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Making the Peg Fit the Hole: A Superior Solution to the Inherant Problems of Incorporated Definitions

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MAKING THE PEG FIT THE HOLE: A SUPERIOR SOLUTION TO THE INHERENT PROBLEMS OF INCORPORATED DEFINITIONS

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I. INTRODUCTION

For more than a century, scholars have warned legislative drafters that defining terms with borrowed language, created through an incorporated reference rather than through carefully tailored language, is risky. Scholars have used strong words in their warnings: incorporated definitions are labeled "traps for the unwary"[1] that create "a statutory jungle";[2] scholars question whether they are worthwhile[3] or whether they allow drafters to "borrow now and pay later";[4] and the statutory construction used to interpret is characterized as a "loose cannon."[5] Despite the warnings, incorporated references have become ubiquitous in federal and most state systems,[6] and are a significant contributor to the complexity of the statutory systems we all must unwind and apply has increased.

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1. *See* Scott A. Baxter, *Reference Statutes: Traps for the Unwary*, 30 MCGEORGE L. REV. 562, 563–64 (1999) (comparing incorporated references to nesting dolls).

2. *See* Arie Poldervaart, *Legislation by Reference—A Statutory Jungle*, 38 IOWA L. REV. 705 (1953).

3. *See* Horace Emerson Read, *Is Referential Legislation Worth While?*, 25 MINN. L. REV. 261 (1941).

4. *See* R. Perry Sentell, Jr., *"Reference Statutes"—Borrow Now and Pay Later?*, 10 GA. L. REV. 153 (1975).

5. *See* Ernest E. Means, *Statutory Cross References—The "Loose Cannon" of Statutory Construction in Florida*, 9 FLA. ST. U. L. REV. 1 (1981).

6. Some states constitutionally prohibited incorporations by reference. *See* REED DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING 132–33 (1986) (listing New Jersey, New York, Louisiana). These provisions are narrowly interpreted because a literal reading of the ban would "lead to innumerable repetitions of laws in the statute books, and render them not only bulky and cumbersome but confused and unintelligible, almost beyond conception." Town of Islip v. Cuomo, 541 N.Y.S.2d 829, 833 (N.Y. App. Div. 1989). Scholars have complained that these prohibitions themselves are routinely manipulated by the courts. Baxter, *supra* note 1, at 570 ("Judicial neglect of these statutory mandates is troubling because such neglect undermines the certainty reference statute construction laws are supposed to instill in the codes. Researchers are left in the same position as under the common law rules, wondering (or oblivious to) which law is applicable.").

For a modern example of the statutory uncertainty created by incorporated references, consider Jose Angel Carachuri–Rosendo, a lawful permanent resident of the United States since he was five years old, who in 2006 received notice that he faced deportation under federal law.[7] Mr. Carachuri-Rosendo had been convicted in Texas state court of two misdemeanors. The first conviction was for possession of less than two ounces of marijuana, for which he received twenty days in jail.[8] The second conviction was for possession of a single antianxiety tablet without a prescription, for which he received ten days.[9] Mr. Carachuri-Rosendo conceded that his misdemeanor convictions made him eligible for removal, but he sought discretionary relief from removal under 8 U.S.C. § 1229b(a) of the Immigration and Nationality Act (INA) because he met all of the section's qualifiers, including not being convicted of an "aggravated felony."[10]

But the INA does not provide an independent definition of aggravated felony; it instead adopts through reference a definition from the federal criminal code,[11] which in turn adopts through reference a definition from the Controlled Substances Act.[12] These layers of cross-referencing led to three separate circuit splits, including one resolved by Mr. Carachuri-Rosendo's petition for relief, and led the Supreme Court to complain that—to determine the meaning of "aggravated felony" as used in section 1229b(a)—it was forced to navigate a "maze of statutory cross-references."[13]

While borrowing a definition from another portion of the federal code appears to promote efficiency and harmony between statutory sections and promise a tested and reliable definition, doing so via an incorporated reference may raise two significant issues: *what* language is actually adopted and *how* to interpret the meaning of the definition in its new context.

The first problem occurs when the original definition has been amended, renumbered, or eliminated, so courts must determine whether the incorporated reference is likewise altered because it was created through a dynamic link or whether the incorporated reference adopts only the language in place at the time of the incorporation because it was created through a static link. Determining the language of a statutory definition is Congress's constitutional prerogative, yet, if lawmakers fail to clearly indicate how an incorporated definition is impacted by a change to the original definition,

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7. Carachuri-Rosendo v. Holder, 560 U.S. 563, 566 (2010).
8. *Id*.
9. *Id.*
10. *Id.*
11. 8 U.S.C. § 1101(a)(43)(B) (2014) (incorporating by reference 18 U.S.C. § 924(c) (2006)).
12. 18 U.S.C. § 924(c)(2) (defining "drug trafficking crime" as "any felony punishable under the Controlled Substances Act").
13. *Carachuri-Rosendo*, 560 U.S. at 567.

the historic interpretive canons and their inconsistent application provide courts with seemingly unlimited justification in setting the language of the definition.

Second, with all incorporated references, courts are tasked with determining the meaning of definitions, and too often the sloppy fit of the incorporated definition in its new home results in uncertain and unpredictable applications. Drafters who do not have to craft a definition are less likely to be careful with the language of the definition.[14] And those governed by these definitions—especially those without sophisticated representation—are vulnerable to their unexpected and apparently undeliberated scope.

Further, the interpretive canons also fail to create predictable interpretations of terms. Consequently, some courts borrow the meaning of the language in its original context to inform the meaning in the new context, and other courts do not. Litigants are left wondering not only which language may define a key term, but whether a court will limit the borrowing to the *language* of the original definition or expand it to include the language and the *meaning* it has developed in its original context.[15]

Both problems erode the shared mental space between the lawmakers, the courts, and the public that an effective definition must have.[16] This article revisits the disconnections created when incorporated references are used to define terms in the federal system and offers a solution in two parts: one for drafters and one for interpreting courts. Part II begins by justifying the article's focus on definitions and by describing how the most effective, predictable definitions evolve from a shared understanding between lawmakers and interpreting courts. Part III gives two extended modern examples of the confusion created by incorporated references when there is no apparent shared understanding. And Part IV provides the two-part solution: First, lawmakers must retake their roles in announcing whether incorporated ref-

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14. DICKERSON, *supra* note 6, at 130 ("That incorporated language is less likely to be checked by the draftsman . . . increases the chances of mistake or deception.").

15. Two specific problems of incorporation by reference have been raised in recent articles but are not covered here. One is the lack of public access when the adopted material is not available to the public. *See* Emily S. Bremer, *Incorporation by Reference in an Open-Government Age*, 36 HARV. J.L. & PUB. POL'Y 131, 133–36 (2013) (noting that the Code of Federal Regulations (CFR) contains over 9,500 incorporated references, many of them to private documents that require payment to view, and that this inaccessibility is a particularly acute problem for transparency during rulemaking). The second consists of the unique problems raised by incorporated references in international treaties. *See* John F. Coyle, *Incorporative Statutes and the Borrowed Treaty Rule*, 50 VA. J. INT'L L. 655, 664–69 (2010) (noting the risk that courts called upon to interpret an incorporative statute will "pay too little attention to its international origins, disregard important international and foreign law sources, or read the statute through an exclusively domestic lens").

16. *See* Jeanne Frazier Price, *Wagging, Not Barking: Statutory Definitions*, 60 CLEV. ST. L. REV. 999, 1033 (2013).

erences are static or dynamic, removing from the courts the burden of determining the language of a definition through the alternatively formulaic or manipulated reliance on a characterization of a reference as either general or specific; and second, courts should determine the meaning of incorporated language using an approach that is consistent with the established spectrum of shared language.

In short, legislative drafters should be just as precise and careful with selecting incorporated language as they are with crafting original language. Although incorporated references are relied upon as an efficient, essential tool, using them effectively so as not to facilitate thoughtless drafting may require even more drafting time than it saves.[17]

II. THE SHARED MENTAL SPACE OF AN EFFECTIVE DEFINITION

A. Definitions and Discretion

Definitions are the gatekeepers of statutory law and the focal point of statutory interpretation. Not all statutory terms need definition,[18] but when drafters undertake to set the limits on a term's meaning, the limits should be precisely and clearly communicated so that the public knows how to conform its behavior, and those who enforce and interpret the law have clear boundaries "outside of which interpretation ought not to stray."[19] Carefully crafted definitions "narrow the margin of uncertainty in application, and reduce the number of hard cases."[20] They establish an objective system of adjudication, one that "govern[s] by rules that meaningfully limit discretion."[21]

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17. *See* DICKERSON, *supra* note 6, at 131 ("[T]ime legitimately saved by incorporation is less than first appears, because it takes time to screen even compatible incorporated material.").

18. *See id.* at 137–38 (advising the drafters of definitions to limit meaning "only when necessary" and "only as full as necessary" because it is "apparently easier to use words properly than to define them accurately").

19. Price, *supra* note 16, at 1019–20 ("To define is to limit . . . ."). Although imprecise definitions may create considerable confusion and inconsistent governance, they are not void for vagueness so long as they "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute" and discourage "arbitrary and erratic arrests and convictions." Colautti v. Franklin, 439 U.S. 379, 390 (1979) (describing the constitutional flaw of "void for vagueness").

20. Price, *supra* note 16, at 1022.

21. Gerald Leonard, *Rape, Murder, and Formalism: What Happens If We Define Mistake of Law?*, 72 U. COLO. L. REV. 507, 511 n.12 (2001); *see also* Price, *supra* note 16, at 1033 (noting that definitions may "establish a shared mental space, in which lawmakers and those subject to laws are consistently informed of the ground rules for interpretation . . . and meaning to the world at large").

Effective definitions limit, but do not eliminate, an interpreting court's discretion because flexibility allows statutes to meet the dynamic movements of technology, the market, and society generally. Definitions should be "crisp" yet "flexible."[22] Drafters must not only be precise in defining terms, but also thoughtful in crafting language that gives courts space and discretion to apply the definitions sensibly and fairly, in a way that is "reflective of the appropriate theoretical underpinnings."[23] In return, courts articulate and regularly apply rules and canons to interpret the language, so "lawmakers and those subject to laws are consistently informed of the ground rules for interpretation and application."[24] The aim is to create "a shared mental space" between those creating the law, those applying the law, and those conforming their behavior to those laws.[25]

Unfortunately, when drafters use a shortcut to create the definition rather than tailor language to its purpose, too often the drafters and legislators fail to consider and debate the meaning of the incorporated language. The rough fit of the definition to its new context forces courts to interpret the definition, but the courts' interpretative rules may fail in turn to inform the lawmakers because the rules are manipulated and inconsistently applied.[26] And litigants may not appreciate from the plain language of the statute that there is ambiguity in the scope of the incorporated definition.

B. The Appeal of Incorporated Definitions

Statutory drafters do not work on a blank slate; they create meaning to fit within an already complex network of legislation. Since the beginning of American legislative history, drafters have mined existing statutes for defi-

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22. LAWRENCE M. SOLAN, THE LANGUAGE OF STATUTES: LAWS AND THEIR INTERPRETATIONS 3 (John M. Conley & Lynn Mather eds., 2010).

23. Maureen A. O'Rourke, *Evaluating Mistakes in Intellectual Property Law: Configuring the System to Account for Imperfection*, 4 J. SMALL & EMERGING BUS. L. 167, 170–71 (2000) (noting drafters should not "enshrine static definitions of statutory subject matter and the corresponding rights"); *see also* Price, *supra* note 16, at 1022; DEBORAH CAO, TRANSLATING LAW 122 (2007) ("[L]egislative language must anticipate a world that does not exist at the time of expression and must be prepared for an infinity of possibilities.").

24. Price, *supra* note 16, at 1033; *see also* Coyle, *supra* note 15, at 697 (stating the goal of statutory interpretation is that "a system of established rules of construction might make the process of statutory interpretation more predictable, effective, and even legitimate") (quoting John F. Manning, *Legal Realism & the Canons' Revival*, 5 GREEN BAG 2D 283, 284 (2002)).

25. Price, *supra* note 16, at 1033.

26. *See* Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898, 1898 (2011) (noting judges' failure to settle on a consistent and predictable approach to statutory interpretation); Coyle, *supra* note 15, at 698 (noting that rules "invite judges openly to take policy considerations into account when deciding what a statute means").

nitions that may be incorporated and repurposed.[27] Definitions may be borrowed through two methods: First, drafters may simply repeat a definition in its new context, with or without a reference to the original section. Courts are more likely to view this borrowing as creating a distinct definition, but there is a risk that repeating long, complicated definitions will create unintended differences, or that courts and litigants will fail to see and consider the links between the two definitions.[28] Second, drafters may borrow a definition through an incorporated reference. This method is a recognized, legitimate, and necessary drafting tool, allowing drafters to efficiently borrow a definition and possibly further the harmony of statutory sections.[29]

Drafters use incorporated definitions as a shortcut, but they may also rely on an existing definition because it (apparently, but not assuredly) represents a tested, accepted meaning. When elements of proposed legislation are likely to be contentious, lawmakers may borrow an established definition not only to avoid re-drafting something that appears to be working, but also to move at least a portion of the legislation out of debate.[30]

Incorporated references are not only efficient; they may act to further the harmony of federal legislation. The principle of harmony, which has become increasingly important with the complexity of legislation,[31] encourages courts to find the meaning of terms by referring to the meaning of the same term in other statutory sections.[32] It is therefore not only unrealistic, but undesirable for drafters to create every definition whole cloth.

The ease of the drafting shortcut, however, often leads to definitions that are not carefully deliberated. The First Circuit Court of Appeals, in a decision that required it to interpret definitions incorporated by the Secretary of Labor from the Americans with Disabilities Act and placed in the Family and Medical Leave Act (FMLA), complained that the drafting Secretary

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27. *See* F. Scott Boyd, *Looking Glass Law: Legislation by Reference in the States*, 68 LA. L. REV. 1201, 1202 (2008); DICKERSON, *supra* note 6, at 130 ("Incorporation by reference saves space and sometimes valuable time for the draftsman (if not for the users).").

28. DICKERSON, *supra* note 6, at 130.

29. *See* Boyd, *supra* note 27, at 1202; DICKERSON, *supra* note 6, at 130 (claiming that "[w]here parallel results are desirable, [incorporated references] guarantee[] them," which, as discussed *infra*, overstates the case).

30. Credit for this idea goes to the faculty of the St. Mary's University School of Law, who shared with me their experience drafting legislation and using incorporated reference for just this purpose. The irony, of course, is that definitions that mean one thing and are effective in one area of legislation may not mean the same thing or even work in another area. The incorporated definitions should be fully debated, not slipped in.

31. 2B NORMAN SINGER & SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 53:1 (7th ed. 2014) [hereinafter SUTHERLAND] ("[L]egislation never is written on a clean slate, never is read in isolation, and never applies in a vacuum.").

32. *See* Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 879 (1994) (affirming "the familiar principle of statutory construction that, when possible, courts should construe statutes . . . to foster harmony with other statutory and constitutional law").

"caught the nearest way" when "in lieu of tailoring the definition of terms . . . to suit the peculiar needs of the FMLA, the Secretary simply co-opted existing definitions."[33] When drafters and lawmakers fail to thoughtfully consider the nuances of a definition, the hard work of making the definition fit is pushed to the courts, which are ill-equipped by interpretative canons to resolve the issues in predictable, consistent ways.[34]

III. THE CONFUSION CAUSED BY INCORPORATED DEFINITIONS IN MODERN FEDERAL LEGISLATION

An incorporated definition can be the square peg in a round hole: drafters are taking a definition created for one purpose and using it for another.[35] Sometimes the purposes of both statutes are so similar that the use of a linked definition is preferable to the creation of a unique definition, but other times the link reveals (as the *Navarro* court suspected) sloppy legislation that repurposes a definition whose meaning, in turn, does not enjoy a shared mental space.[36]

The following examples illustrate how modern layers of complex statutory schemes exacerbate the weaknesses and uncertainties of incorporated references. Definitions are often linked across unrelated legislation; drafters may not fully investigate the meaning of the incorporated definition or anticipate its fit in a new context—the words themselves are not even part of the proposed legislation—and the lawmakers may not understand the definition they have just adopted.

To interpret and apply the statutes, a court may stretch the meaning of an incorporated definition in an unpredictable way to fit a new purpose, or a court's application of a term in a new context may reveal previously unappreciated weaknesses in the definition.

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33. Navarro v. Pfizer Corp., 261 F.3d 90, 92–93, 96–97 (1st Cir. 2001).

34. Despite this shift, courts have uniformly held the use of incorporated references constitutional; "[e]ven if such incorporation by reference were somehow regarded as a 'delegation' of power, it would not pose any problem, because the delegated power is exercised only by the full Congress acting through the constitutionally prescribed procedures for enacting another statute." Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457, 1481 (2000).

35. *See* DICKERSON, *supra* note 6, at 130 (warning that the "big" risk of incorporated references is "that the incorporated reference may not adequately fit the immediate situation").

36. Any kind of borrowed definition—including the modeling of language—can be sloppy, but the problems described here are more often present in incorporated references, presumably because the lawmakers do not have the language of the borrowed definition included as part of the legislation.

A. A Cascade of Circuit Splits Caused by Layers of Ill-Fitting Definitions in the INA, the Federal Criminal Code, and the Sentencing Guidelines

The "maze of statutory cross references" interpreted by the Supreme Court in *Carachuri-Rosendo v. Holder*[37] is an extreme example of the confusion caused by incorporated definitions that span titles in the federal code and in the Sentencing Guidelines. The Court's holding in *Carachuri-Rosendo* resolved just one of the three circuit splits generated by four layers of incorporated references. The courts—and the impacted defendants—were confused not only by the sloppy cross-section references from the INA to the federal criminal code to the Sentencing Guidelines, but also by the layers of interpretation courts built on this poor link.

1. Circuit Split #1: Whether Conduct Not Punishable Under the Controlled Substances Act Could Be Considered a Felony Punishable Under the Controlled Substances Act

Section 1229b(a)(3) of the INA makes an alien ineligible for cancellation of removal proceedings if he or she has been convicted of an "aggravated felony."[38] The definitions section of the INA defines "aggravated felony" with an incorporated reference to the federal criminal code: An aggravated felony includes "a drug trafficking crime (as defined in section 924(c) of Title 18)." Section 924(c)(2) defines a "drug trafficking crime" as "any felony punishable under the Controlled Substances Act."[39]

In *Lopez v. Gonzales*, the Court was asked to decide whether Jose Antonio Lopez—who had been convicted in South Dakota of a felony drug offense—was eligible for cancellation of removal because the state felony conviction was not for conduct punishable under the Controlled Substances Act.[40] In essence, the Court had to decide whether a crime *not* punishable under the Controlled Substances Act *could* be a felony punishable under the Controlled Substances Act,[41] and thereby a drug trafficking crime,[42] and thereby an aggravated felony for purposes of the INA,[43] and thereby an offense that made Lopez ineligible for cancellation of removal.[44]

The lower courts had been split on this issue, with the Eighth Circuit holding in *Lopez* that section 924(c)(2) required only that an offense be pun-

37. 560 U.S. 563 (2010).
38. 8 U.S.C. § 1229b(a)(3) (2008).
39. 18 U.S.C. § 924(c)(2) (2006).
40. 549 U.S. 47, 50–51 (2006).
41. *See* 21 U.S.C. §§ 801–889 (1970).
42. *See* 18 U.S.C. § 924(c)(2).
43. *See* 8 U.S.C. § 1101(a)(43)(B) (2014).
44. *See* 8 U.S.C. § 1229b(a)(3) (2008).

ishable, not that it be punishable as a felony.[45] The Supreme Court, however, held that the words meant exactly what they appear to mean: that the activity must be punishable under the Controlled Substances Act to fall within the definition in section 924(c)(2) and to exclude Lopez from cancellation of removal.[46]

2. *Circuit Split #2: Whether a Conviction in State Court for Conduct That May Have Been Punishable as a Felony Under the Controlled Substances Act Could Be Considered a Conviction for an Aggravated Felony Under the Controlled Substances Act*

After the Supreme Court's decision in *Lopez*, courts continued to struggle with the scope of an INA definition pulled from the federal criminal code. Lower courts developed the "hypothetical felony approach" to apply the *Lopez* holding. Under this approach, courts "g[o] beyond the state statute's elements to look at the hypothetical conduct a state statute proscribes."[47] If conduct could "hypothetically" have been punished as a felony had it been prosecuted in a federal court, it is an "aggravated felony" for federal immigration law purposes.[48] This approach was criticized as pulling the meaning of the phrase "any felony punishable under the Controlled Substances Act" too far from the statutory text and presenting a difference in meaning that could unexpectedly and drastically impact immigrants.[49]

In *Carachuri-Rosendo v. Holder*, the government argued that Carachuri-Rosendo's second misdemeanor conviction in a Texas state court could hypothetically have been prosecuted as a felony in federal court.[50] As a consequence, Carachuri-Rosendo was ineligible for cancellation of removal.[51] To have understood the federal government's interpretation of 8 U.S.C.

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45. Lopez v. Gonzalez, 417 F.3d 934, 937 (8th Cir. 2005).

46. Lopez v. Gonzalez, 549 U.S. 47, 50 (2006).

47. Carachuri-Rosendo v. Holder, 570 F.3d 263, 266 & n.3 (5th Cir. 2009), *rev'd*, 560 U.S. 563 (2010).

48. *See* Fernandez v. Mukasey, 544 F.3d 862, 875–76 (7th Cir. 2008). But the First, Second, Third, and Sixth Circuits have adopted the approach the Board of Immigration Appeals advocated in its en banc opinion in *Carachuri-Rosendo*, 24 I. & N. Dec. 382 (B.I.A. 2007). *See* Berhe v. Gonzales, 464 F.3d 74 (1st Cir. 2006); Alsol v. Mukasey, 548 F.3d 207 (2d Cir. 2008); Gerbier v. Holmes, 280 F.3d 297 (3d Cir. 2002) (holding specifically on the meaning in the INS context, but holding open the meaning in the Guidelines, recognizing that the two statutory systems have different purposes, and therefore the terms may have different meanings).

49. *See* Allison M. Whitmore, *The Need to Know: Why Multiple State Drug Possession Offenses Should Not Automatically Amount to an Aggravated Felony*, 36 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 359, 359–60 (2010) (quoting 18 U.S.C. § 924(c)(2) (2006)).

50. *Carachuri-Rosendo*, 560 U.S. at 570.

51. *Id.* at 572–73.

§ 1229b(a)(3), and to thereby have anticipated the behavior that would make him ineligible for cancellation of removal, Carachuri-Rosendo would have had to understand these steps in the statutory maze: (1) the cancellation of removal statute, § 1229b(a)(3), makes an alien ineligible for cancellation of removal when the alien has been convicted of an "aggravated felony"; (2) the definitions section of the same title defines "aggravated felony" as including "a drug trafficking crime (as defined in section 924(c) of Title 18)";[52] (3) 18 U.S.C. 924(c) defines "drug trafficking crime" as "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.)"; and (4) relevant for Carachuri-Rosendo, 21 U.S.C. § 844(a) gives a federal court the option to sentence recidivist simple possession as a felony.

The government, relying on this stacking of statutes, argued that Carachuri-Rosendo's second simple-possession offense could have hypothetically been punishable in federal court as an aggravated felony and that this possibility made his two misdemeanor convictions in state court disqualifying events.[53]

The Court, in language critical of both the government's manipulations and the layers of poor definitions that allowed it, rejected the hypothetical felony approach and its application to Carachuri-Rosendo.[54] The Court attempted to cut through the ill-fitting definitions and the interpretive hypothetical approach by adopting instead the "commonsense conception" of "aggravated felony."[55] The Court recognized that "a reading of this statutory scheme that would apply an 'aggravated' or 'trafficking' label to *any* simple possession offense is, to say the least, counterintuitive and 'unorthodox.'"[56] Notably, the Court also recognized a benefit of the borrowed meaning: "[T]hat ambiguities in criminal statutes, where referenced in immigration law, are construed in favor of the noncitizen."[57]

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52. 8 U.S.C. § 1101(a)(43)(B) (2014).

53. *Carachuri-Rosendo*, 560 U.S. at 573.

54. *Id.* at 575–77.

55. *Id.* at 573–74.

56. *Id*. at 574. The court rejected the government's arguments for reasons other than the plain meaning of the text: The government's approach failed to give full effect to the mandatory notice and process requirements of the federal recidivism statute; the hypothetical approach thwarts prosecutorial discretion and dispenses with procedural safeguards that are fundamental to federal drug laws; the Third Circuit misread *Lopez* by failing to use a categorical approach that focused on the conduct that was actually punished, rather than the punishment that could have been imposed; and the common practice in federal courts was inconsistent with the government's position, in that this type of offense would almost never, if ever, be prosecuted as a felony in a federal court. *Id*.; *see also* Joy Sanders, *U.S. Supreme Court Rules Noncitizens with Two or More Misdemeanor Possession Convictions Are Not Automatic Aggravated Felons*, HOUS. LAW., July–Aug. 2010, at 47, 48.

57. Sanders, *supra* note 56, at 42 (citing Leocal v. Ashcroft, 543 U.S. 1, 11 n.8 (2004)); *see also* Moncrieffe v. Holder, 133 S. Ct. 1678, 1685 (2012) (addressing this issue and outlining two conditions that a state offense must meet in order to constitute a drug trafficking

3. Circuit Split #3: Whether "Drug Trafficking Crime" Can Mean Something Different in the INA and in the Sentencing Guidelines

The third circuit split involves the same core factual question decided in *Lopez*—whether a state felony conviction may be treated as an aggravated felony by the government—but this split arises from a fourth layer of incorporation. Sentencing Guidelines for unlawfully entering or remaining in the United States increase the base level by eight levels when the defendant has previously been deported from or unlawfully remained in the United States after being convicted of an "aggravated felony."[58] Application Note 1 to section 2L1.2(b)(1)(C) defines "aggravated felony" through an incorporated reference, giving it "the meaning given that term in 8 U.S.C. 1101(a)(43)," which is the definitions section of the INA that in turn borrows a definition from the federal criminal code.[59]

Although the Supreme Court has not explicitly extended *Lopez* to the Sentencing Guidelines and held that a state offense constitutes an aggravated felony for purposes of an enhancement "only if it proscribes conduct punishable as a felony under that federal law,"[60] the language and reasoning of the *Lopez* holding make clear the Court intended it to apply to both the INA and the Sentencing Guidelines.[61]

The Court indicated in *Lopez* its intent to broadly cover the area, but there lingers the fundamental question whether the linked term "drug trafficking crime" could mean one thing when the Immigration and Naturalization Service (INS) cancellation of removal statute borrows it, and another when the Sentencing Guidelines borrow it. The competing theories on this question are typical of the dilemma courts face when interpreting the meaning of incorporated definitions. On one side, courts recognize that incorporated definitions indicate the overarching congressional intent that supports reconciling the intra- and inter-circuit split between the hypothetical felony approach and the guidelines approach, and that defendants with similar

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crime under 8 U.S.C. § 1101(a)(43)(B): First, "[i]t must 'necessarily' proscribe conduct that is an offense under the CSA; and [second,] the CSA must 'necessarily' prescribe felony punishment for that conduct").

58. UNITED STATES SENTENCING COMMISSION GUIDELINES MANUAL § 2L1.2(b)(1)(C) (2014) [hereinafter SENTENCING GUIDELINES].

59. *Id.* cmt. 1.

60. *See* Lopez v. Gonzales, 549 U.S. 47, 60 (2006).

61. *See, e.g.*, United States v. Figueroa-Ocampo, 494 F.3d 1211, 1216 (9th Cir. 2007) ("Given the Supreme Court's discussion of the shared definition of 'aggravated felony' under the INA and the Sentencing Guidelines, the Court's reference to [sentencing guidelines cases], and the Court's interpretation of the INA term 'aggravated felony' adopted by the Guidelines, it is beyond dispute that *Lopez* applies in both criminal sentencing and immigration matters.").

backgrounds who commit the same offense should be treated similarly.[62] On the other side, courts engage in a familiar, purpose-driven analysis of congressional intent. Prior to the recent Court rulings, many circuits held that these borrowed, linked definitions could have different meanings in separate contexts because (1) the two statutory schemes had different purposes, and (2) the need for uniformity was greater in INS enforcement than it was in sentencing because states retain primary authority for sentencing.[63]

This latter approach is appealing because it is consistent with the courts' general approach to interpreting language of one statute by looking at similar or identical language in another statute.[64] But because an incorporated reference appears to directly align the meaning of one section with the meaning of another, it may be absurd to imagine a member of the public will anticipate that behavior may qualify as an aggravated felony under one section but not under another.

Indeed, when federal courts have split on so many issues raised by these poorly incorporated definitions, how could any of us governed by this maze have anticipated the scope of the incorporated definition in each context? The incorporated definitions here are ineffective because they fail to provide any shared mental space between the drafters, the courts, and those impacted by the statutes. And the complexity most directly impacts vulnerable defendants.

4. United States v. Kramer*: An Incorporated Definition That Reveals Weaknesses in the Original Definition*

Placing a definition in a new legal landscape through an incorporated reference strips the definition down to its plain language and may reveal weaknesses in the definition not as apparent in the larger context of the original act. The Sentencing Guidelines' incorporated definition of "computer" in the Computer Fraud and Abuse Act (CFAA) provides just such an illustration.

On March 13, 2013, Professor Orin Kerr testified before the United States House of Representatives Subcommittee on Crime, Terrorism, Homeland Security and Investigations on the dangers of the "remarkably vague" language in the CFAA.[65] In his written remarks, Professor Kerr specifically

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62. *See* United States v. Booker, 543 U.S. 220, 254 (2005).

63. *See, e.g.*, United States v. Castro-Coello, 474 F. Supp. 2d 853, 863 n.11 (S.D. Tex. 2007) (noting that it "goes without saying" that the Controlled Substances Act and the Sentencing Guidelines serve different purposes, and, as such, one should expect certain differences) (citing *Booker*, 543 U.S. at 324)).

64. *See* discussion *infra* notes 123–27 and accompanying text.

65. Orin S. Kerr, *Investigating and Prosecuting 21st Century Cyber Threats: Hearing Before the Subcommittee on Crime, Terrorism, Homeland Security and Investigations* (March

criticized the breadth of the CFAA's definition of computer, contained in 18 U.S.C. § 1030(e)(1), which defines a "computer" as

> an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held calculator, or other similar device.[66]

As support for his criticism that the definition includes devices most people would not consider a computer—such as toys, coffeemakers, and calculators—Professor Kerr cited *United States v. Kramer*, an Eighth Circuit decision that did not even involve the CFAA but instead through an incorporated reference applied the CFAA's definition of computer to an issue of sentencing enhancement.[67]

The narrow question in *Kramer* was whether a basic cell phone the defendant admitted using in the commission of the crime was a "computer" for purposes of Sentencing Guidelines section 2G1.3(b)(3).[68] As is typical of the Guidelines, all but one of the terms defined in section 2G1.3(b)(3) are defined with an incorporated reference.[69] Comment 1 to the Guidelines states that "computer" is to have the meaning given it in 18 U.S.C. § 1030(e)(1) of the CFAA, quoted above.[70]

Kramer argued that because his cell phone could not access the internet, it should not be considered a computer; it was more like the typewriter and the calculator—devices that were exempted from the definition.[71] But the Eighth Circuit was unpersuaded that the plain reading of the borrowed definition restricted a computer to a device that accessed the internet. The court acknowledged that the definition from 18 U.S.C. § 1030(e)(1) is "exceedingly broad."[72] But because the Guidelines borrowed this broad definition, and because the cell phone at issue performed logical, arithmetic, and

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13, 2013, 11:30 AM), http://www.loc.gov/law/opportunities/PDFs/KerrCFAATestimony2013.pdf.

66. United States v. Kramer, 631 F.3d 900, 902 (8th Cir. 2011).

67. *Id.*

68. *Id.*

69. *See* SENTENCING GUIDELINES § 2G1.3(b)(3) (defining "commercial sex act," "computer," "illicit sexual conduct," "interactive computer service," "participant," "prohibited sexual conduct," "sexual act," and "sexual contact" all through references to the U.S.C. or to other Guidelines).

70. *Id.* § 2G1.3(b)(3) cmt. n. 1.

71. *Kramer*, 631 F.3d at 902–05.

72. *Id.* at 902–03 (citing and quoting Orin S. Kerr, *Vagueness Challenges to the Computer Fraud and Abuse Act*, 94 MINN. L. REV. 1561, 1577 (2010)).

storage functions, the court held it was a computer for purposes of the statutory enhancement.[73]

While the court held it was bound "by the specific—if broad—definition set forth in § 1030(e)(1)," it acknowledged that the basic cell phone "might not easily fit within the colloquial definition of 'computer.'"[74] In addition, the court seemed unconvinced that the meaning was intended by either the Sentencing Commission or Congress and warned that the broad, borrowed definition of § 1030(e)(1) "may come to capture still additional devices that few industry experts, much less the Commission or Congress, could foresee."[75]

Professor Kerr and other scholars have complained that the definition of computer is broad even in the context of the CFAA.[76] These scholars recognize and debate the appropriateness of courts' narrow interpretation of the CFAA definitions to control its application. But outside the CFAA interpretative case law, the Eighth Circuit applied the plain language of the definition as incorporated and did not use the definition's new context as either a reason for a narrow interpretation or even a distinct meaning from its original placement in the CFAA. The court applied the text's plain meaning and held that "to the extent that such a sweeping definition was unintended or is now inappropriate, it is a matter for the Commission or Congress to correct."[77]

In *Kramer*, the Eighth Circuit limited its interpretative role and thereby explicitly invited lawmakers to improve its broad definition, whose weaknesses are even more apparent outside the interpretative framework of the CFAA. In this way, the court was opening dialogue with lawmakers and encouraging a shared understanding of the incorporated reference, something courts do not do when they manipulate interpretative rules to reach a desired conclusion.

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73. *Id.* at 903.

74. *Id.*

75. *Id.* at 903–04.

76. Kerr, *supra* note 65, at 3–4; Kelsey T. Patterson, *Narrowing It Down to One Narrow View: Clarifying and Limiting the Computer Fraud and Abuse Act*, 7 CHARLESTON L. REV. 489, 497 (2013) ("Currently, a wide circuit split exists regarding the CFAA, specifically concerning the meaning of the terms without authorization and exceeds authorized access found within the statute."); Samantha Jensen, *Abusing the Computer Fraud and Abuse Act: Why Broad Interpretations of the CFAA Fail*, 36 HAMLINE L. REV. 81, 84 (2013) ("Only a narrow interpretation of the CFAA keeps the statute constitutional and fulfills Congress's original and primary intent to punish criminal computer hackers and people who abuse legitimate access privileges.").

77. *Kramer*, 631 F.3d at 903.

IV. BUILDING A SUPERIOR SYSTEM OF DEFINITION INCORPORATION AND INTERPRETATION

These modern examples demonstrate the continued problem with definitions that are created with a drafting shortcut that, apparently, also represents a deliberation shortcut. But even with definitions that fit their new context, courts routinely have to answer questions raised by incorporated references. The first question deals with identifying the actual *language* that is borrowed—which should be a strictly legislative task. If not clear from the language of the link, courts must determine whether lawmakers intended that the incorporation be static, with the language remaining the language at the time of incorporation even if the original definition is amended or eliminated, or whether lawmakers intended the incorporation to be dynamic, with the incorporated definition altering as the original alters. Lawmakers create this ambiguity when they fail to clearly indicate their intent, and courts have created and will continue to attempt to apply an unsatisfactory, unpredictable solution. The solution to confusion about the actual language of the borrowed definition lies with the drafters.

The second issue raised with an incorporated reference is whether the courts deciding the *meaning* of the language in the new context may be informed by the meaning of the language in the original context or whether the linked definitions—even though they have identical language—may have different meanings. Determining the meaning of statutory language is not outside the courts' role or expertise. Too often, however, the canons applied to incorporated references are used without evidence of judicial deliberation that would act to inform and forewarn the public and lawmakers. The solution to the inconsistent, unreasoned application of the canons therefore lies primarily with the courts.

A. The Wrong Place for Judicial Interpretation: Determining the Actual Language of the Incorporated Definition

When a statute defines a term through an incorporated reference, the first questions that should be asked—but are frequently not even raised by litigants or courts—are whether the original, borrowed language has changed since the incorporation and whether the adopting statute's language changed with it. To determine whether an incorporation is static or dynamic, courts have developed two interpretive rules—the English rule and the American rule—but neither offers adequate certainty to litigants.

1. The Logical but Unexpected Application of the English Rule to Subsequent Amendments

The original common law of English and then American courts valued the "logic" and "certainty" behind a clear rule: the incorporation cloned the language that existed at the time of incorporation, and it is as if that language itself appears in the borrowing statute.[78] The two statutes "coexist as separate distinct legislative enactments, each having its appointed spheres of action."[79] In 1938, the Supreme Court held in *Hassett v. Welch* that a "specific and descriptive reference" to the adopted statute "takes the statute as it exists at the time of adoption and does not include subsequent additions or modifications by the statute so taken unless it does so by express intent."[80] Courts recognized that the original language—and not the later amended language—was the definition considered and adopted by the drafters, and it should remain.[81] Beyond this, courts adopted a clear law for the legitimate reason that "no other rule would furnish any certainty as to what was the law."[82]

But the certainty and logic of the English rule does not always match the expectations of the public, in part because this issue—as critical as it may be—is rarely raised in litigation. Most members of the public, most attorneys, and even most courts assume the reference to another section's definition is a reference to that section's current language, not to language that existed at the time of incorporation and may no longer be easily discoverable. So this issue is raised inconsistently, in odd cases. Moreover, some

78. *See* Kendall v. United States, 37 U.S. 524, 625 (1838) (recognizing that incorporation has always been considered as adopting the law existing at the time of the adoption, and that "[n]o other rule would furnish any certainty as to what was the law"); Read, *supra* note 3, at 271.

79. 1A SUTHERLAND, *supra* note 31, at § 22:25. Accordingly, "[a]s neither statute depends upon the other's enactment for its existence, the repeal of the provision in one enactment does not affect its operation in the other statute." *Id.*

80. *See* Hassett v. Welch, 303 U.S. 303, 314 (1938) ("Where one statute adopts the particular provisions of another by a specific and descriptive reference to the statute or provisions adopted, the effect is the same as though the statute or provisions adopted had been incorporated bodily into the adopting statute. Such adoption takes the statute as it exists at the time of adoption and does not include subsequent additions or modifications by the statute so taken unless it does so by express intent." (quoting 2 JABEZ GRIDLEY SUTHERLAND & JOHN LEWIS, STATUTES AND STATUTORY CONSTRUCTION, INCLUDING A DISCUSSION OF LEGISLATIVE POWERS, CONSTITUTIONAL REGULATIONS RELATIVE TO THE FORMS OF LEGISLATION AND TO LEGISLATIVE PROCEDURE 787 (2d ed. 1904))).

81. *See* Michael C. Dorf, *Dynamic Incorporation of Foreign Law*, 157 U. PA. L. REV. 103, 104–05 (2008) (noting that when the adoption is of a foreign law, a dynamic adoption delegates lawmaking authority and is therefore controversial).

82. Read, *supra* note 3, at 270 (citing Kendal v. United States, 37 U.S. (12 Pet.) 524, 625 (1838)).

courts will not even rely on the English rule adopted in *Hassett* unless they find a facial defect with the cross reference or target statute being interpreted.[83]

The English rule gets everyone's attention, however, when it is strictly applied to bring an otherwise defunct definition back when the incorporated reference points "out to the ether."[84] For example, in *United States v. Roberts*, the Second Circuit held that the sentencing court could apply Sentencing Guidelines section 2K2.1(a)(5), which allows for an increased sentence if the offense involves a firearm described in 18 U.S.C. § 921(a)(30), even though § 921(a)(30) had been repealed by the time the defendant was sentenced.[85] The court saw "no sensible alternative" to reading the reference to § 921(a)(30) "to mean that *despite the repeal of that statute*, courts should continue to ascertain whether the firearm used by the defendant in the commission of the crime qualified as a 'semiautomatic assault weapon' under that section."[86] In *Artistic Entertainment, Inc. v. City of Warner Robins*, the Eleventh Circuit applied definitions incorporated by reference from an ordinance that was declared unconstitutional for reasons having nothing to do with the definitions.[87] "For incorporation purposes, as long as the referenced definition is certain and is readily available, it is valid: that the ordinance referenced has lapsed or has been repealed or has been invalidated (for reasons unrelated to the definition) is not important."[88] Under the English rule, the elimination of a provision in one enactment does not affect its operation in the borrowing statute.[89]

Because the English rule is only raised and relied upon when an incorporated reference link appears broken on its face, its strict application and unanticipated results confuse litigants and cause courts some discomfort. In

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83. *See* United States v. Head, 552 F.3d 640, 647 (7th Cir. 2009); United States v. Oates, 427 F.3d 1086, 1089 (8th Cir. 2005); Krolick Contracting Corp. v. Benefits Review Bd., 558 F.2d 685, 686–88 (3d Cir. 1977); Dir., Office of Workers' Comp. Programs v. E. Coal Corp., 561 F.2d 632, 635–41 (6th Cir. 1977); Dir., Office of Workmens' Comp. Program, U.S. Dep't of Labor v. Ala. By-Prods. Corp., 560 F.2d 710, 715 (5th Cir. 1977); *cf.* Carriers Container Council, Inc. v. Mobile S.S. Ass'n, 948 F.2d 1219, 1225 (11th Cir. 1991) (relying in part on *Hassett* to reject a claim that a provision governing interest implicitly incorporated a provision governing compounding of interest); United States v. Smith, 683 F.2d 1236, 1238 n.8, 1247 (9th Cir. 1982) (en banc) (noting that "the Youth Corrections Act does not mesh nicely with the Probation Act" before concluding that a cross-reference from the former statute to the latter was a general reference (internal quotation marks omitted)).

84. *Head*, 552 F.3d at 646 (noting references to repealed statutory provisions).

85. 442 F.3d 128, 130 (2d Cir. 2006); *see also* United States v. Myers, 553 F.3d 328, 333 (4th Cir. 2009) (recognizing that courts uniformly hold § 921(a)(30)(B) is properly treated as remaining in force for sentencing purposes).

86. *Roberts*, 442 F.3d at 130.

87. 331 F.3d 1196, 1206–07 (11th Cir. 2003).

88. *Id.* (citing *In re* Heath, 144 U.S. 92 (1892)).

89. 1A SUTHERLAND, *supra* note 31, at § 22:25.

Fisher v. City of Grand Island, Justice Shanahan of the Supreme Court of Nebraska labeled the English rule the "Lazarus rule," as it brought back through an incorporated reference a procedure that had been eliminated.[90] Justice Shanahan complained that the revival of amended procedure betrayed the "experience and ordinary expectations" of the practitioner and that it failed to give individuals adequate notice of the law.[91]

2. The American Rule as a Rule to Divine Legislative Intent

Early American courts struggled against the strictures of the English rule as adopted in *Hassett* and developed an exception to recognize that lawmakers may sometimes intend that the incorporated reference include subsequent amendments. Courts subsequently read *Hassett* narrowly to apply to only a "specific and descriptive reference" and distinguished specific references from general references that refer to the law on a subject more broadly.[92] While specific references exclude subsequent amendments, a general reference indicates the drafters' intent that the two sections develop together.[93] A general reference refers to the law on a subject generally and indicates the drafters' intent that the two sections develop together. General references therefore include subsequent amendments.[94]

From the beginning, because the American rule allowed for this exception, it failed to provide the certainty of the English rule and failed to facili-

90. 479 N.W.2d 772, 774–78 (Neb. 1992) (Shanahan, J., dissenting); Jeanelle R. Robson, *"Lazarus Come Forth. And He That Was Dead Came Forth." An Examination of the Lazarus Rule:* Fisher v. City of Grand Island, 26 CREIGHTON L. REV. 221, 221–22 (1992) (arguing the Nebraska Supreme Court erroneously failed to consider legislative intent and the general versus specific reference analytical framework that other courts have applied).

91. *Fisher*, 479 N.W.2d at 778. No court, however, has held that an incorporated reference was so confusing that it failed to satisfy due process. *See* Colautti v. Granklin, 439 U.S. 379, 390 (1979) (holding a criminal statute void for vagueness only when it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute, or is so indefinite that it encourages arbitrary and erratic arrests and convictions").

92. *See, e.g.*, Clark v. Crown Const. Co., 887 F.2d 149, 152 (8th Cir. 1989) ("In other words, the 1969 Act's reference to the Longshoremen's Act was a 'general' rather than a 'specific' reference. It envisaged a systematic structure rather than an isolated statutory fragment, a forest rather than a single tree, a tree rather than a single leaf."); Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor v. Peabody Coal Co., 554 F.2d 310, 329 (7th Cir. 1977) ("On balance, we are persuaded toward the view that § 422(a) of the amended (May 1972) FCMHSA, 30 U.S.C. § 932(a) (Supp. V, 1975), is a general reference masquerading as a specific and descriptive reference.").

93. 2B SUTHERLAND, *supra* note 31, at § 51:7 (noting that specific references "incorporate provisions as they exist at the time of adoption, without subsequent amendments, unless a legislature has expressly or by strong implication shown its intention to incorporate subsequent amendments with the statute").

94. *Id.*

tate a shared understanding between drafters, courts, and the public.[95] First, the rule relied upon an unstable foundation: the distinction between specific and general references is slight and imprecise, and courts were parsing a drafting tool intended only to aid in efficiency.[96] Lawmakers are not likely to carefully consider the language of incorporation and the consequences of subsequent amendments when the incorporated reference tool itself allows lawmakers *not* to carefully consider the definition.

Second, the distinction between general and specific references is unlikely to get drafters' attention unless courts clearly and predictably adhere to its strict application. In practice, however, courts regularly categorize references as general or specific based not on the language of the reference, but on the court's interpretation of legislative intent. Courts routinely assert that facially specific legislative references are general references.[97] In practice, courts interpret most references as general; the distinction does little more than provide courts with a "generous flexibility."[98] Contrary to the predictable English rule, courts are free to presume that lawmakers intend the linked definitions to develop together, even when the reference is facially specific.[99]

For example, a facially specific reference may be construed as a general reference because of its larger context. In *United States v. Rodriguez-Rodriguez*, the Eleventh Circuit held that, although 46 U.S.C. § 1903 by its terms reads as a specific reference to 21 U.S.C. § 960, because titles 46 and 21 "are both part of a larger legislative scheme aimed at increasing the penalties for those violating the federal narcotics law," the reference is general and includes all subsequent amendments to the cited statute.[100] In *EEOC v. Chrysler Corp.*, the district court found that the "surface specificity of the incorporating language dissolved upon close judicial scrutiny" when "the complex interplay of two statutory schemes, one of which is incorporated

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95. Boyd, *supra* note 27, at 1240 (noting that this presumption was intended to bring certainty to the law, but it "was destined to foster only more confusion"); *see also* Read, *supra* note 3, at 276.

96. Boyd, *supra* note 27, at 1240.

97. *See, e.g.*, *Peabody Coal Co.*, 554 F.2d at 323; *see also* Boyd, *supra* note 27, at 1242–43 (giving multiple state court examples of conflicting holdings; "examples abound"); 2B SUTHERLAND, *supra* note 31, at § 51:7 ("Facially specific references can, and sometimes do, operate as general legislative references.").

98. Boyd, *supra* note 27, at 1243 (commenting on the Florida corollary interpretive rule).

99. Read, *supra* note 3, at 276 ("Perhaps the apparent contradictions between the cases which purport to apply the [specific/general distinction] are reconcilable on the basis of a silent application of an all pervading doctrine of statutory construction: that a court may transmute any so-called rule of construction into a mere canon to be discarded in the face of the court's notion of what was or should have been the instant 'legislative intent.'").

100. 863 F.2d 803, 831 (11th Cir. 1989).

into the other, warrants the conclusion that this facially specific reference actually operates as a general one."[101]

In an even broader blurring of the distinction, courts have characterized a link as general, not on the language of the incorporation, but because the court finds the subject matter of the statute itself to be "general."[102] Scholars have criticized not only the unpredictability in the general/specific classifications, but also the lack of careful reasoning behind the classifications: "[R]easoned judicial applications of the distinction have been rarer than radium."[103]

Finally, the American rule fails because it allows the court discretion in an area where judicial discretion is inappropriate. Determining the *actual* language of the definitions—and not just the *meaning* of the terms of the definition—is a legislative task, and it should not be left to the musings and manipulations of the courts. Without a predictable framework for determining the actual language of an incorporated definition, even careful attorneys—not to mention members of the public—are left with a series of questions to answer just to get to a definition to interpret.[104]

As demonstrated by the history of the English rule and the American rule, courts have been unable to craft and then strictly apply a rule that can justify its holdings on the applicability of subsequent amendments to the incorporating definition. Because courts have failed to narrowly apply the general/specific distinction, lawmakers are not on notice that the distinction is relevant, and litigants are left with a "bewildering enterprise of statutory interpretation."[105]

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101. 546 F. Supp. 54, 74 (E.D. Mich. 1982), *aff'd*, 733 F.2d 1183 (6th Cir. 1984).

102. Read, *supra* note 3, at 271 n.9.

103. *Id.* at 273 (noting his primary criticism is that "most of the courts forced to confront the problem have been content merely to enunciate the general approaches as though they were dogmatic rules and that reasoned judicial analysis has been almost absent from the opinions"); *see also* R. Perry Sentell, *Reference Statutes, Borrow Now and Pay Later?*, 10 GA. L. REV. 153 (1975).

104. Scott A. Baxter, *Reference Statutes: Traps for the Unwary*, 30 MCGEORGE L. REV. 562, 568 (1999) (listing the questions a researcher faces with an incorporated reference, including whether one should research prior versions of a definition and whether one should engage in an elaborate legislative intent analysis just to convince the court of the applicable law).

105. John L. Flynn, *Mixed-Motive Causation Under the ADA: Linked Statutes, Fuzzy Thinking, and Clear Statements*, 83 GEO. L.J. 2009, 2065 (recommending a narrow reading of the "linked statutes rule" because a broad linking of statutes intrudes on later Congress's prerogatives to shape meaning, creates too difficult an interpretive task for courts, and is a rule with balanced burdens).

3. The Solution

There is no satisfactory substitute for drafters making clear whether language is incorporated only in its present form or includes subsequent amendments. A failure to do so not only leaves the question open to the uncertainties of interpretation, but also may jeopardize the constitutionality of the incorporating provision.[106] If incorporation includes future changes, it may be construed as an unconstitutional delegation of "the legislative power to the persons authorized to change the incorporated material."[107]

Although drafters have been encouraged to be precise with incorporated references since 1941,[108] the effort now—thanks to technological advances—need not burden the efficiency of the shortcut and should become a routine process for incorporating a definition through reference. When inserting the incorporated reference, drafters may choose just to refer to the statutory section, indicating that they intend the two statutes to develop together, or drafters may hyperlink to the exact copy of the original material and make that link permanent, if drafters do not intend that the language amend with the original.[109] With this small, practical step, lawmakers would reclaim the decision on what language is incorporated, thus eliminating a significant area of uncertainty in incorporated definitions.

B. The Right Place for Judicial Interpretation: Determining the *Meaning* of the Incorporated Language

The *Hassett* rule was narrowly adopted to address whether future amendments to the first statute impacted the borrowed language in the second; as stated above, the Court held that at incorporation the two linked statutes have identical but independent language.[110] Courts have extended the *Hassett* rule to decide not only the language that is borrowed, but also the meaning of that language—specifically, whether a definition may have an independent meaning in its new context, distinct from its meaning in its original context.

The *Hassett* rule is not irrelevant to this inquiry, but too often courts use it as a stand-in for careful, thoughtful deliberation that should be the

106. *See* DICKERSON, *supra* note 6, at 131; Flynn, *supra* note 105, at 2065.

107. DICKERSON, *supra* note 6, at 132. Dickerson further recommends spelling out the language rather than including it through a reference to avoid the risk of the incorporation being "functionally orphaned by later changes in the incorporated law." *Id.*

108. Read, *supra* note 3, at 276 ("[T]he wise draftsmen will avoid the rule . . . by explicitly stating whether or not the reference is confined to the then existing precept or is to include any future change or substitution.").

109. *See* Boyd, *supra* note 27, at 1249–50 (giving that same advice to Florida lawmakers).

110. Hassett v. Welch, 303 U.S. 303, 314 (1938).

hallmark of judicial interpretation. Struggling with the complexities of meaning and making them consistent with the purpose of legislation is a critical judicial role, especially in an area with complex statutory references. Interpretive gaps in meaning need not be mystifying to, or glossed over for, the litigants; they should, in fact, invite thoughtful argument by both sides on the language of the definition and the values that may justify an interpretation, resulting in a judicial opinion that answers issues raised and informs later issues.[111]

1. Unexpected Results When Hassett *Is Applied Without Judicial Analysis*

When courts cite *Hassett* (or apply it without a reference) and simply assert that two linked definitions are independent and need not have the same meaning, without reference to broader legislative purposes, litigants may be surprised that goods or conduct may be included under the definition in one section, but not under another section.

In *United States v. Ray*, the Eighth Circuit affirmed Ray's sentence enhancement, holding that guns found at Ray's home qualified as "firearms" under Sentencing Guidelines section 2K2.1(a)(4)(B), which incorporated by reference the definition of "firearms" in 18 U.S.C. § 921(a)(30) of the assault-weapons ban.[112] But Ray owned these guns legally under the assault-weapons ban itself because they had been grandfathered in under § 922(v)(2).[113] Ray, therefore, had his sentence enhanced even though the definition incorporated into the Sentencing Guidelines came from an act that did not itself make the weapons illegal.[114] The majority of the courts holding on this issue agree that the scope of an incorporated definition may be broader than the same definition in its original context, although at least one court acknowledged it could not fault an attorney for failing to adequately argue the issue because "the need to research the effect of a grandfather provision found in another statute . . . would not have been obvious."[115]

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111. SOLAN, *supra* note 22, at 3.

112. 411 F.3d 900, 904 (8th Cir. 2005).

113. *Id.* at 905 (citing 18 U.S.C. § 922(v)(2) (2000)).

114. *Id.* Most circuits have held similarly that the clause grandfathering weapons applies to defendants charged with simple possession but not to sentence enhancements under the guidelines. *See, e.g.*, United States v. Simmons, 485 F.3d 951, 954 (7th Cir. 2007). *But see* United States v. O'Malley, 332 F.3d 361, 363 (6th Cir. 2003) (recognizing that the government conceded the weapons were not illegal under the assault-weapons ban and were therefore not grounds for enhancement).

115. Counterman v. United States, No. 2:08-CV-142, 2009 WL 3585942, at *3 (W.D. Mich. Oct. 27, 2009) (refusing to find a defendant's trial counsel constitutionally deficient for failing to raise an argument on this issue).

The rules on incorporated references may also be manipulated to answer creative but odd arguments. While the courts may reach an expected outcome in these cases, their strict application of the interpretive rules—without reference to a statute's larger policy or purpose—just exacerbates the impression that these rules are manipulated. In *United States v. Oates*, the Eighth Circuit rejected the defendant's argument that a court must literally apply Sentencing Guidelines even though they incorporate a section with the wrong definition.[116] The court called on the English rule and held that because at the time the 2003 guidelines were adopted they referenced the correct section, the existing statute thereby "preserved the original definition notwithstanding the failure to correctly cross-reference the statute after its reorganization."[117]

The interpretative rules may also be ignored when it suits a court's purposes. In *United States v. Syverson*, the Seventh Circuit held—without citation or justification—that an incorporated definition did not get its meaning from the new, adopting context, but that it "borrows the meaning" of the original context.[118] The defendant had argued that because the incorporated definition included the phrase "designed and intended" to be converted into a machine gun, prosecutors needed to prove that he "intended" to put the parts together as a machine gun, not just that they were "designed" for that purpose.[119] The court rejected Syverson's textual argument with a discussion of the historic development of the phrase in the original statute, and it asserted that the meaning of the phrase in the new statute could not mean more than it meant in the borrowed, original statute.[120]

These courts may have reached expected outcomes in these cases, but their manipulation of the rules of incorporated references frustrates the reason and predictability that should counter the maze of links created by statutory references.

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116. 427 F.3d 1086, 1089 (8th Cir. 2005).

117. *Id.* For a similar holding, but from a carefully reasoned opinion, see *Herrmann v. Cencom Cable Associates, Inc.*, 978 F.2d 978, 983 (7th Cir. 1992). The Seventh Circuit in *Hermann* recognizes that because of the complexity of modern statutes that frequently amend,

> [e]very new section or sentence in a text riddled with cross-references poses a risk that one of the references will point to thin air, or to a destination out of synch with the referring provision. Political, judicial, and private actors alike need a simple, reliable way to unravel these mistakes. The best approach, we believe, is the one we have used here: treat the referring clause as continuing to point to its original target, even if that target moves or acquires a new number.

Id. (recognizing that the holding "follows the logic behind the principle that new section numbers or minor changes in phraseology during the recodification of a title of the United States Code do not alter its meaning").

118. 90 F.3d 227, 231 (7th Cir. 1996).

119. *Id.* at 229–31.

120. *Id.*

2. The Solution

When the issue before a court is the meaning of an incorporated definition, the thin assertions, manipulations, and misstatements of the *Hassett* rule interfere with the natural placement of this analysis within the spectrum of established rules for using language in one statute to inform the meaning of language in another section. Courts have been doing this kind of comparative interpretation for a long time and have established consistent, predictable analyses on the spectrum of related meaning.

The difference between definitions that are closely enough related to be linked in meaning and those that are not is only one of degree, and the touchstone is congressional intent that the two meanings be similar.[121] At the far end of the spectrum, when legislation uses commonplace words, courts generally will not look to other sections for guidance but will construe the terms to provide adequate notice to the public and direction to the courts.[122] When two sections use similar—but not identical—phrases, courts are reluctant to adopt the definition of another section unless specifically directed to do so; use of a similar phrase alone is not enough to indicate Congress intended the same meaning.[123] But—moving along the spectrum—when two sections use the same phrases, courts will give identical terms identical meanings if they find the provisions are topically related.[124] In this last cate-

121. *See, e.g.*, 2B SUTHERLAND, *supra* note 31, at § 53:2 ("This difference in degree is rationalized and explained by the specificity or generality which characterizes the relationship between particular statutes.").

122. *See, e.g.*, United States v. Peterson, 629 F.3d 432, 436 (4th Cir. 2011) (holding that the definition of "manslaughter" as used in Sentencing Guidelines section 4B1.2(a) cmt. 1 should be the same meaning given by the Model Penal Code because it is "the best generic, contemporary, and modern definition, particularly because it has been widely adopted").

123. *See, e.g.*, United States v. Reorganized, 518 U.S. 213, 219 (1996) ("Here and there in the Bankruptcy Code Congress has included specific directions that establish the significance for bankruptcy law of a term used elsewhere in the federal statutes."); *In re* Arclin U.S. Holding, Inc., 416 B.R. 117, 121 (Bankr. D. Del. 2009) (refusing to base the definition of "retiree benefits" on a definition borrowed from statutes designed without bankruptcy in mind); *In re* Walker, 2009 WL 3416056, at *6 (N.J. Super. Ct. App. Div. Oct. 8, 2009) ("A phrase does not retain its legal definition when applied in a wholly different context.").

124. *See* Cheryl L. Anderson, *Unification of Standards in Discrimination Law: The Conundrum of Causation and Reasonable Accommodation Under the ADA*, 82 MISS. L.J. 67, 93–97 (2013) (describing the shared "because of" causation language in federal discrimination statutes and whether those statutes should also share the interpretative case law); 2B SUTHERLAND, *supra* note 31, at § 51:3 (noting the "guiding principle" to be "that if it is natural and reasonable to think that the understanding of legislators or persons affected by a statute is influenced by another statute, then a court construing such an act also should allow its understanding to be similarly influenced"); United States v. Damon, 595 F.3d 395, 400 (1st Cir. 2010) ("[S]imilar language used in different sources of law may be interpreted differently.").

gory, courts look to the "interpretive relevance" of the two statutes for a shared purpose and function.[125]

An incorporated reference fits at the end of this spectrum of presumed shared meaning: the language is identical, and the lawmakers have linked the two provisions in the text of the second statute.[126] Courts, then, may presume—unless there is evidence of contrary congressional intent—that the definitions should share the same meaning and that the decisions interpreting the borrowed section may inform the meaning of the borrowing section.[127] The Eastern District of Virginia inferred just this from an incorporated reference, finding support for its interpretation of the meaning of "traffic" in § 2318(b)(2) because it was consistent with the meaning of the term in the borrowed statute, 18 U.S.C. § 2320: "Congress's decision to borrow § 2320's definition of 'traffic' in § 2318 suggests that Congress viewed the statutes—and their knowledge requirements—similarly."[128] The D.C. Circuit has also explicitly held that the presumption that identical terms have identical meanings in related provisions is particularly true when one statute borrows a term from another.[129]

This presumption of shared meaning is overcome when the courts determine that the purposes of the sections are distinct. For example, in a case with shared language, the Third Circuit determined that the meanings of "claim" and "creditor" as used in the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) could be informed by the meanings given those terms in the Bankruptcy Code and defining caselaw.[130] But the court declined to apply the portion of the meaning in the bankruptcy context

125. *See, e.g.*, Overstreet v. North Shore Corp., 318 U.S. 125, 128–33 (1943) (comparing different statutory provisions using the phrase "engaged in commerce"); United States v. Minker, 217 F.2d 350, 351–53 (3d Cir. 1954), *aff'd*, 334 U.S. 179 (1965) (comparing the sanctions provided in the INA with those provided in criminal statutes); 2B SUTHERLAND, *supra* note 31, at § 53:3 (noting that "[c]ourts look to the function of statutes having similar language to determine the possibility of a [shared meaning]").

126. *Cf.* United States v. Murillo, 2008 WL 697160, at *2 (N.D. Iowa Mar. 13, 2008) (refusing to borrow a definition of "identification document" for 18 U.S.C. § 1546(b) from 18 U.S.C. § 1028 because "there is no reference in § 1546 to § 1028").

127. *See* Flynn, *supra* note 105, at 2037 (noting that the "Borrowed Statute Rule" "presumes that a legislature incorporates high court judicial interpretations of a statute it incorporates by reference or modeling").

128. Microsoft Corp. v. Pronet Cyber Technologies, Inc., 593 F. Supp. 2d 876, 885 (E.D. Va. 2009) (noting "general rule that courts should interpret similar language in related statutes alike" (citing Stiltner v. Beretta U.S.A. Corp., 74 F.3d 1473, 1483 (4th Cir. 1996))); *accord* 2B SUTHERLAND, *supra* note 31, at § 53:3.

129. Estate of Parsons v. Palestinian Auth., 651 F.3d 118, 125 (D.C. Cir. 2011).

130. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. City Sav., F.S.B., 28 F.3d 376, 386–88 (3d Cir. 1994).

because it found that this portion of the meaning was "inconsistent with the general goals of Congress in passing FIRREA."[131]

The manipulations of the *Hassett* rule can confuse what should be a straightforward inquiry into whether two linked statutes have a shared purpose. The First Circuit in *Navarro v. Pfizer Corp.*, tasked with interpreting "impairment," "major life activities," and "substantially limits" as used in definition of "disability" in the FMLA, expressed its frustration with the Secretary of Labor for "co-opting" existing definitions through incorporated references to the Americans with Disabilities Act (ADA).[132] The court recognized that "[s]ome perplexing difficulties lurk in the shadows cast by this cross-reference, including questions about the extent to which the EEOC's informal interpretations of the borrowed definitions are binding in the FMLA context."[133]

Despite the court's frustration with the drafting of the statute, it fell back on traditional statutory analysis to determine whether to apply the EEOC's interpretations of the borrowed definition in an FMLA application.[134] The court's analysis is consistent with the spectrum described above; it starts with a presumption that the linked definitions share the same meaning but then concludes that "the EEOC interpretive guidance cannot be applied to the FMLA because it clashes with the underlying purposes of the statute."[135] The court held that the two statutes "have divergent aims, operate in different ways, and offer disparate relief."[136] Consequently, drafters could not have intended that "disability" in the FMLA—even though it is created through incorporated references to the ADA—have the same meaning as "disability" in the ADA.[137]

The court's examination of the purposes of both sections not only extends the spectrum of shared meaning in a logical way, it allows the court a defined, appropriate space for thoughtful jurisprudence. The Third Circuit engaged in a similar purpose-driven analysis of the meaning of "disposal" in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), which was defined through an incorporated reference to the "disposal" definition in the Resource Conservation and Recovery Act (RCRA).[138] At issue was whether "disposal" included a passive migration of

131. *Id.* at 388.
132. 261 F.3d 90, 92–93 (1st Cir. 2001).
133. *Id.* at 92 (recognizing that the Equal Employment Opportunity Commission (EEOC) drafted the ADA and is responsible for its interpretation).
134. *Id.*
135. *Id.* at 101.
136. *Id.*
137. *Id.*
138. United States v. CDMG Realty Co., 96 F.3d 706, 713 (3d Cir. 1996).

contaminants.[139] The court examined the structure and language of the RCRA, but it held that the disparate structures of liability schemes in and purposes of both the acts justified disparate meanings for "disposal."[140] The court held, based upon the plain meaning of the borrowed words *and* the structure and purposes of CERCLA, that "disposal" required an affirmative act.[141]

In short, the two techniques of repurposing definitions—borrowed language and incorporated references—should encourage the same analysis in the courts.[142] The end result of drafters' use of either technique is the same: the language of one definition is repeated in the other and has an existence separate from the original statute.[143] Therefore, courts should employ the same analytic framework when deciding the meaning of the borrowing definition. The terms mean the same, and lawmakers intended that interpretive law be used to inform the meaning, unless the purposes of the two sections are distinct and divergent or Congress shows an express intent otherwise.

V. CONCLUSION

As noted by Justice Antonin Scalia, "[w]e live in an age of legislation, and most new law is statutory law."[144] Much of that statutory law is riddled with definitions created for another purpose but borrowed without evidence that drafters considered how the definition would fit its new context or whether that definition should withstand subsequent amendments.

In many cases, these ambiguities will be unnoticed and inconsequential; lawyers will not find or make arguments on the borrowed language, and courts will smooth over inconsistencies. But when the fit of an incorporated reference is poor enough, the consequences—often to those who are most vulnerable—are often unexpected and dramatic.

These ambiguities also have a broader impact on the integrity of our governance. A poorly crafted incorporated reference will shift to the courts the discretion not only to interpret but also to set the statutory language. Courts have proven themselves poorly equipped to handle what is a legislative task. And definitions that fail to predictably communicate their language, meaning, and scope to the public fail to give us the information we need to conform our behavior.

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139. *Id.*
140. *Id.*
141. *Id.*
142. Boyd, *supra* note 27, at 1221.
143. Hassett v. Welch, 303 U.S. 303, 314 (1938).
144. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 13 (1997).

The shame in the continuing problems arising from the use of incorporated references is that the confusion is avoidable, and avoiding it does not take a level of effort that overly burdens the drafting shortcut. First, drafters must indicate, either through clear language or a hyperlink, whether the incorporation is intended to include subsequent amendments. The court's interpretive rule is broken, and odds are (without a contrary indication from drafters) that the link will be considered "general" and dynamic, even if the reference is specific on its face. Second, drafters should make clear whether they intend that the meaning of the original definition, as it has developed in interpretive decisions, should be given to the same language in its new context. If drafters fail to do so, courts should engage in an analysis of the purpose of the two linked sections, as is consistent with settled rules of interpretation, and resist the urge to rely without justification on the odd interpretive rules of incorporated references.