classmate complained to campus administrators, Professor Hardy was terminated.[33] Distinguishing this case from *Bonnell v. Lorenzo*,[34] the Sixth Circuit reasoned that this was "a classic illustration of 'undifferentiated fear' of disturbance on the part of the College's academic administrators."[35]

In rare cases, courts found that schools violated the First Amendment rights of professors whose controversial beliefs caused disruption. The Second Circuit ruled that a professor engaged in constitutionally protected speech when he published his view that African-Americans are intellectually inferior to Caucasians—even though this caused disruptive protests.[36] Faculty members who criticized campus administrators engaged in protected speech, even if their communications unsettled operations.[37]

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tees, 635 F.2d 218 (3d Cir. 1980); Appel v. Spiridon, 2011 WL 3651353 (D. Conn. 2011 Aug. 18, 2011), *aff'd in part, rev'd in part*, 521 Fed. App'x 9 (2d Cir. 2013); Milman v. Prokopoff, 100 F. Supp. 2d 954 (S.D. Iowa 2000); Bonnell v. Lorenzo, 81 F. Supp. 2d 777 (E.D. Mich. 1999), *rev'd*, 241 F.3d 800 (6th Cir. 2001); Burnham v. Ianni, 899 F. Supp. 395 (D. Minn. 1995), *rev'd*, 98 F.3d 1007 (8th Cir. 1996), *aff'd*, 119 F.3d 668 (8th Cir. 1997) (en banc); Jeffries v. Harleston, 828 F. Supp. 1066 (S.D.N.Y. 1993), *aff'd in part, vacated in part*, 21 F.3d 1238 (2d Cir. 1994), *vacated*, 513 U.S. 996 (1994), *rev'd on remand*, 52 F.3d 9 (2d Cir. 1995); Bishop v. Aronov, 732 F. Supp. 1562 (N.D. Ala. 1990), *rev'd*, 926 F.2d 1066 (11th Cir. 1991); Hickingbottom v. Easley, 494 F. Supp. 980 (E.D. Ark. 1980); Croushorn v. Bd. of Trustees, 518 F. Supp. 9 (M.D. Tenn. 1980); Hillis v. Stephen F. Austin State Univ., 486 F. Supp. 663 (E.D. Tex. 1980), *rev'd*, 665 F.2d 547 (5th Cir. 1982); Cooper v. Ross, 472 F. Supp. 802 (E.D. Ark. 1979); Aumiller v. Univ. of Del., 434 F. Supp. 1273 (D. Del. 1977); Duke v. N. Tex. State Univ., 338 F. Supp. 990 (E.D. Tex. 1971), *rev'd*, 469 F.2d 829 (5th Cir. 1972); Close v. Lederle, 303 F. Supp. 1109 (D. Mass. 1969), *rev'd*, 424 F.2d 988 (1st Cir. 1970).

30 *Hulen*, 322 F.3d at 1229; *Hardy*, 260 F.3d at 671; *Burnham*, 119 F.3d at 668 (en banc); *Burnham*, 98 F.3d at 1007; *Appel*, 2011 WL 3651353 at *20; *Milman*, 100 F. Supp. 2d at 954; *Burnham*, 899 F. Supp. at 395. Notably, the *Burnham* case contributed three opinions to this small total.

31 260 F.3d at 671.

32 *Id.* at 675.

33 *Id.*

34 *Id.* at 678–79 (citing Bonnell v. Lorenzo, 241 F.3d 800 (6th Cir. 2001)).

35 *Id.* at 682.

36 *See* Levin v. Harleston, 966 F.2d 85 (2d Cir. 1992).

37 *See* Trotman v. Bd. of Trustees, 635 F.2d 216 (3d Cir. 1980).

One case epitomized the amorphous boundary that demarcates the First Amendment's protection of academic freedom. The City University of New York (CUNY)'s Professor Leonard Jeffries gave a widely publicized speech in Albany that made insulting references to Jews.[38] In response, CUNY removed him as department chair but retained him as a faculty member. Professor Jeffries won damages and reinstatement to his department chair position.[39] But the Supreme Court vacated the Second Circuit's affirmance of the trial court's ruling.[40] Afterwards, the appellate court reversed itself,[41] ruling that CUNY had a reasonable belief that Professor Jeffries's speech would disrupt its operations.[42]

In sum, the disruptive speech doctrine that has taken hold for public sector employers has had an apparent effect on First Amendment faculty cases. Professors usually lose cases if their employer proves that it had a reasonable belief in characterizing their speech as disruptive.

II. TWITTER AND THE SPEECH RIGHTS OF PROFESSORS

To date, there are no Twitter cases involving college faculty. Given the growing popularity of this messaging service, Twitter controversies are likely to result in litigation. Courts will not treat Twitter as a unique speech category. Instead, tweets will be judged by their context, form, and content.[43]

How might this framework apply to faculty tweets? For context, Twitter is a social media technology that allows people with an account to publicize their views to the world. Its broad platform for social connectivity enables professors to publicize discourse. For form, Twitter is an awkward tool to communicate academic ideas. Its rigid architecture impedes scholarly exchange. Marx would probably have found some epigrammatic ways to use Twitter; but *Das Kapital* would not squeeze into 140-character tweets. For content, Twitter does not offer a scholarly culture. Most tweets are babble (about 40%) or conversation (about 37%).[44] Very little information is socially significant; news is about 4% of tweets.[45] The tone

38 Jeffries v. Harleston, 828 F. Supp. 1066, 1091 (S.D.N.Y. 1993) (describing CUNY's president as the "'head Jew at City College'"), *aff'd in part, vacated in part*, 21 F.3d 1238 (2d Cir. 1994), *vacated*, 513 U.S. 996 (1994), *rev'd on remand*, 52 F.3d 9 (2d Cir. 1995).

39 *Id.* at 1071.

40 Harleston v. Jeffries, 513 U.S. 996 (1994) (vacating Jeffries v. Harleston, 21 F.3d 1238 (2d Cir. 1994)), *rev'g on remand*, 52 F.3d 9 (2d Cir. 1995).

41 Jeffries v. Harleston, 52 F.3d 9 (2d Cir. 1995).

42 *Id.* at 13.

43 Connick v. Myers, 461 U.S. 138, 147–48 (1983).

44 *See Twitter Study*, PEAR ANALYTICS (Aug. 2009), pearanalytics.com/wp-content/uploads/2012/12/Twitter-Study-August-2009.pdf.

45 *Id.*

of tweets is also problematical for academic speech. By compressing speech, Twitter forces some speakers into attention-seeking tweets that become instant embarrassments. Some evidence suggests that Twitter facilitates bigotry.[46] A recent research project, titled the "Geography of Hate," used a Google map to track tweets that are homophobic, racist, or demeaning to disabled people.[47]

For now, Twitter is not a medium for much academic speech. Followers do not seek deep insights. Tweets are shallow. Twitter content rarely concerns news. But Twitter is also a robust social medium that expresses social and political commentary. It illuminates conditions in censored parts of the world.[48] It is an evolving technology, with a growing network of communities. Scholars are beginning to employ Twitter for professional purposes.[49] Some have already established Twitter reputations.[50] More are likely to follow.

In sum, Twitter cannot be summarily dismissed as an outlet for academic speech, but neither can it be ranked on a par with a classroom, conference, or peer-reviewed publication.

Returning to my research question: is every tweet from a professor protected as a form of academic freedom by the First Amendment? In the wake of *Waters* and *Garcetti*, colleges and universities have won most First Amendment cases involving disruptive faculty speech.[51] This strong trend implies that tweets that disrupt a school's mission or operations are not protected by the First Amendment.

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46 *See, e.g.*, Jackson v. Deen, No. CV492–139, 2013 WL 1911445, at *4 (S.D. Ga. May 8, 2013) (plaintiff attorney in case involving race discrimination claim against TV celebrity Paula Deen often tweeted racially-charged language).

47 Monica Stephens, *Geography of Hate: Geotagged Hateful Tweets in the United States*, HUMBOLDT STATE. UNIV., http://users.humboldt.edu/mstephens/hate/hate_map.html# (last visited Mar. 17, 2015). The map was based on all geocoded tweets in the United States from June 2012 to April 2013 that contained hate words such as "fag," "nigger," and other offensive terms. *Id.*

48 Shannon Williams, *Foreigners Denied Facebook and Twitter as North Korea Orders Blanket Ban*, TECHDAY NETGUIDE (Nov. 3, 2014, 10:00 AM), http://netguide.co.nz/story/foreigners-denied-facebook-and-twitter-as-north-korea-orders-blanket-ban/.

49 *See* G. Veletsianos, *Higher Education Scholars' Participation and Practices on Twitter*, 28 J. COMPUTER ASSISTED LEARNING 336 (2012).

50 David Burkus, *Top Professors on Twitter*, DAVID BURKUS, http://ldrlb.co/top-professors-on-twitter/ (last visited Feb. 23, 2015).

51 *Compare* cases decided after 1994 in *supra* note 23 (eleven wins for schools), *with* cases decided after 1994 in *supra* note 29 (eight wins for faculty members). *See also supra* note 30 (indicating that three opinions that faculty won were from one case).

At this point, only one Twitter lawsuit is pending.[52] In public appearances, Professor Salaita contends that the University of Illinois rescinded his job offer due to donor pressure that resulted from his anti-Israel tweets.[53] A faculty committee found no evidence of donor pressure, but also rejected the school's civility rationale for not forwarding Professor Salaita's appointment.[54]

After Professor Salaita filed his lawsuit in federal court, the campus published a list of some tweets that led to the withdrawal of his job offer.[55] In addition, Professor Salaita re-tweeted a post that appeared to advocate the stabbing death of a pro-Israel journalist.[56] Near the time he filed his lawsuit, he posted a vaguely homicidal tweet that can be read as intimidation directed at the chancellor who blocked his appointment.[57] Professor

52 Jodi S. Cohen, *Steven Salaita Files Lawsuit Against the University of Illinois*, CHI. TRIB. (Nov. 17, 2014, 5:05 PM), http://www.chicagotribune.com/news/local/breaking/ct-steven-salaita-lawsuit-met-20141117-story.html.

53 Steven Salaita, *Steven Salaita: U. of I. Destroyed My Career*, CHI. TRIB. (Sept. 29, 2014, 6:36 PM), http://www.chicagotribune.com/news/opinion/commentary/ct-steven-salaita-tenure-jews-twitter-tweets-unive-20140929-story.html.

54 SALAITA REPORT, *supra* note 4.

55 *A Statement by the University re Steven Salaita Complaint*, UNIV. OF ILLINOIS (Jan. 29, 2015), http://uofi.uillinois.edu/emailer/newsletter/66664.html. The news release included the following tweets:

"You may be too refined to say it, but I'm not: I wish all the f**king West Bank settlers would go missing."

"Zionist uplift in America: every little Jewish boy and girl can grow up to be the leader of a monstrous colonial regime."

"If #Israel affirms life, then why do so many Zionists celebrate the slaughter of children? What's that? Oh, I see JEWISH life."

"Zionists: transforming antisemitism [sic] from something horrible into something honorable since 1948."

"Let's cut to the chase: If you're defending #Israel right now you're an awful human being."

The first tweet referred to three Israeli teens who were kidnapped while hitchhiking in the West Bank on June 12 or June 13, and found dead several days later. *See* Ray Sanchez, *Hamas Leader Admits Militants Abducted Slain Israeli Teens*, CNN (Aug. 22, 2014, 8:01 PM), http://www.cnn.com/2014/08/22/world/meast/israel-teens-death-hamas/.

56 *See* Steven Lubet, *Professor's Tweets about Israel Crossed the Line*, CHI. TRIB. (Aug. 14, 2014), http://www.chicagotribune.com/news/opinion/commentary/ct-speech-steven-lubet-salaita-university-illinois-20140814-story.html (reporting Prof. Salaita's re-tweet of the "vile suggestion that journalist Jeffrey Goldberg ought to get 'the pointy end of a shiv'"). Prof. Salaita's "shiv" re-tweet looks even less deserving of First Amendment protection after the beheading of two journalists, James Foley and Steven Sotloff. *See* Chelsea J. Carter, *Video Shows ISIS Beheading U.S. Journalist James Foley*, CNN (Aug. 20, 2014), http://www.cnn.com/2014/08/19/world/meast/isis-james-foley/; Chelsea J. Carter & Ashley Fantz, *ISIS Video Shows Beheading of American Journalist Steven Sotloff*, CNN (Sept. 9, 2014), http://www.cnn.com/2014/09/02/world/meast/isis-american-journalist-sotloff/.

57 It states: "My last boss mysteriously disappeared. #FiveWordstoRuinAJobInterview." Steven Salaita, TWITTER (Jan. 17, 2015, 10:48 PM),

Salaita and his supporters contend that all of his tweets deserve First Amendment protection. I suggest, to the contrary, that some tweets are not constitutionally protected. My research shows that when a university makes a reasonable prediction that students or faculty would feel intimidated by personally abusive or demeaning speech, courts support actions that promote a campus climate of tolerance.

https://twitter.com/stevesalaita/status/556659301511864320. This tweet uses similar death-imagery to Prof. Salaita's "wish" that settlers "would go missing." *See supra* note 55.

GETTING TO GROUP UNDER U.S. ASYLUM LAW

*Jillian Blake**

INTRODUCTION

Of the five grounds for asylum established in the 1951 Refugee Convention,[1] none is more heavily scrutinized than that of "particular social group." While the other four asylum grounds of race, religion, political opinion, and nationality immediately draw to mind certain traits, behaviors, or beliefs for which a person could be persecuted, the particular social group (PSG) category is open-ended and does not immediately suggest any specific characteristics. The ambiguity of the PSG category presents the opportunity for those who fear returning to their home country, but do not fit into one of the other four grounds, to gain asylum.[2] Under U.S. asylum law, women who oppose female genital mutilation (FGM)[3] or have been victims of domestic violence,[4] homosexuals,[5] former police officers,[6] and

* J.D., University of Michigan Law School; M.A., Johns Hopkins School of Advanced International Studies (SAIS); B.A., Johns Hopkins University. The author currently practices immigration and asylum law in Alexandria, Virginia. She would like to thank Aqsa Mahmud, Noah Peters, and the editors of the *Notre Dame Law Review* for their helpful comments and suggestions for this Essay.

1 *See* U.N. Convention Relating to the Status of Refugees art. 1(A)(2), July 28, 1951, 189 U.N.T.S. 150 [hereinafter Refugee Convention]. The United States is not party to the 1951 Convention, but is party to the 1967 Protocol. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Refugee Protocol].

2 However, PSG should not be interpreted as a "catch-all" covering everyone who fears return to their country of origin. U.N. High Comm'r for Refugees, Guidelines on International Protection: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, para. 2 (May 7, 2002), http://www.unhcr.org/3d58de2da.pdf [hereinafter UNHCR guidelines].

3 *See In re* Kasinga, 21 I. & N. Dec. 357 (B.I.A. 1996).

4 *See Matter of* A-R-C-G-, 26 I. & N. Dec. 388 (B.I.A. 2014).

5 *See* Karouni v. Gonzales, 399 F.3d 1163 (9th Cir. 2005); Hernandez-Montiel v. INS, 225 F.3d 1084 (9th Cir. 2000); *Matter of* Toboso-Alfonso, 20 I. & N. Dec. 819 (B.I.A. 1990).

6 *See Matter of* Fuentes, 19 I. & N. Dec. 658 (B.I.A. 1988).

others have been found to be members of PSGs. The ambiguity of the PSG classification, however, also creates the possibility that certain deserving groups will be arbitrarily denied protection.

In February 2014, the Board of Immigration Appeals (BIA or the Board) issued two new precedential decisions, *Matter of M-E-V-G-*[7] and *Matter of W-G-R-*,[8] clarifying the legal requirements for PSG asylum. This Essay argues that the BIA's decisions further confuse this already complex area of law and the standards established in the decisions exclude particular social groups already recognized under U.S. law. The complications and contradictions in these and other BIA decisions carry the risk of excluding valid claims to PSG protection and rely upon criteria that cannot be applied consistently. Because the new BIA PSG standards are unworkable, courts should defer to the standard established in the 1985 BIA decision, *Matter of Acosta*.[9] The criteria recognized in *Matter of Acosta* are accepted internationally and will lead to clearer and more consistent outcomes.

Next, this Essay proposes a novel way to re-conceptualize "social distinction"—a requirement in BIA and other PSG decisions—as "social construction" to better align the standard with the *Acosta* decision, and more accurately capture social reality and the intent of the Refugee Convention. Finally, this Essay argues that "particularity"—another requirement in many PSG decisions—should be eliminated entirely because it is already implied by a social distinction or social construction standard.

I. GROUPS OF PARTICULAR SOCIAL GROUPS

In order to meet the legal definition of "refugee" established in the 1951 Refugee Convention and 1967 Protocol one must demonstrate: a well-founded fear of persecution, a nexus between that persecution and an asylum ground (race, religion, nationality, political opinion, or particular social group), and a lack of state protection.[10]

The United States Board of Immigration Appeals established three distinct standards for determining the existence of a particular social group at different times. The first was recognized in the 1985 BIA decision, *Matter of Acosta*. In *Acosta* the BIA found that a particular social group is:

> [A] group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land

7 *Matter of* M-E-V-G-, 26 I. & N. Dec. 227 (B.I.A. 2014).

8 *Matter of* W-G-R-, 26 I. & N. Dec. 208 (B.I.A. 2014).

9 19 I. & N. Dec. 211 (B.I.A. 1985), *overruled on other grounds by* Mogharrabi, 19 I. & N. Dec. 439 (B.I.A. 1987).

10 *See* Refugee Convention, *supra* note 1, art. 1(A)(2); Refugee Protocol, *supra* note 1, art. I(2).

> ship. . . . [W]hatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.[11]

The legal rationale behind the "immutable/fundamental" standard established in *Acosta* is that it is in line with the other four grounds for asylum in the 1951 Refugee Convention. Under the *ejusdem generis* ("of the same kind") canon of statutory construction, general terms in a statute should be interpreted as being consistent in nature with the enumerated terms. Therefore, particular social group should be interpreted as being consistent with, or similar in nature to, the enumerated grounds of race, religion, nationality, and political opinion. According to the BIA in *Acosta*, persons who are members of these groups have characteristics they cannot change or should not have to change because they are so fundamental to their identity.

The BIA introduced the second distinct PSG standard in the case *In re C-A-*.[12] In *In re C-A-* the BIA held that, in addition to the criteria established in *Acosta*, "social visibility" was a factor and "particularity" was a requirement in determining PSG.[13] The proposed PSG in *In re C-A-* was composed of "'former noncriminal government informants working against the Cali drug cartel.'"[14] The BIA found that this group was "too loosely defined" to meet the new particularity requirement.[15] The BIA also found that "decisions recognizing particular social groups involved characteristics that were highly visible and recognizable by others in the country in question," and the proposed group was not "highly visible and recognizable" because criminal informants "intend[] to remain unknown and undiscovered."[16]

In the 2007 case *In re A-M-E & J-G-U-* the BIA considered the potential PSG "wealthy Guatemalans" and found that the group also failed the social visibility and particularity requirements.[17] The BIA applied the same legal standard as *In re C-A-* in this case. The BIA found that the group "wealthy Guatemalans" failed the particularity requirement because the term wealthy was "too amorphous to provide an adequate benchmark for determining group membership."[18] The Board also found that because members of all socio-economic classes suffered from violence and crime

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11 *Acosta*, 19 I. & N. Dec. at 233.
12 23 I. & N, Dec. 951 (B.I.A. 2006).
13 *Id.* at 957–59.
14 *Id.* at 957.
15 *Id.*
16 *Id.* at 960.
17 *In re* A-M-E & J-G-U-, 24 I. & N. Dec. 69, 74–76 (B.I.A. 2007).
18 *Id.* at 76.

the proposed group was not socially visible.[19] *In re A-M-E & J-G-U-* does not make clear how the relative amount of violence suffered by a group directly relates to its social visibility, although presumably the reasoning was that if a group suffers greater violence people in the society have identified members of that group and targeted them.

This reasoning is faulty, however, because a group may suffer a greater amount of violence than the general population even if it is not socially visible, or suffer the same or lesser amount of violence than the general population even if it is socially visible. For example, if women are less likely than men to be victims of violent crime, then are they not socially visible? Are noncriminal government informants hidden from the public view (as decided in *In re C-A-*) now socially visible as a group because they are more likely to be killed than the average person? If heterosexuals are just as likely to be victims of violence as homosexuals, can homosexuals not form a particular social group? In *In re A-M-E & J-G-U-* the BIA confused the existence of a PSG with the question of nexus between the group membership and persecution. A PSG can exist and be socially visible even if the asylum seeker fails to show she was persecuted *because* she is a member of that group.

The third BIA legal standard for PSGs was articulated in a set of companion cases, *Matter of S-E-G-*[20] and *Matter of E-A-G-*.[21] In these cases the BIA found that particularity and social visibility were both requirements for establishing the existence of a PSG, in addition to the *Acosta* factors.[22] The PSG proposed in *Matter of S-E-G-*, which the BIA rejected, was "Salavadoran [sic] youths who have resisted gang recruitment, or family members of such Salvadoran youth."[23] The BIA held that particularity is "whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons."[24] The BIA held that although the number of members in the group could be a factor in determining its particularity, the key issue was whether a "'benchmark for determining group membership'"[25] could be created so that the group was not "amorphous."[26]

In terms of the visibility requirement, the BIA found in *Matter of S-E-G-* that society must perceive the group as such, in line with its previous decisions in *In re C-A-* and *In re A-M-E- & J-G-U-*.[27] It found that gangs

19 *Id.*
20 *Matter of* S-E-G-, 24 I. & N. Dec. 579 (B.I.A. 2008).
21 *Matter of* E-A-G-, 24 I. & N. Dec. 591 (B.I.A. 2008).
22 *S-E-G-*, 24 I. & N. Dec. at 582; *E-A-G-*, 24 I. & N. Dec. at 593.
23 *S-E-G-*, 24 I. & N. Dec. at 582.
24 *Id.* at 584.
25 *Id.* (quoting Davila-Mejia v. Mukasey, 531 F.3d 624, 628–29 (2008)).
26 *S-E-G-*, 24 I. & N. Dec. at 584–85.
27 *Id.* at 586.

were no more likely to harm the group than any other group that presented a challenge to their power.[28] Again, the BIA focused on the reason gangs targeted the group (a separate nexus question) rather than the visibility of the group within society.

In addition to the three legal standards articulated by the BIA, the United Nations High Commissioner for Refugees (UNHCR), an international authority on refugee and asylum law, has established PSG standards. According to the UNHCR:

> [A] particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.[29]

The UNHCR standard includes two criteria (immutability and social perception) but does not require both. Furthermore, the particularity criterion is not part of the UNHCR standard.

II. THE CIRCUITS SCATTER ON PARTICULAR SOCIAL GROUP

Federal courts of appeals across the United States responded differently to the BIA PSG decisions.[30] In 2009, soon after the BIA decided *Matter of S-E-G-* and *Matter of E-A-G-*, the Seventh Circuit rejected the social visibility requirement. In *Gatimi v. Holder* the Seventh Circuit found:

> [The social visibility requirement] makes no sense; nor has the [BIA] attempted, in this or any other case, to explain the reasoning behind the criterion of social visibility. Women who have not yet undergone female genital mutilation in tribes that practice it do not look different from anyone else. A homosexual in a homophobic society will pass as heterosexual.[31]

Furthermore the Seventh Circuit found, regarding the social visibility requirement, that "[i]f you are a member of a group that has been targeted . . . you will take pains to avoid being social visible."[32] An on-sight social visibility standard would therefore require persecuted groups to "pin[] a target to their backs" to qualify for relief.[33]

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28 *Id.* at 587.

29 UNHCR guidelines, *supra* note 2, para. 11.

30 Federal courts of appeals must defer to a federal administrative agency's (such as the Board of Immigration Appeals) interpretation of ambiguous term in a statute (such as particular social group) unless they find that interpretation is unreasonable. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005); Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc. 467 U.S. 837, 844 (1984).

31 Gatimi v. Holder, 578 F.3d 611, 615 (7th Cir. 2009).

32 *Id.*

33 *Id.* at 616.

Addressing the particularity requirement in 2013, the Seventh Circuit found in *Cece v. Holder* that the number of people included in a group should not be a factor in determining refugee status because it is "antithetical to asylum law to deny refuge to a group of persecuted individuals . . . merely because too many have valid claims."[34] Furthermore, the court held that the nexus requirement would narrow those eligible for asylum because even if one belonged to a large group, not all members would be targeted for persecution. Ultimately, the court accepted the proposed particular social group—"young Albanian women living alone"[35]—and held that gender "plus one or more narrowing characteristics" could constitute a particular social group.[36]

In 2011, the Third Circuit rejected the social visibility and particularity requirements in the case *Valdiviezo-Galdamez v. Attorney General*.[37] In this case the court found that many groups already recognized as particular social groups were not "highly visible and recognizable" by others in the country.[38] Like the Seventh Circuit, the Third Circuit reasoned that women who were opposed to genital mutilation, homosexuals, and former police (previously recognized as forming PSGs) were all not visible on-sight.[39] The court also could not find a meaningful difference between the social visibility and particularity requirements and therefore found that this requirement was "unreasonable" and "inconsistent with many of the BIA's prior decisions."[40]

The Ninth Circuit, in the 2013 case *Henriquez-Rivas v. Holder*, did not go as far as the Seventh and Third Circuits in completely rejecting the social visibility requirement, but held "that a requirement of 'on-sight' visibility would be inconsistent with previous BIA decisions and likely impermissible under the statute."[41] The court also held that "[w]hen a particular social group is not visible to society in general (as with a characteristic that is geographically limited, or that individuals may make efforts to hide), social visibility may be demonstrated by looking to the perceptions of persecutors."[42]

On the other hand, a number of other courts of appeals have upheld the Board's PSG requirements, including the First Circuit in *Mendez-*

34 Cece v. Holder, 733 F.3d 662, 675 (7th Cir. 2013).

35 *Id.* at 673.

36 *Id.* at 676; *see* Jaya Ramji-Nogales, *Gender "Plus" as a Particular Social Group*, INTLAWGRRLS (Aug. 20, 2013), http://ilg2.org/2013/08/20/gender-plus-as-a-particular-social-group/.

37 Valdiviezo-Galdamez v. Att'y Gen., 663 F.3d 582 (3d Cir. 2011).

38 *Id.* at 559 (quoting *In re* C-A-, 23 I. & N. Dec. 951, 960 (B.I.A. 2006)).

39 *Valdiviezo-Galdamez*, 663 F.3d at 604.

40 *Id.* at 608.

41 Henriquez-Rivas v. Holder, 707 F.3d 1081, 1087 (9th Cir. 2013).

42 *Id.* at 1090.

Barrera v. Holder (2010),[43] the Second Circuit in *Ucelo-Gomez v. Mukasey* (2007),[44] the Fifth Circuit in *Orellana-Monson v. Holder* (2012),[45] the Sixth Circuit in *Al-Ghorbani v. Holder* (2009),[46] the Eighth Circuit in *Gaitan v. Holder* (2012),[47] and the Tenth Circuit in *Rivera-Barrientos v. Holder* (2012).[48] The Fourth Circuit has declined to decide whether the social visibility standard merited deference.[49]

III. NEW BIA PRECEDENT: *MATTER OF M-E-V-G-* AND *MATTER OF W-G-R-*

In February 2014 the BIA issued two new precedential decisions: *Matter of M-E-V-G-*[50] and a companion case, *Matter of W-G-R-*.[51] In these cases the BIA established a three-part test for determining the existence of a cognizable PSG, including: immutability, particularity, and social distinction within the society in question.[52] This standard was the same as that in *Matter of S-E-G-* and *Matter of E-A-G-* except that it replaced "social visibility" with "social distinction."[53] In *Matter of M-E-V-G-*, the Board considered the PSG "'Honduran youth who have been actively recruited by gangs but who have refused to join because they oppose the gangs.'"[54]

The BIA clarified that social visibility "may be based on characteristics that are overt and visible to the naked eye or on those that are subtle and only discernable by people familiar with the particular culture. The characteristics are sometimes not literally visible."[55] In light of this clarification the Board renamed the social visibility requirement "social distinction" to "more accurately describe[] the function of the requirement" although it maintained that the requirement itself remained unchanged.[56] The BIA described social distinction as consideration of:

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43 Mendez-Barrera v. Holder, 602 F.3d 21 (1st Cir. 2010).

44 Ucelo-Gomez v. Mukasey, 509 F.3d 70 (2d Cir. 2007) (decided before *Matter of S-E-G-*).

45 Orellana-Monson v. Holder, 685 F.3d 511 (5th Cir. 2012).

46 Al-Ghorbani v. Holder, 585 F.3d 980 (6th Cir. 2009).

47 Gaitan v. Holder, 671 F.3d 678 (8th Cir. 2012).

48 Rivera-Barrientos v. Holder, 666 F.3d 641 (10th Cir. 2012).

49 *See* Martinez v. Holder, 740 F.3d 902, 906 (4th Cir. 2014) (finding being a former member of MS-13 was an immutable characteristic); Crespin-Valladares v. Holder, 632 F.3d 117 (4th Cir. 2011); Lizama v. Holder, 629 F.3d 440 (4th Cir. 2011).

50 *Matter of* M-E-V-G-, 26 I. & N. Dec. 227, 227 (B.I.A. 2014).

51 *Matter of* W-G-R-, 26 I. & N. Dec. 208, 208 (B.I.A. 2014).

52 *M-E-V-G-*, 26 I. & N. Dec. at 227; *W-G-R-*, 26 I. & N. Dec. at 208.

53 *M-E-V-G-*, 26 I. & N. Dec. at 236 (internal quotation marks omitted); *W-G-R-*, 26 I. & N. Dec. at 212 (internal quotation marks omitted).

54 *M-E-V-G-*, 26 I. & N. Dec. at 228 (quoting another source).

55 *M-E-V-G-*, 26 I. & N. Dec. at 235–36.

56 *Id.* at 236–37.

> [W]hether those with a common immutable characteristic are set apart, or distinct, from other persons within the society in some significant way. In other words, if the common immutable characteristic were known, those with the characteristic in the society in question would be meaningfully distinguished from those who do not have it. A viable particular social group should be perceived within the given society as a sufficiently distinct group.[57]

The BIA also described particularity as the group being "discrete and hav[ing] definable boundaries—it must not be amorphous, overbroad, diffuse, or subjective."[58] It noted that there was "considerable overlap" between the social distinction and particularity requirements.[59] It held, however, that they each serve a separate purpose because one considers whether the group is too indefinable or amorphous (particularity) and the other considered whether society viewed the group as separate (social distinction).[60] However, the BIA did not offer an example of a group that would be socially distinct but not particular. Although a group could certainly be particular but not socially distinct (i.e., a group that one could clearly define but that was not recognized by society), it seems impossible that a group could be socially distinct and not particular (i.e., a group that society recognizes as separate, but is also amorphous). Therefore, if social distinction is a requirement, particularity is unnecessary and only confuses the PSG analysis.

In *Matter of M-E-V-G-*, even the Department of Homeland Security (DHS), acting as counsel for the government, argued that the two standards should be combined because of the significant overlap between the two.[61] Still, the Board failed to consider where the overlap between the two terms was and how that overlap functioned before rejecting this argument.

Ultimately, the BIA concluded that because gang violence affects large segments of the population and many people are targeted, the applicant could not establish that he was targeted on a protected basis.[62] The Board, however, did not specifically address its own social distinction and particularity requirements with regard to the proposed PSG.

Matter of W-G-R-, the companion case to *Matter of M-E-V-G-*, considered the proposed PSG "'former members of the Mara 18 gang in El Salvador who have renounced their gang membership.'"[63] The BIA held

57 *Id.* at 238.

58 *Id.* at 239.

59 *Id.* at 240.

60 *Id.* at 241.

61 *Id.* at 236 n.11.

62 *Id.* at 251.

63 *Matter of* W-G-R-, 26 I. & N. Dec. 208, 209 (B.I.A. 2014) (quoting another source).

that former membership in the Mara 18 gang was clearly immutable, so it focused instead on the particularity and social distinction requirements.[64]

In terms of social distinction the BIA held, as in *Matter of M-E-V-G-*, that the requirement was not ocular or on-sight visibility.[65] It found that the requirement was based on the perception of society in general rather than the persecutor because basing social distinction on the perception of the persecutor could lead to groups being defined solely by the persecution they face.[66] It did not, however, consider that groups already recognized under U.S. asylum law, most notably family or kinship groups explicitly listed in *Acosta*, are almost never perceived by society in general, but rather by the persecutor and individuals in society.

The BIA held that the proposed group of former gang members was not sufficiently particular because the "group as defined . . . [wa]s too diffuse, as well as being too broad and subjective. . . . [T]he group could include persons of any age, sex, or background."[67] According to the BIA:

> [The group] could include a person who joined the gang many years ago at a young age but disavowed his membership shortly after initiation without having engaged in any criminal or other gang-related activities; it could also include a long-term, hardened gang member with an extensive criminal record who only recently left the gang.[68]

It is therefore unclear whether homogeneity is now required to meet the particularity standard. Other PSGs, for example former police officers, upheld in *Matter of Fuentes*, could similarly be of different age, sex or background.[69] Again, the standard upheld in *Fuentes* ("former member[s] of the national police"[70]) could include a police officer that recently joined the force, or a long-time police officer. Additionally, the PSG upheld in the BIA decision *In re H-* (Marehan subclan of Somalia)[71] contains people of different ages and sexes as does the PSG upheld in the decision *In re V-T-S-* (Filipinos of mixed Filipino-Chinese ancestry).[72] The explanation in *Matter of W-G-R-* therefore directly contradicts previous BIA precedent without explanation. If the BIA intends to require that a group be homogenous it must describe what sort of characteristics must be homogenous within a group, and then apply that rule consistently.

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64 *Id.* at 213.

65 *Id.* at 216–17.

66 *Id.* at 218; *cf.* Henriquez-Rivas v. Holder, 707 F.3d 1081, 1089–90 (9th Cir. 2013) (finding that the perception of the persecutor was relevant in determining the existence of a particular social group).

67 *Id.* at 221 (citation omitted).

68 *Id.*

69 *Matter of* Fuentes, 19 I. & N. Dec. 658 (B.I.A. 1988).

70 *Id.* at 662.

71 *In re* H-, 21 I. & N. Dec. 337, 343 (B.I.A. 1996).

72 *In re* V-T-S-, 21 I. & N. Dec. 792, 798 (B.I.A. 1997).

The BIA held that the PSG of former gang members was not socially distinct. The BIA did not find sufficient evidence to determine whether former gang members faced discrimination because they were former gang members or because their tattoos made people believe they were current gang members. It held, in sum, that former gang members were not viewed by society as a distinct group.[73] Although the BIA held in the same case that social distinction was the standard and not on-sight visibility, it reasoned that because members of society cannot visually tell the difference between current and former gang members, they do not view them as separate groups.[74] The BIA also failed to consider how the persecutors (e.g., current gang members) view former gang members as a separate group.

The decisions in *Matter of M-E-V-G-* and *Matter of W-G-R-* create more confusion over PSG claims. First, it is unclear whether homogeneity is now required for a group to be considered particular. And if homogeneity is required, how homogenous must the group be, and based upon which factors must it be homogenous? It is also unclear whether the size of the group is relevant, and if size is relevant, it is unclear how small the group must be. Finally, it is uncertain how the perception of the persecutor will be used in PSG determinations.[75]

In addition to these concerns, the new BIA decisions threaten to shut out PSG claims by holding prospective PSGs to contradictory requirements. Under a potential interpretation of particularity a group must be small and homogenous. However, a small and homogenous group is much less likely to be viewed by society as a whole as a separate group. For example, if former gang members are not a PSG, but former gang members who were part of a gang for longer than fifteen years (which limits group size and likely makes the group more homogenous) are a PSG, it is unlikely that society at large will view these two groups as different. Therefore, a proposed PSG would have to meet one requirement at the expense of the other. A standard that is impossible to meet is clearly not reasonable, and therefore not entitled to deference.

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73 *Matter of* W-G-R-, 26 I. & N. Dec. 208, 222 (B.I.A. 2014).

74 *Id.*

75 *Matter of* M-E-V-G-, 26 I. & N. Dec. 227, 242 (B.I.A. 2014). Furthermore, this conflicts with recent Ninth Circuit jurisprudence. *See, e.g.*, Cordoba v. Holder, 726 F.3d 1106 (9th Cir. 2013) (finding that the perception of the persecutor was relevant in determining the existence of a particular social group); Henriquez-Rivas v. Holder, 707 F.3d 1081 (9th Cir. 2013) (same).

IV. THE NINTH CIRCUIT RESPONDS TO *MATTER OF M-E-V-G-* AND *MATTER OF W-G-R-*

The Ninth Circuit responded to the new 2014 BIA precedents in the recent case *Pirir-Boc v. Holder*.[76] In this case, the court considered the proposed PSG "'persons taking concrete steps to oppose gang membership and gang authority.'"[77] The Ninth Circuit found that the BIA's decisions in *Matter of M-E-V-G-* and *Matter of W-G-R-* were not "'blanket rejection[s] of all factual scenarios involving gangs' and that '[s]ocial group determinations are made on a case-by-case basis.'"[78] It therefore held that the case should be remanded to the Board, which failed to "consider how Guatemalan society views the proposed group, and [] did not consider the society-specific evidence submitted by [the applicant]."[79] The court declined to decide whether the social distinction and particularity requirements were reasonable until it was clearer how the BIA rule would be implemented.[80] The Ninth Circuit again did not go as far as the Third and Seventh Circuits in rejecting BIA PSG requirements,[81] but did hold that the BIA had to make reasonable social distinction determinations based on country-specific evidence.

V. *ACOSTA* AND SOCIAL CONSTRUCTION: TOWARDS A WORKABLE STANDARD

While the social distinction standard is preferable to an "on-sight" social visibility standard, a further revision could improve the criterion and align it more strongly with the decision in *Matter of Acosta*. In light of recent BIA PSG decisions, many have proposed a return to the *Acosta* PSG standard or to a standard that requires either immutability or social distinction, but not both (the UNHCR PSG standard).[82] These two approaches would certainly be preferable to the current BIA standard, but the BIA has already rejected these suggestions.[83] Therefore, this Essay proposes to reconceptualize "social distinction" as "social constriction" as a way to pos-

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76 750 F.3d 1077 (9th Cir. 2014).

77 *Id.* at 1084 (quoting another source).

78 *Pirir-Boc*, 750 F.3d at 1083 (quoting *M-E-V-G-*, 26 I. & N. Dec. at 251 (first alteration added)).

79 *Pirir-Boc*, 750 F.3d at 1084.

80 *Id.*

81 *See supra* notes 31–40 and accompanying text.

82 Josh Lunsford, *Not Seeing Eye to Eye on Social "Visibility,"* IMMIGR. L. ADVISOR (U.S. Dep't of Justice, D.C.), Feb. 2014, at 3, *available at* http://www.justice.gov/eoir/vll/ILA-Newsleter/ILA%202014/vol8no2.pdf.

83 *Id.*

sibly move beyond the current impasse between the *Acosta*/UNHCR standard and the BIA standard.[84]

Considering the *ejusdem generis* approach established in *Acosta*, another commonality among the other four grounds for asylum in the 1951 Refugee Convention, besides being immutable and/or fundamental to identity, is that they are all social constructs. A social construct is "an idea or notion that appears to be natural and obvious to people who accept it but may or may not represent reality, so it remains largely an invention or artifice of a given society."[85] The international system,[86] nationality, and nationalism[87] are all socially constructed, as are religious and political systems. Race is socially constructed[88] and gender, another ground on which asylum is routinely sought outside of the four Convention grounds,[89] is also a social construction.[90] Finally, characteristics that have been identified in particular social group analysis, including linguistic and kinship ties,[91] are all socially constructed.

The difference between social construction and social distinction is that social distinction assumes the ground for persecution arises separately and that society is merely identifying it—or observing it, as suggested by the "social visibility" test. In reality, society is not observing or setting aside a group, but rather, creating it.[92] The social construction approach

84 The "social construction" standard advocated in this Essay is intended to be used in conjunction with the *Acosta* standard, not on its own.

85 7 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 578–79 (William A. Darity Jr. ed., 2d ed. 2008).

86 *See* John Gerard Ruggie, *What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge*, 52 INT'L ORG. 855, 855–57 (1998) (discussing social construction in international relations); Alexander Wendt, *Anarchy Is What States Make of It: The Social Construction of Power Politics*, 46 INT'L ORG. 391, 403–07 (1992) (same).

87 *See* BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM 1–7 (rev. ed. 2006).

88 *See* DERRICK BELL, RACE, RACISM AND AMERICAN LAW 7–8 (6th ed. 2008); Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 27–37 (1994).

89 *See, e.g.*, Cece v. Holder, 733 F.3d 662, 675 (7th Cir. 2013); Yadegar-Sargis v. INS, 297 F.3d 596 (7th Cir. 2002); *Matter of* A-R-C-G-, 26 I. & N. Dec. 388 (B.I.A. 2014); *In re* Kasinga, 21 I. & N. Dec. 357 (B.I.A. 1996).

90 *See* CATHERINE MACKINNON, SEX EQUALITY 212 (2d ed. 2007). For a leading treatise on the topic, see generally SIMONE DE BEAUVOIR, THE SECOND SEX (1949).

91 *See In re* H-, 21 I. & N. Dec. 337, 343 (B.I.A. 1996) (holding that members of the Somalian Marehan subclan were part of a particular social group because of shared "kinship" and "linguistic commonalities").

92 "The second approach examines whether or not a group shares a common characteristic which makes them a cognizable group or *sets them aside from society at large*. This has been referred to as the 'social perception' approach." UNHCR guidelines, *supra* note 2, at para. 7 (emphasis added).

also avoids a dictum with a premise that "society" is white, straight, and male, and people who are not are somehow less of a part of society or are set apart from it.

At first glance the social construct description seems to contradict the immutability test—if a characteristic is socially constructed it can be undone because it is not physically "real." However, there is no contradiction with the immutability standard for several reasons. First, many social constructs have an underlying biological feature, for example sex, race, ancestry, or sexual orientation. Therefore, the underlying biological feature would still be immutable. Second, certain social constructs may be so strong in a particular society that they seem immutable to those in that society, and in fact this aspect makes up the definition of social construct. Furthermore, because of the nature of social constructs—they are made up of the ideas and actions of many people—an individual person would not be able to change social constructs on their own even if they wanted to. Finally, because many social constructs make up a person's social identity, they could still fit under the *Acosta* standard of fundamental characteristics one should not have to change even if she could.

The case of the Tutsi and Hutu ethnic groups in Rwanda illustrates how a social construction test would work practically. For example, the fact that one is tall and has a long nose and long neck is biologically determined and almost impossible to change; it is immutable. Still, there is no social construct in, say, Canada concerning tall people with long noses and long necks, so being persecuted for that reason in that country would not be grounds for asylum even though it is immutable and visible. However, set in Rwandan society the same biological traits would suggest a person is a Tutsi—a once fluid social/ethnic group that long existed in Rwandan society and was later constructed into an oppressive social hierarchy by Belgian and German colonizers.[93] The distinguishing feature between the two potential asylum claims is social construction, not social distinction, visibility, or particularity. Members of Rwandan society do not see those traits more

93 Kenneth R. White, *Scourge of Racism: Genocide in Rwanda*, J. BLACK STUD. 471, 472–73 (2009) ("Prior to the arrival of the German and Belgian colonizers, the social boundaries between the Hutus and the Tutsis were fluid. The type of work was the primary difference between the groups. Hutus had a penchant for farming, and the Tutsis were cattle breeders. The Twa (an aboriginal group) were hunters and gatherers. Although precolonial Rwandan society had social stratification, the social boundaries were permeable, which allowed for crossing over from one group to another. . . . With the establishment of German colonialism (i.e., hegemony), the impositioning of European racial theories (e.g., Great Chain of Being and the Hamitic Curse) solidified ethnic lines. The more physical European-featured Tutsis were deemed to be the natural-born local rulers, and the Hutus (short, stocky, more pronounced African physical features) were destined to serve them. The distinctions between the various groups were racialized into hierarchies, with the Europeans at the top, the Tutsis in the middle, the Hutus at the bottom, and the Twa on the periphery." (citation omitted)).

clearly or think of people with those traits as set apart from society. In fact, it is quite the opposite—those traits are part of a social construction that is a deeply rooted part of society.

The case of Rwanda also serves as an example of why the particularity requirement—that a group not be too large—may ultimately be unworkable as well. While the Hutu social group is a majority in the country, they may present valid claims for asylum if they are being targeted because of their membership in this socially constructed group.[94] Furthermore, the standard of particularity conflicts with the *Acosta ejusdem generis* reading—the four other grounds in the 1951 Refugee Convention (race, religion, political opinion, and nationality) make up groups that are often large segments of the population, not small or isolated factions.

Another reason why the particularity requirement may ultimately fail is that its meaning beyond that the group may not be too large (i.e., that the group must be well-defined and not amorphous) is already captured by a social construction or social distinction test. While a group with well-defined boundaries is not necessarily socially distinct, a group that is socially distinct would always be particular in this sense. Therefore, the particularity requirement is unnecessary. The only additional purpose that the requirement could serve after a group has been determined to be socially distinct or constructed would be to limit group size, which is not in line with the *Acosta* and other BIA decisions.[95]

Thinking of PSGs in terms of social construction instead of social visibility, social distinction, or particularity more accurately captures the reality of persecution and aligns it with the *Acosta* criteria. Social construction, combined with the *Acosta* criteria, would therefore be a preferable standard to the social visibility, social distinction, and/or particularity requirements that have been articulated by courts, the BIA, and other authorities in the past.

CONCLUSION

PSG jurisprudence in the United States is still evolving and many issues remain unsettled. Unfortunately the recent BIA decisions in *Matter of M-E-V-G-* and *Matter of W-G-R-* do not provide answers and only raise more questions. Courts should, for now, defer to the standard established in *Matter of Acosta* until the BIA rationalizes additional requirements. A

94 U.S. CITIZENSHIP AND IMMIGR. SERVS., ASYLUM OFFICER BASIC TRAINING COURSE, PARTICIPANT WORKBOOK 18 (March 12, 2009), *available at* http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTC%20Lesson%20Plans/Nexus-the-Five-Protected-Characteristics-31aug10.pdf ("Hutu is the majority tribal group in Rwanda, while Tutsi, the minority group, controls the government. Both Hutus and Tutsis have presented valid claims for asylum.").

95 *See e.g.*, *H-*, 21 I. & N. Dec. 337.

way to possibly improve the PSG requirements in the future would be to replace social distinction with a social construction standard and eliminate the particularity standard entirely. This scheme would be in line with internationally accepted standards and lead to more reliable and just outcomes in U.S. asylum law.