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## The Federal Bank Robbery Act: Why the Current Split Involving the Use of Force Requirement for Attempted Bank Robbery is Really an Exception

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## THE FEDERAL BANK ROBBERY ACT: WHY THE CURRENT SPLIT INVOLVING THE USE OF FORCE REQUIREMENT FOR ATTEMPTED BANK ROBBERY IS REALLY AN EXCEPTION

Paul R. Piaskoski\*

*The Federal Bank Robbery Act has been on the books for seventy years by the time the federal appellate courts began to openly quarrel about the necessary elements of attempted bank robbery under the first paragraph of the Act, 18 U.S.C. § 2113(a). Specifically, the circuits disagree as to whether proof of actual force is required to sustain a conviction of attempted bank robbery, or if attempted force is sufficient for a conviction. Legal scholars have repeatedly framed this split in authority as a consequence of competing methods of statutory interpretation. In this Comment, however, I argue that it is neither a true split, nor the result of competing methods of interpretation. In fact, a close examination of the case law reveals that in those instances where the majority circuits have held that attempted force is sufficient for a conviction, the courts are skipping the statutory analysis altogether. Further scrutiny of the facts in each of the majority cases shows that this non-canonical approach to statutory interpretation—or, more accurately, the absence of an approach—only occurs when certain distinguishing facts are present: (1) foreknowledge of the attempt by law enforcement; and (2) the corresponding opportunity for law enforcement to intervene before somebody gets hurt. As such, I contend the so-called split is more accurately categorized as an exception to the statutorily prescribed actual force*

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\* J.D. candidate, Northwestern University Pritzker School of Law, 2019. You are never too old for mentors, and I have several I wish to thank: Professor Victoria Nourse for serving as my comment advisor; the Honorable Marvin E. Aspen for taking the time to read it; Professor Edward Fallon for setting me on this new path, and Professor Jody Marcucci for lighting it. Thanks also to “my two dads,” Stephen E. Kravit Esq. and C.J. Krawczyk Esq., for their guidance and support throughout, and to my real dad, Paul A. Piaskoski, Esq., whose guidance and support I will miss, and to whom this comment is dedicated.

*requirement, firmly rooted in one of the primary policy considerations behind the passage and current enforcement of the Act: protecting innocent bystanders from harm.*

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*You've read the story of Jessie James  
of how he lived and died.  
If you're still in need;  
Of something to read  
Here's the story of Bonnie and Clyde.  
—Bonnie Parker, *The Trail's End**

#### I. INTRODUCTION

Bonnie Elizabeth Parker and Clyde Chestnut Barrow were about the age of typical first-year law students, just twenty-one and twenty-two years old respectively, when they embarked on their infamous bank-robbing spree in the spring of 1932.<sup>1</sup> Their “brief era of banditry” would last for little more than two years, a period during which they robbed at least ten banks in five Midwestern states, deliberately skirting the borders of those states to take advantage of what was then an almost total lack of communication and

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<sup>1</sup> JEFF GUINN, *GO DOWN TOGETHER: THE TRUE, UNTOLD STORY OF BONNIE & CLYDE* 13 (establishing Clyde’s birthdate as March 24, 1910), 50 (establishing that Bonnie was seventeen on January 1, 1928), 93 (establishing that the Barrow Gang committed its first robbery on March 25, 1932) (2009).

coordination among law enforcement in different jurisdictions.<sup>2</sup> The tactic, however, was hardly a trade secret, and at the time robbing banks was a growth industry.<sup>3</sup>

In fact, the years between 1931 and 1935 are collectively referred to as “The Public Enemies Era,” a time during which the number of bank robberies in the United States skyrocketed, thanks in no small part to a pantheon of notorious gangsters carved from the unyielding granite of the Great Depression: John Dillinger, Baby Face Nelson, and Pretty Boy Floyd, to name a few.<sup>4</sup> Many people saw these colorful criminals as folk heroes, striking at the banks – the very institutions millions of Americans, including some members of Congress, blamed for their sudden plunge into poverty.<sup>5</sup> Bonnie and Clyde were no exception.<sup>6</sup> The image of star-crossed young lovers as avenging outlaws was as irresistible to the press and the public then as it is now.<sup>7</sup> Public opinion, however, began to turn as the body count rose.<sup>8</sup> At least nine police officers were killed during Bonnie and Clyde’s spree, in addition to several innocent civilians.<sup>9</sup>

Bonnie and Clyde’s “final run” came in May 1934, when investigators who had studied their movements set up an ambush along a secluded country

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<sup>2</sup> *Id.* at 4 (“This was one of Clyde’s regular tricks—lawmen from one state in pursuit of criminals had no jurisdiction in any other.”).

<sup>3</sup> *American History: The Great Depression: Gangsters and G-Men, Guide for Library Research on the Great Depression*, JOHN JAY COLL. OF CRIM. JUST. <http://guides.lib.jjay.cuny.edu/c.php?g=288390&p=1922564> [<https://perma.cc/R6FM-Y79T>] (last visited Jan. 22, 2019) [hereinafter *Gangsters and G-Men*].

<sup>4</sup> *Id.*; see also *infra* note 13; *Crime in the Great Depression*, HISTORY <https://www.history.com/topics/great-depression/crime-in-the-great-depression> [<https://perma.cc/V2R2-8TAK>] (last visited Jan. 22, 2019) (“At the same time, colorful figures like John Dillinger, Charles ‘Pretty Boy’ Floyd, George ‘Machine Gun’ Kelly, Clyde Barrow and Bonnie Parker, ‘Baby Face’ Nelson and ‘Ma’ Barker and her sons were committing a wave of bank robberies and other crimes across the country.”).

<sup>5</sup> GUINN, *supra* note 1, at 4 (“Many Americans considered cops and bankers to be their enemies.”); *Subcommittee on Senate Resolutions 84 and 234*, UNITED STATES SENATE <https://www.senate.gov/artandhistory/history/common/investigations/Pecora.htm> [<https://perma.cc/4KC3-2XX7>] (last visited Jan. 22, 2019) (“On March 2, 1932, senators passed Senate Resolution 84 authorizing the Committee on Banking and Currency to investigate ‘practices with respect to the buying and selling and the borrowing and lending’ of stocks and securities.”).

<sup>6</sup> GUINN, *supra* note 1, at 4 (“Stories about the Barrow Gang invariably boosted newspaper and magazine circulation.”).

<sup>7</sup> *Id.*; see also Bryson Tiller, *Bonnie & Clyde* (2017).

<sup>8</sup> GUINN, *supra* note 1, at 5 (“The vicarious love affair between Americans and the Barrow Gang was over.”).

<sup>9</sup> GUINN, *supra* note 1, at 3–5.

road in Bienville Parish, Louisiana.<sup>10</sup> Like many of their hapless victims, the young outlaws never stood a chance. When their stolen Ford Deluxe finally appeared, police opened fire on the vehicle with Thompson submachine guns, and they continued firing until they ran out of bullets.<sup>11</sup> Bonnie Parker and Clyde Barrow were both killed, the coroner later determining that each suffered “many potentially fatal wounds.”<sup>12</sup>

Bonnie and Clyde’s grisly and glamorized story is not only representative of the broader criminal trend of the time, but also encapsulates the specific policy considerations behind the passage of the Bank Robbery Act later that same summer: ending the bloodshed, and eliminating the exploitable jurisdictional weaknesses between states.<sup>13</sup>

In the years since, the Act has provided a comprehensive scheme for prosecuting and penalizing those who steal from a federally insured bank.<sup>14</sup> The statute encompasses the underlying crimes of entering with felonious intent, robbery, petit and grand larceny, and receiving property stolen from a bank.<sup>15</sup>

Even today, the Federal Bureau of Investigation’s (“FBI”) stated priority in terms of enforcing the Bank Robbery Act reflects these foundational policy considerations of safeguarding the public and closing the jurisdictional gaps: “[The FBI] focuses its investigative resources on those suspects who pos[e] the greatest threats to the public, including the most violent and/or the most prolific serial offenders who often cross jurisdictional boundaries.”<sup>16</sup>

However, it is now said that a split exists among the federal circuits regarding the necessary elements of attempted bank robbery as prescribed by the Act. The split specifically concerns the use of force, violence or intimidation under the first paragraph of § 2113(a), which reads in relevant part:

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<sup>10</sup> *Id.* at 334–37.

<sup>11</sup> *Id.* at 338–41.

<sup>12</sup> *Id.* at 345.

<sup>13</sup> 78 CONG. REC. 8148, 6609 (1934), available at: <https://www.gpo.gov/fdsys/pkg/GPO-CRECB-1934-pt6-v78/pdf/GPO-CRECB-1934-pt6-v78-12-1.pdf> [<https://perma.cc/LBU8-LD9L>] (“By this legislation we hope to curb the activities of gangsters and racketeers, and to give the public more adequate protection against their depredations.”).

<sup>14</sup> *See generally* Bank Robbery Act, 18 U.S.C. § 2113 (2018).

<sup>15</sup> *Id.*

<sup>16</sup> *What We Investigate: Bank Robbery*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/investigate/violent-crime/bank-robbery> [<https://perma.cc/6F6A-VEWK>] (last visited Jan. 22, 2019).

Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association . . . [s]hall be fined under this title or imprisoned not more than twenty years, or both.<sup>17</sup>

As typically presented, the controversy centers entirely on the first thirteen words of § 2113(a), and whether the word “attempts” applies exclusively to the word “take,” or if it also reaches back in the sentence to modify the words “force,” “violence,” and “intimidation.”<sup>18</sup> The difference is dispositive in terms of the required elements of the crime. Under the narrower reading, where “attempts” only modifies “take,” the government must show and prove that the defendant used actual force and violence, or intimidation to gain a conviction.<sup>19</sup> Under the broader reading, where “attempts” modifies the force clause in addition to the word “take,” in order to convict, the government must only prove that the defendant *attempted* to use force and violence, or intimidation—a significantly lower hurdle.<sup>20</sup> The Fifth and Seventh Circuit Courts of Appeal have held that the word “attempts” only modifies the word “take,” as a plain reading of the statute suggests, and accordingly, that the government must show and prove actual force and violence or intimidation in order to sustain a conviction of attempted bank robbery.<sup>21</sup> On the other hand, the Second, Fourth, Sixth, and Ninth Circuits have all held that *attempted* force is sufficient for a conviction.<sup>22</sup>

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<sup>17</sup> 18 U.S.C. § 2113(a).

<sup>18</sup> *Id.*

<sup>19</sup> See cases cited *infra* note 21.

<sup>20</sup> See cases cited *infra* note 22.

<sup>21</sup> *United States v. Thornton*, 539 F.3d 741, 747 (7th Cir. 2008) (“Actual force and violence or intimidation is required for a conviction under the first paragraph of § 2113(a).”); *United States v. Bellew*, 369 F.3d 450, 454 (5th Cir. 2004) (“We find the ‘actual act of intimidation’ reading to be the most natural reading of the text.”); *United States v. Baker*, 129 F. Supp. 684, 686 (S.D. Cal. 1955) (“It is apparent that in the statute under consideration the ‘attempt’ relates to the taking and not to the intimidation.”).

<sup>22</sup> *United States v. Wesley*, 417 F.3d 612 (6th Cir. 2005) (holding that actual intimidation is not required to prove attempted bank robbery under the first paragraph of the statute); *United States v. Moore*, 921 F.2d 207 (9th Cir. 1990) (finding that a conviction for attempted bank robbery requires government to prove culpable intent and conduct constituting substantial step towards commission of crime); *United States v. McFadden*, 739 F.2d 149 (4th Cir. 1984) (holding that § 2113(a) does not require that actual force and violence or intimidation accompany the attempt); *United States v. Jackson*, 560 F.2d 112 (2d Cir. 1977) (finding that bank robbery was in progress is not essential to conviction of attempted bank robbery); *United States v. Stallworth*, 543 F.2d 1038, 1040 (2d Cir. 1976) (“We reject this wooden logic.”).

Legal scholars have repeatedly framed this controversy as a consequence of “conflicting methods of statutory interpretation,” arguing that a reading of the first paragraph of § 2113(a) whereby the word “attempts” also modifies the words “force,” “violence,” and “intimidation” is implicit in the majority’s decisions.<sup>23</sup> However, this framing presupposes that the majority is, in fact, engaged in statutory interpretation.<sup>24</sup> A closer examination of the case law reveals they are not.<sup>25</sup> Accordingly, in this Comment, I argue that the so-called split among the circuits is really an exception, the triggering circumstances for which are: (1) at least some foreknowledge of the crime by law enforcement; and (2) the corresponding opportunity for law enforcement to intervene before innocent bystanders are put at risk.<sup>26</sup> I further argue that the clear policy consideration girding the majority’s decisions is one of the primary considerations invoked in the passage and current enforcement of the Act: neutralizing threats to the public.<sup>27</sup>

In Part II, I trace the legislative history of the Bank Robbery Act and diagram its present construction. In Part III, I establish a threshold distinction between statutory interpretation and statutory application (or construction) before chronologically illustrating the majority and minority decisions from the federal circuits. I also survey the generally accepted definitions of a true circuit split, and explain why the so-called split involving the first paragraph of § 2113(a) of the Bank Robbery Act is really an exception. In Part IV, I explore the various ways in which the majority’s valid policy considerations might be harmonized with the letter of the law, and in Part V, I offer my specific recommendation for doing so.

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<sup>23</sup> E.g., Jennifer M. Lota, *Analyzing 18 U.S.C. § 2113(a) of the Federal Bank Robbery Act: Achieving Safety and Upholding Precedent Through Statutory Amendment*, 7 SETON HALL CIR. REV. 445, 448 (2011), (“Ultimately, the split has resulted from circuit courts’ application of conflicting methods of statutory interpretation.”); see also Michael Rizzo, *The Need to Apply the “Plain Meaning” Rule to the First Paragraph of 18 U.S.C. § 2113(a) is “Plain”*: A Bank Robber Must Have Used Actual Force and Violence or Intimidation, 17 GEO. MASON L. REV. 227, 229 (2009) (“The reason for the circuit court split lies in the contrasting approaches to statutory interpretation.”).

<sup>24</sup> See discussion *infra* Part III.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> See discussion *infra* Part II.

## II. BACKGROUND

## A. THE LEGISLATIVE HISTORY OF THE BANK ROBBERY ACT

The Bank Robbery Act made robbing or attempting to rob a bank a federal offense, but according to the Record of the Seventy-Third Congress, there was some initial resistance to the idea on the part of the House Judiciary Committee.<sup>28</sup> Prior to 1934, bank robbery had been considered strictly a state law crime, and some lawmakers believed that federalizing the offense would infringe on the “police powers of the states.”<sup>29</sup> Ironically, it was John Dillinger who managed to whip up the necessary votes.<sup>30</sup> In April 1934, just as lawmakers were debating the change, Dillinger went on a violent tear, raiding a police armory in Indiana, shooting his way out of an FBI trap at the Little Bohemia Lodge near Rhineland, Wisconsin (one FBI agent was killed), and engaging in a second gun battle and high speed chase with federal agents in Minnesota.<sup>31</sup> According to the congressional record, opposition to what would become the Bank Robbery Act then “gave way” under withering public reaction to “the exploits of the escaped convict John Dillinger.”<sup>32</sup> On May 18, 1932, President Franklin Delano Roosevelt signed six of the anti-crime bills recommended by then-Attorney General Homer Cummings,

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<sup>28</sup> CQ Researcher, *Record of the Seventy-Third Congress, Second Session, Anti-Crime and Anti-Lynching Legislation*, CQ PRESS, [https://library.cqpress.com/cqresearcher/document.php?id=cqresre1934061900#H2\\_9](https://library.cqpress.com/cqresearcher/document.php?id=cqresre1934061900#H2_9) [<https://perma.cc/QFD2-B6BC>] (last visited Jan. 22, 2019):

The bills encountered opposition in the House Judiciary Committee on the ground that, while purporting to forward federal-state cooperation in the suppression of crime, many of the bills constituted invasions by the federal government of police powers of the states. This opposition gave way toward the end of April under pressure of the public reaction to the exploits of the escaped convict, John Dillinger.

*Id.*

<sup>29</sup> *Jerome v. United States*, 318 U.S. 101, 102–03 (1943) (providing a brief early history of the Act).

<sup>30</sup> CQ Researcher, *supra* note 28.

<sup>31</sup> *History: Famous Cases & Criminals: John Dillinger*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/history/famous-cases/john-dillinger> <https://www.fbi.gov/history/famous-cases/john-dillinger> [<https://perma.cc/9RMJ-LPSR>] (last visited March 9, 2019) (“Dillinger and Van Meter robbed a police station at Warsaw, Indiana of guns and bulletproof vests . . . . The agents spread out to surround the lodge and as they approached, machine gun fire rattled down on them from the roof.”); Robert Cloud, *Taken Hostage by Gangsters: Peterson’s Latest Book about John Dillinger*, WAUPACA COUNTY NEWS (June 23, 2016) <https://www.waupacanow.com/2016/06/23/taken-hostage-by-gangsters/> [<https://perma.cc/HY8H-XDKL>] (“Federal agents and area police hunted for Dillinger and his gang. They were spotted in Johnson’s car near Hastings, Minnesota. A 20-mile high speed chase ensued.”).

<sup>32</sup> CQ Researcher, *supra* note 28.

including measures that made it a federal offense to rob a Federal Reserve member bank, or to transport stolen goods, including money, across state lines.<sup>33</sup> Codified as 18 U.S.C. § 2113, the statute brought such offenses directly under the purview of the newly designated FBI.<sup>34</sup> The concrete sanctuary that ethereal state lines once provided marauding gangsters vanished with the stroke of FDR's pen, and so too did the serial killing that frequently accompanied such crimes.<sup>35</sup> The Public Enemies Era was over, but the debate over the language and effectiveness of the Act was just beginning.<sup>36</sup>

In fact, by 1937, it was clear the Bank Robbery Act needed some tweaking.<sup>37</sup> As originally constructed, the Act applied only to “robbery, robbery accompanied by an aggravated assault, and homicide perpetrated in committing a robbery or escaping thereafter.”<sup>38</sup> Given the sort of violent collateral damage described above, and the concerns of some lawmakers regarding federal overreach, one can certainly understand why the statute was narrowly tailored to address only the most serious and violent offenses.

Nevertheless, by 1937, Attorney General Cummings urged Congress to broaden the language of the Act to include lesser crimes against banks, such as larceny.<sup>39</sup> To illustrate the need, Cummings cited one case in particular, in which a man was caught red-handed trying to walk out of a bank with thousands of dollars in stolen money, but escaped prosecution under the Act because he did not use “force and violence, or intimidation.”<sup>40</sup> Congress responded by adding larceny, and entering a bank with the intent to commit “any felony” to the same paragraph that already covered robbery and attempted robbery under § 2113(a), but without making any changes to the penalty.<sup>41</sup>

Unfortunately, this oversight involving the penalty meant the severity of the punishment—twenty years in prison—did not always match the severity of the crime.<sup>42</sup> Justice was clearly not served when an opportunistic

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<sup>33</sup> *Id.*

<sup>34</sup> *History: The FBI and the American Gangster, 1924–1938*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/history/brief-history/the-fbi-and-the-american-gangster> [<https://perma.cc/8DRS-CVSR>] (last visited Jan. 22, 2019).

<sup>35</sup> *Gangsters and G-Men*, *supra* note 3.

<sup>36</sup> *Jerome v. United States*, 318 U.S. 101, 102–03 (1943).

<sup>37</sup> *Id.* at 103 (“The fact that the 1934 statute was limited to robbery was said to have produced ‘some incongruous results.’”).

<sup>38</sup> *Prince v. United States*, 352 U.S. 322, 325–27 (1957).

<sup>39</sup> *Jerome*, 318 U.S. at 103–04.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

defendant who merely grabbed a handful of money from the drawer when the teller was not looking was punished with the same severity as a gun-toting gangster on a multi-state tour of murder and mayhem.<sup>43</sup> So in 1948, Congress further tweaked the statute, moving the larceny provision out of § 2113(a) and into its own section, § 2113(b).<sup>44</sup> Congress also assigned lesser, tiered penalties based on the amount of “property or money” taken from the bank:

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding \$1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined under this title or imprisoned not more than ten years, or both;

or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding \$1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined under this title or imprisoned not more than one year, or both.<sup>45</sup>

Finally, lawmakers split § 2113(a) into two paragraphs, the first dealing with robbery and attempted robbery, and the second dealing specifically with unlawful entry.<sup>46</sup>

In 1986, lawmakers amended the Act yet again, adding the phrase “obtains or attempts to obtain by extortion” to the first paragraph of § 2113(a).<sup>47</sup>

## B. A TALE OF TWO PARAGRAPHS

As it reads today, the first paragraph of § 2113(a) deals specifically with bank robbery and attempted bank robbery, whereas the second paragraph pertains specifically to anyone who enters a bank “with intent to commit . . . any felony.”<sup>48</sup>

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<sup>43</sup> *Prince*, 352 U.S. at 326 (noting “[t]he larceny penalties were set according to the degree of the offense”).

<sup>44</sup> 18 U.S.C. § 2113(b) (2006); Act of June 25, 1948, ch. 645, 62 Stat. 796 (1948) (codified as amended at 18 U.S.C. § 2113).

<sup>45</sup> 18 U.S.C. § 2113(b).

<sup>46</sup> *See*, Act of June 25, 1948, Pub. L. No. 772, § 2113, 62 Stat. 796 (1948) (codified as amended at 18 U.S.C. § 2113).

<sup>47</sup> Act of Nov. 10, 1986, Pub. L. No. 99-646, 100 Stat. 3592 (“Section 2113 (a) of title 18, United States Code, is amended by inserting ‘, or obtains or attempts to obtain by extortion’ after ‘from the person or presence of another.’”) (Westlaw through P.L. 115-281).

<sup>48</sup> 18 U.S.C. § 2113(a)–(b).

Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or

Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—

Shall be fined under this title or imprisoned not more than twenty years, or both.<sup>49</sup>

Defendants accused of actually robbing a bank, or attempting to rob a bank, are typically charged under the first paragraph of § 2113(a).<sup>50</sup> Whereas defendants who enter a bank with the intention of robbing it, but are somehow frustrated in the attempt, are typically charged—and face the same maximum penalty of twenty years in prison—under the second paragraph of the statute.<sup>51</sup> As we shall see, application of this particular statute becomes somewhat controversial when defendants with the requisite intent are arrested *before* they enter, or attempt to enter a bank.<sup>52</sup>

Also note, Congress has had plenty of bites at this particular apple, tweaking the language of the Act several times over the course of several decades and stratifying the penalties to match the severity of specific crimes.<sup>53</sup> Although the text of the first paragraph of § 2113(a) is arguably unambiguous, Congress' demonstrated vigilance will become an important point as we attempt to divine legislative intent and purpose, specifically with regard to the first paragraph of § 2113(a).<sup>54</sup>

### III. ARGUMENT

I acknowledge at the outset that many legal theorists tend to use statutory interpretation and statutory application (or construction)

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<sup>49</sup> *Id.*

<sup>50</sup> *See e.g.*, *United States v. Armour*, 840 F.3d 904, 906 (7th Cir. 2016).

<sup>51</sup> *Prince v. United States*, 352 U.S. 322, 328 (1957) (“It is a fair inference from the wording in the Act . . . that the unlawful entry provision was inserted to cover the situation where a person enters a bank for the purpose of committing a crime, but is frustrated for some reason before completing the crime.”); 18 U.S.C. § 2113(b).

<sup>52</sup> *See infra* Part III.

<sup>53</sup> *See supra* Part II.

<sup>54</sup> *See infra* Part III.

interchangeably.<sup>55</sup> Textualists in particular believe that interpretation and construction are intertwined, with construction constrained by interpretation.<sup>56</sup> Intentionalists and purposovists, on the other hand, believe that semantic meaning can and should give way to other considerations such as legislative intent, or, as is likely here, objective statutory purpose.<sup>57</sup> A full exploration of this debate is beyond the scope of this Comment; however, for purposes of the argument that follows, I consider statutory interpretation and statutory application to be necessarily distinct.<sup>58</sup> Interpretation refers to the process that recognizes or discovers the linguistic meaning or semantic content of the text, whereas construction refers to the process that gives the text legal effect, in other words, application of the statute.<sup>59</sup>

To borrow an analogy from civil procedure, taken as true, this distinction allows for the plausible inference on which my larger claim—that the split is really an exception—rests: the notion that statutory interpretation is *not* implicit in the majority’s application of § 2113(a).<sup>60</sup> Instead, I argue that the majority is reaching conclusions about the semantic meaning of the text based on policy considerations, effectively “arguing for the existence of a fact from its desirability.”<sup>61</sup> As legal scholar Lawrence Solum explains, “[w]hen this happens, the interpretation-construction distinction allows us to reconstruct the arguments so that they make sense, or, if they don’t, then in a way that exposes the error.”<sup>62</sup> This is the aim of the analysis that follows.

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<sup>55</sup> Robert J. Martineau, *Craft and Technique, Not Canons and Grand Theories: A Neo-Realist View of Statutory Construction*, 62 GEO. WASH. L. REV. 1, 42 (1993) (noting that “[m]ost often interpretation and construction are used as synonyms.”).

<sup>56</sup> Lawrence B. Solum, *Construction and Constraint: Discussion of Living Originalism*, 7 JERUSALEM REV. OF LEGAL STUD. 1, 22 (2013) (noting that “[s]ome originalists may endorse versions of the principle that provide very strong constraint; others may accept weaker forms of constraint.”).

<sup>57</sup> Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 23–24 (2006) (“When judges search for underlying purposes based on anything other than statutory text, textualists argued, judges elevate not only their own policy preferences, but also the preferences of one legislator over another.”).

<sup>58</sup> Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010) (“[T]he distinction is both real and fundamental—that it marks a deep difference in two different stages (or moments) in the way that legal and political actors process legal texts.”).

<sup>59</sup> *Id.* at 96.

<sup>60</sup> *Cf.* Fed. R. Civ. Pro. 12(b)(6).

<sup>61</sup> Lawrence Solum, *Legal Theory Lexicon: Interpretation and Construction*, LEGAL THEORY BLOG (Apr. 27, 2008 11:08AM), <http://lsolum.typepad.com/legaltheory/2008/04/legal-theory--6.html> [<https://perma.cc/4KTB-HSFE>].

<sup>62</sup> *Id.*

## A. THE MAJORITY CASES: ATTEMPTED FORCE IS SUFFICIENT

As noted above, the Second, Fourth, Sixth, and Ninth Circuits have all held that establishing an attempted use of force—as opposed to the actual use of force—is sufficient for a conviction of attempted bank robbery under the first paragraph of § 2113(a).

*United States v. Baker*, a 1955 case from the Southern District of California, was the first case in any court to directly address the use of force requirement for attempted bank robbery, and therefore serves as a common ancestor of sorts when tracing the lineage of the current controversy.<sup>63</sup> The defendant in *Baker*, an intoxicated man named Elvin Cyril Baker, was accused of trying to rob the Citizens National Trust and Savings Bank of Los Angeles.<sup>64</sup> He entered the bank and handed the teller a largely incoherent note, assuring her there “won’t be any trouble,” so long as she did what he was asking, although it was far from clear what that might be.<sup>65</sup> The note read, “Please check all, into this sack, Thank you ECB.”<sup>66</sup> Erring on the side of caution, the confused teller triggered the silent alarm and Baker was quickly apprehended.<sup>67</sup> The case turned on whether Baker’s note and brief conversation with the teller amounted to actual intimidation under the Act.<sup>68</sup> The court held that it did, and, without explicitly acknowledging as much, appears to have utilized a plain meaning analysis of the statute, noting, “[i]t is apparent that [in the first paragraph of § 2113(a)] the ‘attempt’ relates to the ‘taking’ and not to the ‘intimidation.’”<sup>69</sup> The district court further held that where intimidation is relied upon to establish a crime, it must be shown by proof of conduct or words.<sup>70</sup>

Twenty-three years after *Baker*, the Second Circuit laid the groundwork for the majority’s position in *United States v. Stallworth*.<sup>71</sup> In *Stallworth*, the court held that proof of actual force and violence, or intimidation was not necessary for a conviction of attempted bank robbery, even though the defendants in the case had been convicted under the second paragraph of § 2113(a)—attempting unlawful entry of a bank with the intent of

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<sup>63</sup> *United States v. Baker*, 129 F. Supp. 684, 686 (S.D. Cal. 1955).

<sup>64</sup> *Id.* at 687.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* (finding that the “[d]efendant intended to get money from the teller by intimidation”).

<sup>69</sup> *Id.* at 686.

<sup>70</sup> *Id.*

<sup>71</sup> *United States v. Stallworth*, 543 F.2d 1038 (2d Cir. 1976).

committing a felony—and not the first.<sup>72</sup> Clarence Stallworth was one of five defendants who planned to rob a bank in Queens, New York, unaware that the FBI had the entire group under constant video and audio surveillance for nearly two weeks prior, and that one member of the group was, in fact, an FBI informant.<sup>73</sup>

While still under surveillance, the defendants pulled up in front of the bank armed with guns and wearing ski masks, but were arrested before they even had a chance to get out of the car.<sup>74</sup> The defendants in *Stallworth* argued that they could not be convicted of attempted bank robbery under § 2113(a) because they had “neither entered the bank nor brandished [a] weapon[.]”<sup>75</sup> They admitted to conspiracy to commit the robbery, which carried a possible five-year prison term, but, similar to *Baker*, the defendants argued that because they had not used actual “force and violence, or intimidation,” they could not be convicted of attempted bank robbery and should not face a possible twenty-year prison term under the language of the Act.<sup>76</sup> The Second Circuit flatly rejected this argument—and the court’s reasoning in *Baker*—as “wooden logic.”<sup>77</sup>

To be clear, in *Stallworth*, the Second Circuit never actually engaged in statutory interpretation, and the court conducted no textual analysis whatsoever.<sup>78</sup> Instead, the court launched immediately into an exploration of the common law definition of attempt: “intent to commit a crime, the execution of an overt act in furtherance of the intention, and a failure to consummate the crime.”<sup>79</sup> The court then settled on the Fifth Circuit’s relatively new “substantial step” analysis for inchoate crimes, based on a definition of attempt “proffered” by American Law Institute’s Model Penal Code (“MPC”).<sup>80</sup> Under the substantial step analysis, a “defendant must have engaged in conduct which constitutes a substantial step toward commission of the crime,” conduct that is “strongly corroborative of the firmness of the defendant’s criminal intent.”<sup>81</sup> In holding that proof of attempted force or intimidation was sufficient to affirm the district court’s conviction for

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<sup>72</sup> *Id.* at 1041 (holding that “[b]ecause the conduct of Stallworth and Sellers constituted an attempted bank robbery, the conviction must be affirmed”).

<sup>73</sup> *Id.* at 1039.

<sup>74</sup> *Id.* at 1040.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *See generally Stallworth*, 543 F.2d 1038.

<sup>79</sup> *Id.* at 1040.

<sup>80</sup> *Id.* (citing *United States v. Mandujano*, 499 F.2d 370, 376 (5th Cir. 1974)).

<sup>81</sup> *Id.* at 1040.

attempted bank robbery, the Second Circuit noted the “rational polices of the attempt doctrine,”<sup>82</sup> and stressed the fact that law enforcement’s “timely intervention” had “probably prevented . . . bloodshed in an area crowded with noontime shoppers.”<sup>83</sup>

One year later, in *United States v. Jackson*, a defendant came before the Second Circuit who had been convicted specifically under the first paragraph of § 2113(a).<sup>84</sup> However, instead of looking to *Baker*—the only other reported case to date in which the defendant had also been convicted under the first paragraph<sup>85</sup>—the Second Circuit opted to follow *Stallworth*, a case in which the defendants had been convicted under the second paragraph.<sup>86</sup> Notwithstanding this misplaced reliance, *Jackson* and *Stallworth* are factually very similar.<sup>87</sup>

In *Jackson*, the FBI knew ahead of time via an informant when the robbery was scheduled to take place, and had pre-positioned agents outside the bank on the prescribed day.<sup>88</sup> The defendants, however, after circling and scouting the bank for much of the morning, “detected the presence” of the agents and tried to speed off.<sup>89</sup> The agents gave chase, stopping the vehicle, and taking all three defendants into custody several blocks from the bank.<sup>90</sup> Guns, masks, and handcuffs were found inside the car, and all three defendants would later admit to, and be convicted of, conspiracy to commit bank robbery.<sup>91</sup>

At trial and on appeal, however, the defendants challenged a second count of attempted bank robbery and the much harsher penalty it carried—twenty years in prison.<sup>92</sup> Citing *Baker*, the defendants argued that “since [the first paragraph of § 2113(a)] only mentions attempted taking and not attempted force, violence, or intimidation,” it clearly follows that the government must prove actual use of force, violence, or intimidation in order to sustain their convictions.<sup>93</sup> In response, the Second Circuit once again ignored *Baker* and pronounced the defendants’ first-paragraph argument

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<sup>82</sup> *Id.* at 1041.

<sup>83</sup> *Id.*

<sup>84</sup> *United States v. Jackson*, 560 F.2d 112 (2d Cir. 1977).

<sup>85</sup> *United States v. Baker*, 129 F. Supp. 684, 686 (S.D. Cal. 1955).

<sup>86</sup> *Jackson*, 560 F.2d at 113 (“This troublesome question was recently examined by this court in *United States v. Stallworth* . . . which set forth the applicable legal principles.”).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 115.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 116.

<sup>93</sup> *Id.*

“foreclosed” by the holding in *Stallworth*, even though the defendants in *Stallworth* had been charged specifically under the second paragraph of § 2113(a).<sup>94</sup> Accordingly, the Second Circuit found that proof of attempted force, violence or intimidation was sufficient to uphold the conviction.<sup>95</sup> The *Jackson* court then conducted a substantial step analysis, finding that the defendants acted “with the kind of culpability otherwise required for the commission of the crime,” and that they “engaged in conduct which constitutes a substantial step toward commission of the crime.”<sup>96</sup> The convictions for attempted bank robbery were affirmed.<sup>97</sup>

Just as in *Stallworth*, however, the *Jackson* court failed to conduct any direct analysis of the statutory text whatsoever. Instead, the court declared itself “in entire accord” with the broader policy consideration cited in *Stallworth*: that the definition of attempt ought be one that “enables society to punish malefactors who have unequivocally set out upon a criminal course without requiring law enforcement officers to delay until innocent bystanders are imperiled.”<sup>98</sup>

In 1984, the Fourth Circuit also addressed the force requirement under the first paragraph of § 2113(a) in *United States v. McFadden*.<sup>99</sup> In *McFadden*, the two defendants had already robbed three banks in South Carolina and were about to rob a fourth, but thanks to an inside informant and ongoing surveillance, the FBI captured them before they could retrieve a bag of weapons stashed near the bank and enter the building.<sup>100</sup>

Citing *Baker*, the defendants argued that under the first paragraph of § 2113(a) “[actual] force and violence or intimidation must accompany the attempt.”<sup>101</sup> Defendants further argued that “because there was no use of force as required by the controlling statute,” their convictions under the first paragraph of § 2113(a) should be overturned.<sup>102</sup>

The Fourth Circuit rejected that argument, asserting—without explanation—that *Baker* simply did not “support appellants’ position.”<sup>103</sup>

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<sup>94</sup> *Id.* at 117.

<sup>95</sup> *Id.* at 117 (“We conclude that Scott’s argument [that actual force is required] is foreclosed by this *Stallworth* holding, with which we are in entire accord.”).

<sup>96</sup> *Id.* at 116.

<sup>97</sup> *Id.* at 121.

<sup>98</sup> *Id.* at 117 (“We conclude that Scott’s argument is foreclosed by this *Stallworth* holding.”).

<sup>99</sup> *United States v. McFadden*, 739 F.2d 149 (4th Cir. 1984).

<sup>100</sup> *Id.* at 151.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 150.

<sup>103</sup> *Id.* at 151–52.

Instead, the court cited to *Stallworth* and *Jackson*, and, just as the Second Circuit had done, skipped the textual analysis of the controlling statute.<sup>104</sup> Under the MPC's substantial step analysis, the *McFadden* court then held that proof of attempted force and violence or intimidation was sufficient for a conviction of attempted bank robbery, and accordingly, the convictions were affirmed.<sup>105</sup>

In 1990, the Ninth Circuit followed suit in *United States v. Moore*, holding that a conviction under the first paragraph of § 2113(a) "requires only that the defendant *intended* to use force, violence or intimidation and made a substantial step toward consummating the robbery."<sup>106</sup> The FBI had arrested the defendant, Earnest Moore, as he approached a bank in Oregon with a loaded handgun "concealed in the waistband of his trousers," wearing a ski mask, and carrying two empty pillowcases.<sup>107</sup> Just as in the previous cases, the FBI had an inside informant and, through that informant, furnished the actual vehicle to be used in the robbery.<sup>108</sup> Moore argued that the government could not prove a necessary element of attempted bank robbery—actual force and violence, or intimidation—because he was arrested before he entered the bank.<sup>109</sup>

In what was now becoming a familiar refrain, the Ninth Circuit rejected that argument, ignored the controlling statute, and instead cited to *Jackson*, emphasizing the notion that a conviction for attempted bank robbery "does not require the actual use of force, violence or intimidation."<sup>110</sup> The Ninth Circuit further affirmed the underlying policy consideration driving the court's analysis: the notion that "[p]olice are not required to delay arrest until innocent bystanders are imperiled."<sup>111</sup>

In 2005, the Sixth Circuit joined the majority circuits with its decision in *United States v. Wesley*.<sup>112</sup> *Wesley* is similar to the other majority cases in that police had an inside informant and were conducting video, audio, and telephone surveillance of the defendant, Donyal Wesley.<sup>113</sup> *Wesley* is distinct, however, in that the defendant was not anywhere in the vicinity of

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<sup>104</sup> *Id.* at 152.

<sup>105</sup> *Id.* at 153.

<sup>106</sup> *United States v. Moore*, 921 F.2d 207, 209 (9th Cir. 1990) (emphasis added).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 208.

<sup>109</sup> *Id.* at 209.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *United States v. Wesley*, 417 F.3d 612 (6th Cir. 2005).

<sup>113</sup> *Id.* at 615–16.

the bank when he was arrested.<sup>114</sup> Additionally, “no accomplices were present and no weapons or disguises were found.”<sup>115</sup> *Wesley* is further distinguished by the fact that by the time the case was in front of the Sixth Circuit, the Fifth Circuit had already created the split, holding in *United States v. Bellew* that a most natural reading of the first paragraph of § 2113(a) does, in fact, require proof of actual force and violence or intimidation to sustain a conviction for attempted bank robbery.<sup>116</sup> In *Wesley*, the Sixth Circuit acknowledged the nascent split, but rejected the newly minted minority view and the defendant’s argument.<sup>117</sup> Citing to *Stallworth*, *Jackson*, *McFadden*, and *Moore*, the *Wesley* court noted that the Fifth Circuit’s interpretation of the statute—that “attempt relates only to the taking and not the intimidation” —had been “squarely rejected by three other circuits.”<sup>118</sup> The court went on to warn that “to read the statute as defendant urges would be inconsistent with our definition of attempt crimes,” and then held that “[a]ctual intimidation is not required to prove attempted bank robbery under the first paragraph of 18 U.S.C. § 2113(a).”<sup>119</sup> In this respect, *Wesley* is also distinct; it is the only majority case in which the court explicitly mentions the controlling statute in its analysis.<sup>120</sup> However, instead of engaging in any meaningful analysis of the semantic meaning of § 2113(a), the *Wesley* court appears to adopt the same policy-driven premise girding each of the other majority decisions: “Attempt is a subtle concept that requires a rational and logically sound definition, one that enables society to punish malefactors who have unequivocally set out upon a criminal course without requiring law enforcement officers to delay until innocent bystanders are imperiled.”<sup>121</sup>

#### B. THE MINORITY CASES: ACTUAL FORCE IS NECESSARY

Utilizing a plain meaning analysis of the Bank Robbery Act, the Fifth and Seventh Circuits have held that proof of actual force and violence, or

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<sup>114</sup> *Id.* at 616.

<sup>115</sup> *Id.*

<sup>116</sup> *United States v. Bellew*, 369 F.3d 450, 454 (5th Cir. 2004) (holding that “to prove a violation of bank robbery statute on theory that defendant, by force and violence or by intimidation, took or attempted to take money or other property from bank, it is not enough for government to show that defendant attempted to engage in act of intimidation”).

<sup>117</sup> *Wesley*, 417 F.3d at 617.

<sup>118</sup> *Id.* at 618.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* (quoting *United States v. Jackson*, 560 F.2d 112, 116 (2d Cir. 1977) (quoting *United States v. Stallworth*, 543 F.2d 1038, 1040 (2d Cir. 1976)).

intimidation is necessary for a conviction of attempted bank robbery under the first paragraph of § 2113(a).<sup>122</sup>

As noted above, the Fifth Circuit spurned the majority and openly created a split in authority with its 2004 decision in *United States v. Bellew*.<sup>123</sup> In *Bellew*, the Fifth Circuit reversed the defendant's conviction for attempted bank robbery, holding that under a "natural reading" of the first paragraph of § 2113(a), the government must prove actual use of force and violence, or intimidation.<sup>124</sup> Bryon Worley Bellew had been convicted of attempted robbery in the Eastern District of Texas after entering and then leaving a bank in Plano twice in the same day while wearing a wig and carrying a firearm in a briefcase.<sup>125</sup> On his third trip to the bank, police attempted to arrest Bellew in the parking lot, where he quickly removed the gun from the briefcase and put it to his own head.<sup>126</sup> A standoff ensued, and three hours later, Bellew finally surrendered and admitted that it was his intention all along to rob the bank.<sup>127</sup> Bellew would later argue, however, that the evidence against him was insufficient to support a conviction of attempted bank robbery under the first paragraph of 18 U.S.C. § 2113(a) because he had not used "force and violence, or intimidation" on anyone but himself.<sup>128</sup>

Noting that the evidence in the case was "largely undisputed," the Fifth Circuit would telegraph its approach by reframing the key question in the case: "whether the relevant statutory language upon which the indictment is based, the first paragraph of § 2113(a), requires an actual act of intimidation or only attempted intimidation for a conviction."<sup>129</sup> In answering that question, the Fifth Circuit conducted a plain meaning analysis of the first paragraph and determined that, under the "most natural reading of the text," proof of actual force and violence or intimidation was necessary for a

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<sup>122</sup> *United States v. Bellew*, 369 F.3d 450, 450 (5th Cir. 2004); *United States v. Thornton*, 539 F.3d 741 (7th Cir. 2008).

<sup>123</sup> *Bellew*, 369 F.3d at 450.

<sup>124</sup> *Id.* at 454 ("We find the 'actual act of intimidation' reading to be the most natural reading of the text.").

<sup>125</sup> *Id.* at 451–52.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 452–53 ("When confronted by the police at his vehicle, Bellew reached into his briefcase and retrieved a firearm. He promptly put the weapon to his own head. . . . [T]he government did not point to any evidence that showed that Bellew committed any act of intimidation."); Brief for Appellant at 16, *United States v. Bellew*, 369 F.3d 450 (5th Cir. 2004) (No. 03-40444), 2003 WL 23858861, at \*16 ("These actions do not constitute intimidating behavior by any stretch of the imagination.").

<sup>129</sup> *Bellew*, 369 F.3d at 452.

conviction of attempted bank robbery.<sup>130</sup> The Fifth Circuit then cited to *Baker* to establish that such a reading was supported by the relevant case law.<sup>131</sup> The *Bellew* court also looked to the Act's legislative history to support its interpretation of the text, and to address one of the majority circuits' primary concerns: the difficulty of convicting a defendant of attempted bank robbery if proof of actual force is required.<sup>132</sup> In particular, the court focused on the addition of the second paragraph of § 2113(a), which reads in relevant part: "Whoever enters or attempts to enter any bank . . . with intent to commit . . . any felony."<sup>133</sup> The court surmised that in circumstances where a person was "for some reason" frustrated in his attempt to rob a bank, and did not use actual force or intimidation in the failed attempt (as in *Stallworth*, *Jackson*, *McFadden*, *Moore*, and *Wesley*), the second paragraph of § 2113(a) would serve as a sort of backstop, providing the same harsh penalty prescribed for robbery or attempted robbery under the first paragraph—twenty years in prison—but without the government having to prove actual force or intimidation.<sup>134</sup> Put simply, if the majority was concerned about safeguarding the public in such cases, then the second paragraph of § 2113(a) provided a black-letter solution that sprang from the plain meaning of the controlling statute, and did not require any sacrifice in terms of the available penalty.<sup>135</sup> Indeed, the *Bellew* court appeared to be addressing the majority directly when it wrote, "the troubling result our interpretation of the first paragraph of Section 2113 creates . . . is obviated by the availability of the second paragraph covering such acts."<sup>136</sup>

In 2008, the Seventh Circuit joined the minority and expanded the conflict with its decision in *United States v. Thornton*, holding that under the first paragraph of § 2113(a), the government must prove actual force and violence or intimidation in order to sustain a conviction of attempted bank robbery.<sup>137</sup> Walter Thornton and his accomplice, Tremain Moore, had been

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<sup>130</sup> *Id.* at 454 ("We find the "actual act of intimidation" reading to be the most natural reading of the text. This reading is supported by relevant binding case law. We, therefore, reject the opposing interpretation given this text by our sister circuits.").

<sup>131</sup> *Id.* at 455.

<sup>132</sup> *Id.* ("The troubling result our interpretation of the first paragraph of Section 2113 creates, prohibiting conviction under the first paragraph of Section 2113 absent an actual act of intimidation, is obviated by the availability of the second paragraph covering such acts.").

<sup>133</sup> *Id.* at 454–55 (noting that the second paragraph of Section 2113(a) was added by Congress in an effort to cover precisely the sort of events that occurred in this case).

<sup>134</sup> *Id.* at 455.

<sup>135</sup> *Id.* (noting "the addition of this paragraph implies that *Bellew* properly should have been charged under the second paragraph of Section 2113(a)").

<sup>136</sup> *Id.*

<sup>137</sup> *United States v. Thornton*, 539 F.3d 741, 741 (7th Cir. 2008).

arrested after plotting to rob the Bank One branch in Berwyn, Illinois.<sup>138</sup> They were both convicted of attempted bank robbery in district court, but Thornton later appealed, arguing that the district court had erred when it instructed the jury “on the elements of attempted bank robbery under [the first paragraph of] § 2113(a) because the instruction did not require actual force and violence or intimidation.”<sup>139</sup> The Seventh Circuit agreed and acknowledged the current split, but cited to *Baker* and *Bellew*. It noted that the Fifth Circuit’s plain meaning approach in *Bellew* comported with their own: “we examine the statutory text.”<sup>140</sup> “Under a straightforward reading of § 2113(a),” the court determined that the ‘attempt’ language relates only to the taking and not to the intimidation.”<sup>141</sup> Accordingly, the Seventh Circuit held that actual force and violence or intimidation is required for a conviction under the first paragraph of § 2113(a), regardless of “whether the defendant succeeds [in the taking] or fails [attempts to take] in his robbery attempt.”<sup>142</sup>

In reversing Thornton’s conviction, the Seventh Circuit also offered a blunt assessment of the government’s—and by extension, the majority’s—position on the matter, flatly asserting that it was an attempt “to stretch federal law to cover an act that is not criminalized by the statute at issue.”<sup>143</sup>

The government argues that all that is necessary is that a defendant attempt to intimidate while attempting to rob a bank. If that were so, attempt would relate to the “by force and violence or intimidation” language and the statute would have begun with, “Whoever attempts by force and violence or intimidation to take . . .” The “by force and violence, or by intimidation” language relates to both “takes” and the phrase “attempts to take.”<sup>144</sup>

Like the Fifth Circuit, the Seventh Circuit also pointed out the availability of the second paragraph of § 2113(a) to cover instances where, as in *Thornton*, the defendant is somehow frustrated in the attempt, noting that, “Thornton could have been prosecuted under the second paragraph.”<sup>145</sup>

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<sup>138</sup> *Id.* at 743–45.

<sup>139</sup> *Id.* at 745.

<sup>140</sup> *Id.* at 747.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

## C. WHY THE SPLIT IS REALLY AN EXCEPTION

A circuit split exists “when two or more circuits in the United States court of appeals reach opposite interpretations of federal law.”<sup>146</sup> A circuit split might alternately be defined as “sequences of conflicting decisions by different appellate courts on the same legal question.”<sup>147</sup> Here, the so-called split regarding the necessary elements of attempted bank robbery under the first paragraph of § 2113(a) fails under both definitions.

As the case illustrations above demonstrate, the majority never bothers to engage in any meaningful interpretation of the semantic meaning of the controlling federal law as written, and in so doing, violates a basic canon of statutory interpretation—the notion that “[t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.”<sup>148</sup> Instead, the majority focuses on the elements of an inchoate crime under the MPC: requisite intent, and a substantial step toward commission.<sup>149</sup>

In *Thornton*, the Seventh Circuit articulates the crux of the problem: “We do not find these cases persuasive because they omit an appropriate statutory analysis.”<sup>150</sup> The absence of appropriate statutory analysis by the majority circuits at once impeaches the notion of the controversy falling under the first definition of a true split above, as well as the assertion by many legal scholars that the disagreement results from “conflicting methods of

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<sup>146</sup> Legal Information Institute, *Circuit Split*. WEX, [https://www.law.cornell.edu/wex/circuit\\_split](https://www.law.cornell.edu/wex/circuit_split) [<https://perma.cc/4XSP-8NRW>] (last visited Jan. 22, 2019).

<sup>147</sup> Scott Baker & Anup Malani, *Do Judges Actually Care About the Law? Evidence from Circuit Split Data*, SEMANTICSCHOLAR 1 (2015), [https://pdfs.semanticscholar.org/10e3/a47903791073bc7590b5d6dfc79126b3f847.pdf?\\_ga=2.256810507.1094416143.1548212026-876376388.1548212026](https://pdfs.semanticscholar.org/10e3/a47903791073bc7590b5d6dfc79126b3f847.pdf?_ga=2.256810507.1094416143.1548212026-876376388.1548212026) [<https://perma.cc/WMQ8-RZVV>].

<sup>148</sup> Antonin Scalia & Brian A. Garner, *Reading Law: The Interpretation of Legal Texts*, 56 (Thomson/West, 2012) (articulating the “Supremacy-of-Text Principle”).

<sup>149</sup> *United States v. Wesley*, 417 F.3d 612, 612 (6th Cir. 2005) (holding that the evidence was sufficient to support a finding that the defendant committed an overt act constituting a substantial step toward commission of bank robbery); *United States v. Moore*, 921 F.2d 207, 209 (9th Cir. 1990) (“A conviction for attempted bank robbery requires the government to prove (1) culpable intent, and (2) conduct constituting a substantial step towards the commission of the crime . . . .”); *United States v. McFadden*, 739 F.2d 149, 152 (4th Cir. 1984) (“The defendant must have engaged in conduct which constitutes a substantial step toward commission of the crime”) (quoting *Stallworth*, 543 F.2d at 1040); *United States v. Jackson*, 560 F.2d 112, 120 (2d Cir. 1977) (“Either type of conduct, standing alone, was sufficient as a matter of law to constitute a ‘substantial step’ if it strongly corroborated their criminal purpose.”); *United States v. Stallworth*, 543 F.2d 1038, 1040 (2d Cir. 1976) (“Defendant must have engaged in conduct which constitutes a substantial step toward commission of the crime, conduct strongly corroborative of the firmness of the defendant’s criminal intent.”).

<sup>150</sup> *United States v. Thornton*, 539 F.3d 741, 747 (7th Cir. 2008).

statutory interpretation.”<sup>151</sup> Put simply, where one side skips the interpretation of the statute altogether, there can be no competition.

The controversy also fails to qualify if we attempt to define a true split in terms of the majority and minority circuits addressing a common legal question.<sup>152</sup> For the majority circuits, the key question is, “[w]hat constitutes common-law attempt?”<sup>153</sup> Whereas, the minority circuits ask, “What are the elements of attempt under the controlling statute?”<sup>154</sup> These are fundamentally different questions, demanding fundamentally different answers and, as we have seen, yielding fundamentally different results.<sup>155</sup> It is well established that, unlike state law, federal law “has no generally applicable crime of attempt,” except where Congress has specifically proscribed the attempt and set its punishment.<sup>156</sup> Given that the Act specifically proscribes the attempt and sets its punishment— “[w]hoever, by force and violence, or intimidation, takes or attempts to take . . . shall be fined under this title or imprisoned not more than twenty years, or both”—the majority’s approach is clearly at odds with this established maxim.<sup>157</sup> The statutory language is neither ambiguous nor vague.<sup>158</sup> Nevertheless, instead of looking to the controlling statute and the specific definition of attempt it provides, the majority unabashedly ignores the text and pulls its general definition and “two-tiered inquiry” for determining what constitutes “an attempt” from “the [common law] writings of many distinguished jurists.”<sup>159</sup>

The majority’s approach also appears to be at odds with Supreme Court precedent. In *Carter v. United States*, a case involving the relationship between sections 2113(a) and (b) but which did not directly address the required elements of attempted bank robbery under § 2113(a), the Court held that, “the common law should be imported into statutory text only when

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<sup>151</sup> *Supra* note 23.

<sup>152</sup> Baker & Malani, *supra* note 147.

<sup>153</sup> *Stallworth*, 543 F.2d at 1039 (“Since the question is one likely to present itself to district courts not infrequently it is prudent to discuss briefly the perplexing problem of distinguishing ‘mere preparation’ for the commission of a crime from an ‘attempt.’”).

<sup>154</sup> *United States v. Bellew*, 369 F.3d 450, 452 (5th Cir. 2004).

<sup>155</sup> *Supra* Part III, Sections B and C.

<sup>156</sup> Charles Doyle, *Attempt: An Overview of Federal Criminal Law*, CONGRESSIONAL RESEARCH SERVICE 1–2 (Apr. 6, 2015), <https://fas.org/sgp/crs/misc/R42001.pdf> [<https://perma.cc/C9EZ-EDSS>].

<sup>157</sup> 18 U.S.C. § 2113(a).

<sup>158</sup> Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL’Y 65, 67 (2011) (“language is ambiguous when it has *more than one sense*; it is vague when its meaning admits of *borderline cases* that cannot definitively be ruled in or out of its meaning.”).

<sup>159</sup> *United States v. Stallworth*, 543 F.2d 1038,1040 (2d Cir. 1976).

Congress employs a common-law *term*, and not when . . . Congress simply describes an offense analogous to a common-law crime without using common-law terms.<sup>160</sup> There is no such “term of art” found in § 2113(a).<sup>161</sup>

In contrast, the minority’s inquiry “begin[s] and end[s] with the statutory text,” where we find the relevant qualifier, “attempts,” flanked by, and holding hands with its parental verbs, “takes” and “take.”<sup>162</sup> Within the very structure of the sentence, “attempts” is grammatically walled off from the elements of “force and violence, or intimidation,” which raises the question, why have some courts, in some cases, attempted to scramble over it like former East Berliners?<sup>163</sup>

The clear and valid policy consideration girding the majority’s decisions is essentially the same consideration invoked in the passage and enforcement of the Act—the notion that where the defendant has manifested firm criminal intent in the form of a “substantial step” toward committing the crime, law enforcement ought to be able to step in before somebody gets hurt.<sup>164</sup>

The majority explicitly acknowledges as much in several of the opinions discussed above, but it is only when we identify the common facts which distinguish the majority cases that the true nature of this so-called split is revealed. In every majority case in which attempted force or attempted intimidation was found to be sufficient for a conviction, law enforcement possessed at least some foreknowledge of the crime *and* the corresponding opportunity to intervene before anyone was hurt or placed at risk of being hurt.<sup>165</sup> When considered in light of these common facts, we might fairly say that the statutory rule—that actual use of force and violence, or intimidation is a required element of attempted bank robbery—simply does not apply under these circumstances. In which case, the disagreement among the circuits is more accurately categorized as an exception rather than a split, the triggering circumstances for which are: (1) at least some foreknowledge of the crime by law enforcement; and (2) the opportunity for law enforcement to intervene before innocent bystanders are hurt.<sup>166</sup>

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<sup>160</sup> *Carter v. United States*, 530 U.S. 255, 265 (2000).

<sup>161</sup> *Id.*; 18 U.S.C. § 2113(a).

<sup>162</sup> *United States v. Thornton*, 539 F.3d 741, 748 (7th Cir. 2008); 18 U.S.C. § 2113(a).

<sup>163</sup> *Id.* 18 U.S.C. § 2113(a).

<sup>164</sup> *Supra* Part III, Section B; *see also* *United States v. Wesley*, 417 F.3d 612 (6th Cir. 2005).

<sup>165</sup> *See* *United States v. Stallworth*, 543 F.2d 1038 (2d Cir. 1976); *United States v. Jackson*, 560 F.2d 112 (2d Cir. 1977); *United States v. McFadden*, 739 F.2d 149 (4th Cir. 1984); *United States v. Moore*, 921 F.2d 207 (9th Cir. 1990); *United States v. Wesley*, 417 F.3d 612 (6th Cir. 2005).

<sup>166</sup> The Merriam-Webster Online Dictionary defines “exception” as “a case to which a rule does not apply.” *Exception*, MERRIAM-WEBSTER, <https://www.merriam->

In sum, the majority is not simply reading the statute differently and then applying that interpretation universally regardless of the facts. Instead, the majority appears to have carved out a common-sense exception to the statutory rule which only applies under very specific circumstances: where law enforcement knows a bank robbery is about to be committed and where innocent bystanders may be put at risk, law enforcement ought to be able to step in before somebody gets hurt.<sup>167</sup>

#### IV. POSSIBLE SOLUTION

It goes without saying that “uniformity in the interpretation of the national laws” is a good thing, but Alexander Hamilton said it anyway in Federalist No. 80.<sup>168</sup> Hamilton warned that when the federal courts disagree “over the same causes, arising from the same laws,” you have “a hydra in government, from which nothing but contradiction and confusion can proceed.”<sup>169</sup> However, to the extent that I have now characterized this difference of opinion among the circuits as an exception to the statutory rule rather than a split, we can no longer say, strictly speaking, that the circuits are in direct opposition. It would be more accurate to say that the majority is merely exercising an ad hoc exception in service to a completely valid policy consideration when specific circumstances warrant.<sup>170</sup> Put another way, it is not necessarily the majority’s concern for protecting innocent bystanders that needs addressing here, nor the outcomes in various cases where that consideration has been paramount. Rather, it is the manner in which the majority arrives at those outcomes—by “bend[ing] a federal statute”—that is most troublesome.<sup>171</sup>

One thing we can safely say is that Congress does not cast the nation’s laws in play-dough, nor is such pliability necessarily conducive to Hamilton’s requisite “uniformity.”<sup>172</sup> Regardless of how we classify this particular controversy, as a split or an exception, the question remains: how best to harmonize the majority’s valid policy consideration—protecting

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webster.com/dictionary/exception [https://perma.cc/CRN7-TSQB] (last visited Jan. 22, 2019).

<sup>167</sup> See *Stallworth*, 543 F.2d 1038; *Jackson*, 560 F.2d 112; *McFadden*, 739 F.2d 149; *Moore*, 921 F.2d 207; *Wesley*, 417 F.3d 612.

<sup>168</sup> THE FEDERALIST NO. 80 (Alexander Hamilton).

<sup>169</sup> *Id.*

<sup>170</sup> See *supra* Part III, Section B.

<sup>171</sup> *United States v. Thornton*, 539 F.3d 741, 747 (7th Cir. 2008) (noting that “we cannot bend the statute simply to accommodate the government’s zeal to obtain stiffer penalties”).

<sup>172</sup> THE FEDERALIST NO. 80, *supra* note 168.

innocents from harm—with the cast-iron letter of federal law? There are several possible solutions.

A. AN ALTERNATIVE FOR PROSECUTORS: THE SECOND PARAGRAPH OF § 2113(A)

The Fifth and Seventh Circuits offer the most immediately practicable means of avoiding further confusion: where the government cannot prove actual use of force and violence, or intimidation, the government should simply charge the defendant under the second paragraph of § 2113(a), as opposed to charging the defendant under the first paragraph.<sup>173</sup> As the minority has noted, under the second paragraph pertaining to unlawful entry with the intent to commit “any felony,” the majority’s policy considerations are arguably still served, and there is no difference in terms of available penalties.<sup>174</sup> This approach is unsatisfying, however, because it relies entirely on the discretion of federal prosecutors and fails to harmonize the majority’s decisions with the letter of the law.

Additionally, since the second paragraph of § 2113(a) deals specifically with “anyone who enters or attempts to enter” a bank, it appears that in cases like *Wesley*, where no attempt is made to actually enter the bank, defendants who otherwise fully intend to go through with the crime and pose some danger to the public, might escape liability (and a possible twenty-year prison sentence), under the Act.<sup>175</sup> It is worth noting, however, that a defendant like Wesley, who admits to conspiracy to commit bank robbery, does not completely avoid criminal liability under federal law.<sup>176</sup>

B. THE SUPREME COURT COULD GRANT CERTIORARI

The Supreme Court has already granted certiorari in a number of cases involving the Bank Robbery Act, but none have directly addressed the

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<sup>173</sup> *Thornton*, 539 F.3d at 746.

<sup>174</sup> *Id.*

<sup>175</sup> *Supra* Part II.

<sup>176</sup> 18 U.S.C. § 371 (2012):

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof [including a federally insured bank] in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

*Id.* See also *United States v. McNeal*, 818 F.3d 141, 149 (4th Cir. 2016), *cert denied*, 137 S. Ct. 164 (2016) (defendant was convicted of “conspiracy to commit armed bank robbery, in violation of 18 U.S.C. § 371”).

required elements of attempted bank robbery under § 2113(a).<sup>177</sup> While the continued presence of a split is generally a catalyst, the certiorari process is notoriously cryptic, and only a small percentage of the splits that occur are actually resolved by the Court.<sup>178</sup> Splits that involve multiple circuits, as here, tend to get more attention, but the longer they remain unresolved, the less likely the Court is to intervene, and this one has been “percolating” now for over a decade.<sup>179</sup>

As presently constituted, the Court is “by-and-large a textualist court, having adopted much of the late Justice Antonin Scalia’s judicial reasoning.”<sup>180</sup> Therefore, if the Court does grant certiorari at some point, the smart money would be on the Court siding with the minority circuits’ textualist approach to interpreting the first paragraph of § 2113(a), and a holding that proof of actual force or intimidation is necessary for a conviction of attempted bank robbery.<sup>181</sup> By the same token, as we have seen in cases like *District of Columbia v. Heller*, the smart money is not always the right money, even where the text appears unambiguous on its face.<sup>182</sup>

Rather than choosing between conflicting interpretations of the statute, the Court could simply recognize the public safety exception already being utilized by the majority circuits. It has done so before, and under broadly

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<sup>177</sup> *E.g.*, *Carter v. United States*, 530 U.S. 255, 274 (2000) (holding that the offense of taking and carrying away, with intent to steal or purloin, any thing of value exceeding \$1,000 belonging to, or in the possession of, any bank was not a lesser included offense of charged offense); *Bell v. United States*, 462 U.S. 356, 362 (1983) (holding that the Bank Robbery Act was not limited to common-law larceny, but also proscribed the crime of obtaining money under false pretenses); *Prince v. United States*, 352 U.S. 322, 329 (1957) (holding that when Congress amended Federal Bank Robbery Act to make not only robbery but also entry for such purpose a crime, it intended that maximum punishment for robbery should remain at twenty years and that no additional punishment for entry to commit such robbery should be imposed).

<sup>178</sup> Deborah Beim & Kelly Rader, *Evolution of Conflict in the Courts of Appeals*, 1, 10 (June 25, 2015) <http://dx.doi.org/10.2139/ssrn.2623304> [<https://perma.cc/CGD2-FXVM>] (“In this dataset [2005–2013], there are 418 conflicts involving 2082 cases. As of 2013, only 42 of these conflicts had been resolved by the Supreme Court.”).

<sup>179</sup> *Id.* at 15 (“As the number of years increases, most conflicts remain unresolved.”).

<sup>180</sup> Ryan Lovelace, *Elena Kagan: The Supreme Court is a ‘textualist court’ that reasons more like Scalia than Breyer*, WASHINGTON EXAMINER (October 16, 2017, 7:04 PM), <https://www.washingtonexaminer.com/elena-kagan-the-supreme-court-is-a-textualist-court-that-reasons-more-like-scalia-than-breyer> [<https://perma.cc/7GQR-PJ8N>].

<sup>181</sup> *Supra* Part III, Section B.

<sup>182</sup> *District of Columbia v. Heller*, 554 U.S. 570, 577–78 (2008) (“The Amendment’s prefatory clause announces a purpose, but does not limit or expand the scope of the second part, the operative clause.”).

similar circumstances.<sup>183</sup> In carving out an exception to the requirement that police issue *Miranda* warnings, the Court noted that “concern for public safety must be paramount to adherence to the literal language of the prophylactic rules.”<sup>184</sup>

### C. THE CONGRESSIONAL OPTION: CODIFYING THE EXCEPTION

Congress has repeatedly demonstrated a willingness to amend the Bank Robbery Act as needed.<sup>185</sup> An additional clarifying amendment on the attempt question has the potential to honor the majority’s policy consideration, while also respecting long-established principles of canonical statutory interpretation.<sup>186</sup> If lawmakers want attempted force or intimidation to be sufficient, as the majority asserts, then the hypothetical change suggested by the Seventh Circuit in *Thornton*— “[w]hoever attempts by force and violence or intimidation to take . . .”—would certainly do the trick.<sup>187</sup>

If Congress prefers to make the actual use of force or intimidation a necessary element, as the minority maintains, it could clarify the first paragraph of § 2113(a) by adding the following provision: “In order to sustain a conviction of attempted bank robbery, the government must show and prove actual use of force and violence, or intimidation.”

Arguably, it is our elected representatives who should be leading the charge when it comes to setting societal priorities like protecting innocent bystanders, not the courts.<sup>188</sup> Congress makes the laws and the courts “say what the law is.”<sup>189</sup> It follows then, that the courts should not be using policy considerations, valid or not, to obviate the will of Congress. As Hamilton stated, this is a recipe for “contradiction and confusion” not just with respect to § 2113(a), but any and all federal laws moving forward.<sup>190</sup>

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<sup>183</sup> *New York v. Quarles*, 467 U.S. 649, 655 (1984) (recognizing a “public safety” exception to the requirement that *Miranda* warnings be given before a suspect’s answers may be admitted into evidence).

<sup>184</sup> *Id.* at 653.

<sup>185</sup> *Supra* Part II.

<sup>186</sup> *United States v. Thornton*, 539 F.3d 741, 746–47 (7th Cir. 2008) (“In analyzing the first paragraph of § 2113(a), we ‘begin by examining the text.’”) (quoting *Carter v. United States*, 530 U.S. 255, 271 (2000)).

<sup>187</sup> *Id.* at 746.

<sup>188</sup> *See* U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”).

<sup>189</sup> *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

<sup>190</sup> THE FEDERALIST NO. 80, *supra* note 168.

For these reasons, and because a Supreme Court resolution would likely allow certain defendants who still pose a risk to escape liability, statutory amendment by Congress may be the best possible solution for all concerned.

#### V. CONCLUSION

The so-called split regarding the use of force requirement for attempted bank robbery under the first paragraph of 18 U.S.C. § 2113(a) is really an exception to the statutory rule, the triggering circumstances for which are (1) at least some foreknowledge of the crime by law enforcement, and (2) the corresponding opportunity for law enforcement to intervene before somebody gets hurt. This difference of opinion among the circuits has been repeatedly framed as a consequence of competing methods of statutory interpretation, but as this comment demonstrates, only one side—the minority—bothers to engage in any meaningful linguistic interpretation of the statute.<sup>191</sup> In fact, the majority has skipped the textual analysis altogether, has ignored Congress's prescribed definition of attempted bank robbery, and has substituted its own common-law definition of attempt harvested from the MPC. In holding that attempted force or intimidation is sufficient for a conviction, the majority has a valid policy consideration in mind—protecting innocent bystanders from harm—but in attempting to make this policy-driven exception the rule, the majority invites system-wide unpredictability and confusion related to the application of federal law.<sup>192</sup>

Given these circumstances, a valid policy concern at odds with the statutory text, and absent the granting of certiorari by the Supreme Court to either to interpret the statute or recognize the exception, Congress should amend the statute to clarify its position on the required elements of attempted bank robbery.

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<sup>191</sup> *Supra* Part III, Sections B and C.

<sup>192</sup> THE FEDERALIST NO. 10, *supra* note 168