

Good Faith in Partner Expulsions: Application of a Contract Law Paradigm

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I. INTRODUCTION

It is a central tenet of partnership law that partners are generally free to abandon the partnership at any time.¹ But may the partnership abandon them? The issue of when partners may expel their peers has recently arisen as an important one in partnership law, and one that has belied steady and fair treatment. The underlying statutes that govern partnerships do not give partners the right to expel.² The opportunity to take such action only exists if it is conferred in the partnership agreement.³ Moreover, expulsions pursuant to these agreements are only proper if undertaken in good faith.⁴

The interpretation of good faith has proven especially troublesome. Ousted partners have suggested that the term requires certain procedural and substantive safeguards.⁵ For instance, it is commonly claimed that partners were expelled in bad faith because they were not permitted to defend themselves (exemplifying a procedural objection) or because there was no legitimate business reason to let them go (a substantive complaint).⁶

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¹ UNIF. P'SHIP ACT § 31 (1914). Note, however, that if a partner leaves the partnership before the expiration of the partnership's term or the accomplishment of a specific undertaking, that person will be in breach of an agreement among the partners; *see id.* at § 31(2).

² *See* UNIF. P'SHIP ACT § 31(d) (1914); REVISED UNIF. P'SHIP ACT § 601(3) (1997).

³ UNIF. P'SHIP ACT § 31(d) (1914); REVISED UNIF. P'SHIP ACT § 601(3) (1997).

⁴ UNIF. P'SHIP ACT § 31(d) (1914); REVISED UNIF. P'SHIP ACT § 404(d) (1997) (addressing the good faith obligation that is generally applicable to partnership dealings).

⁵ *See* *Holman v. Coie*, 522 P.2d 515, 519 (Wash. Ct. App. 1974).

⁶ *See id.* at 519.

Courts have yet to settle on a satisfactory approach to contentions such as these. A workable framework, however, can be developed if the confines of partnership law doctrine are left behind; although partner expulsions are an issue unique to this area of law, the notion of good faith is not.⁷ This article suggests a framework that relies on the concept of “forgone opportunity analysis” developed for application to questions of good faith in contractual performance.⁸ This mode of analysis first looks at what motivated the expelling partners’ actions (e.g., why did they expel this partner?), and then asks whether acting for this purpose was an opportunity that the parties surrendered under the partnership agreement. This latter inquiry is determined by the ousted partner’s expectations at the time this individual agreed to the expulsion provision.⁹ If the remaining partners are exercising their discretion in a manner that falls outside the reasonable expectations of the ousted partner, then they are acting with bad faith.

The first part of this article describes the general statutory rules and common law principles that inform the analysis of partner expulsions. Next, this article addresses the specific approaches to the issue developed in the case law and analyzes why each is inadequate. Finally, a new framework is presented and its implications are explored.

II. GENERAL STATUTORY AND COMMON LAW SCHEME

State statutes form the basis of partnership law. These statutes are, for the most part, derived from one of two model codes: the Uniform Partnership Act (UPA) or the revised version of the Uniform Partnership Act (RUPA). Though RUPA departs from UPA in many respects, the statutes treat the topic of partner expulsion similarly: it is only permitted if the right is granted in the partnership agreement¹⁰ and undertaken in good faith. Thus, if several parties enter into a partnership, they generally will not have the power to expel. But if they so choose, they may include the right in their partnership agreement. Under the uniform acts, the exercise of the right will be respected so

⁷ The obligation to perform one’s contractual duties in good faith is well embedded in contract law; *see, e.g.*, U.C.C. § 1-304 (2003); RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

⁸ Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 *passim* (1980) (the seminal article presenting this theory).

⁹ *Id.*

¹⁰ UNIF. P’SHIP ACT § 31(d) (1914); REVISED UNIF. P’SHIP ACT § 601(3) (1997).

long as it is carried out in good faith and according to the terms of their agreement.

Determining whether a particular expulsion complies with the language guiding its use is fairly straightforward. But judging good faith has proven challenging, in part because there is no uniform definition of good faith or even agreement as to the source of the obligation.

Traditionally, good faith has been conceptualized as a component of the fiduciary duty of loyalty.¹¹ The duty of loyalty is seen as imposing dual requirements on partners. One serves to protect the business of the partnership. The other – the duty of good faith – protects the partners themselves. In order to protect the business of the partnership, partners are forbidden from putting their own interests ahead of the partnership.¹² Thus, as an example, they may not seize an opportunity for themselves that rightfully belongs to the partnership¹³ or take intellectual property from the business for use in their own personal endeavors.¹⁴ Under the duty of good faith, partners are required to treat each other with a degree of honesty and respect that goes beyond what is expected of parties interacting at arms-length.¹⁵

More recently, courts and scholars have begun to question whether this latter obligation is properly viewed as part of the duty of loyalty.¹⁶ Partners are bound by the duty of loyalty, they argue, because each is an agent of the partnership.¹⁷ As such, a partner is given authority over partnership business. For exam-

¹¹ *Newburger, Loeb & Co. v. Gross*, 563 F.2d 1057, 1078 (2d Cir. 1977) (defining the duty of loyalty as “utmost good faith, fairness, [and] loyalty”); *see also* Allan W. Vestal, *Law Partner Expulsions*, 55 WASH. & LEE L. REV. 1083, 1140 (1998) [hereinafter Vestal, *Expulsions*].

¹² HAROLD GILL REUSCHLEIN & WILLIAM A. GREGORY, *THE LAW OF AGENCY AND PARTNERSHIP* 278-79 (2d ed. 1990).

¹³ *See, e.g., Meinhard v. Salmon*, 164 N.E. 545, 548 (N.Y. 1928).

¹⁴ *See, e.g., Gibbs v. Breed, Abbott & Morgan*, 710 N.Y.S.2d 578, 582-83 (N.Y. App. Div. 2000).

¹⁵ Allan W. Vestal, *Fundamental Contractarian Error in the Revised Uniform Partnership Act of 1992*, 73 B.U. L. REV. 523, 526 (1993) (citing EUGENE A. GILMORE, *HANDBOOK ON THE LAW OF PARTNERSHIPS, INCLUDING LIMITED PARTNERSHIPS* 375 (1911) (“The duty of each partner to exercise toward the others the highest integrity and good faith is the very basis of their mutual rights in all partnership matters.”); *see* 2 ALAN R. BROMBERG & LARRY E. RIBSTEIN, *BROMBERG AND RIBSTEIN ON PARTNERSHIP* 6:146-47 (2005).

¹⁶ *See, e.g., Paula J. Dalley, The Law of Partner Expulsions: Fiduciary Duty and Good Faith*, 21 CARDOZO L. REV. 181, 183 (1999).

¹⁷ *Id.* at 189.

ple, any partner may bind the partnership to an agreement.¹⁸ In this relationship, unique potential for abuse exists: partners may take advantage of this position of trust to advance their own interests (e.g., by getting a kickback for choosing a certain vendor). And this is what the duty of loyalty forbids.

The duty of loyalty is unrelated to transactions between partners that do not involve one partner exercising control over the partnership business, because outside of this context, there is no special risk of exploitation. Since there is nothing exceptional about dealings between partners *inter se*, they should be treated like normal contracting parties. Such parties are bound by an obligation of good faith, which is read into every contract. Thus, according to this theory, partners should be bound by good faith as defined in contract law, but any higher duty arising out of the fiduciary relationship is ill-conceived.¹⁹

Turning to contract law precedent, however, does not offer much guidance on the standard for measuring whether a particular action is in good faith.²⁰ In fact, neither partnership nor contract cases have devised a consistent definition of the doctrine, and it has been no different in the limited context of partner expulsions.

III. EXPULSION CASE LAW

Cases have applied the duty of good faith to partner expulsions in myriad ways. At the most general level, however, courts have been fairly consistent in that they have viewed good faith from a fiduciary duty perspective²¹ (though some of these cases have included brief analyses of the contractual duty of good faith in addition to their fiduciary duty discussions).²²

The different approaches to analyzing good faith as a fiduciary duty can be grouped into three categories. Some cases set out a rule that good faith generally requires expulsion be justi-

¹⁸ UNIF. P'SHIP ACT § 9 (1914); REVISED UNIF. P'SHIP ACT §301 (1997).

¹⁹ Dalley, *supra* note 16, at 189-90.

²⁰ See E. Allan Farnsworth, *Good Faith in Contract Performance*, in GOOD FAITH AND FAULT IN CONTRACT LAW 153, 161-63 (Jack Beatson & Daniel Friedman eds., 1995) (discussing the different conceptualizations of the duty of good faith in contract law).

²¹ See, e.g., *Gibbs v. Breed, Abbott & Morgan*, 710 N.Y.S.2d 578, 581 (N.Y. App. Div. 2000) (partners are fiduciaries and as such have a duty of good faith toward one another); see also *Gigax v. Repka*, 615 N.E.2d 644, 649-50 (Ohio Ct. App. 1992) (holding the same).

²² See, e.g., *Holman v. Coie*, 522 P.2d 515, 523-24 (Wash. Ct. App. 1974).

fied by a legitimate business purpose.²³ Others follow a contrary reading of good faith: one that permits expulsion unless the remaining partners used the mechanism to wrongfully promote their own economic interests.²⁴ Finally, some follow no general rule at all; instead they look at each expulsion on a purely case-by-case basis.²⁵

None of the above perspectives present an adequate means of addressing good faith, and the results are likewise unsatisfying when courts analyze the concept as a contractual obligation.

A. Legitimate Business Purpose

In certain circumstances, courts have read the duty of good faith to generally require that expulsion be justified by a legitimate business purpose. One case that clearly embraces this approach is *Gigax v. Repka*.²⁶ In this case, the plaintiff, Robert Gigax, and two other individuals were shareholders and directors of a close corporation involved in the sewage treatment business.²⁷ Each of them also served as company employees, although none had an employment agreement.²⁸ Over plaintiff's fourteen year tenure, he held many positions, including six years as president.²⁹ Eventually, however, according to his fellow shareholders, his performance began to suffer, resulting in lower profits on projects to which he was assigned.³⁰ And so they let him go.³¹

Gigax brought suit and alleged that, in firing him, the other shareholders breached their fiduciary duties.³² Though the parties were technically involved in business together under the corporate form, the court turned to partnership law to consider this aspect of the case, finding partnership analysis appropriate because of the close resemblance between partnerships and close

²³ See, e.g., *Gigax*, 615 N.E.2d at 650.

²⁴ See *Holman*, 522 P.2d at 523.

²⁵ See *Winston & Strawn v. Nosal*, 664 N.E.2d 239, 243 (Ill. App. Ct. 1996).

²⁶ *Gigax*, 615 N.E.2d at 650; see also *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657, 663 (Mass. 1976) (holding that courts should weigh the legitimate business purpose involving an expulsion); *Cruz v. S. Dayton Urological Assoc., Inc.*, 700 N.E.2d 675, 679-80 (Ohio Ct. App. 1997) (holding the same).

²⁷ *Gigax*, 615 N.E.2d at 646.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² See *id.* at 646-47.

corporations.³³ From partnership law, the court borrowed the following proposition: “[t]he fiduciary duty [including the duty of good faith] which the partners owe each other requires that the removal of a partner be based on legitimate business reasons.”³⁴ The court, in applying this rule, found that the partners did not prove that there was a legitimate business reason to fire the plaintiff because the decline in profitability that arose in connection with the plaintiff’s projects was not necessarily his fault.³⁵

Since this case did not involve contractual provisions relating to expulsion, the court was able to consider good faith in the abstract. It was not forced to think about the impact of specific contractual language with respect to the topic. For instance, it did not address whether cause should be required despite express language specifying that expulsion could be legitimately undertaken without it.

Because the court did not look at good faith in the context of specific language on the topic, the rule it applied – that good faith requires cause – is overly simplistic. Partnership law is unique in that it allows the partners to control many of the terms of their relationship through agreement; the statutory rules are for the most part merely default provisions.³⁶ There are, however, some rules that cannot be contracted out of (e.g., partners can not agree to completely eliminate fiduciary duties).³⁷ Which rules these should be is a considerable topic of debate, a debate that springs from a basic tension in the law of partnership.³⁸ On the one hand, the law is designed to be flexible, allowing numerous types of business relationships in order to fit the parties’ needs. On the other hand, there are certain basic attributes of the partnership relationship that come with being a partner, and as such cannot be altered. When a court simply says that a legitimate business purpose is required, it is ignoring this tension, failing to consider whether the cause requirement is something the part-

³³ *Gigax*, 615 N.E.2d at 648.

³⁴ *Id.* at 650.

³⁵ *Id.*

³⁶ See, e.g., REVISED UNIF. P’SHIP ACT § 103 (1997) (specifying those areas where the partnership agreement may not deviate from the Act).

³⁷ See REVISED UNIF. P’SHIP ACT § 103(b)(3).

³⁸ See, e.g., J. Dennis Hynes, *Freedom of Contract, Fiduciary Duties, and Partnerships: The Bargain Principle and the Law of Agency*, 54 WASH. & LEE L. REV. 439, 454 (1997) (arguing that freedom of contract allows the waiver of a fiduciary duty). But see Allan W. Vestal, “Assume a Rather Large Boat . . .”: *The Mess We Have Made of Partnership Law*, 54 WASH. & LEE L. REV. 487, 530 (1997) (arguing that fiduciary duties are assumptions of the common law and therefore cannot be waived).

ners can dispose of when setting up the terms of their relationship.

One commentator has undertaken a closer examination of the wisdom of requiring cause in partner expulsions, in the process developing a theory that takes into account what the parties have agreed to with respect to the topic.³⁹ According to this mode of analysis, a cause requirement should be imposed only when “faithful to an agreed upon purpose and consistent with the justified expectations of the partners at formation, or when the circumstances make such a requirement a tool for achieving fairness.”⁴⁰ Good faith would not require expulsion be justified by a legitimate business purpose if the partnership agreement specifically provided otherwise.⁴¹

This analysis is a step forward in that it acknowledges that a proper interpretation of the duty of good faith must look to the partnership agreement and the partner’s expectations. This framework, however, is also imperfect. First, it gives little guidance to the courts about how to determine whether cause should be implied when the agreement is silent. As quoted above, in order to make this judgment, the test relies specifically on “fairness” – a particularly ambiguous word in the law.

Additionally, and more importantly, to look at good faith in terms of whether it requires cause is only part of the necessary analysis. In each case, the partner will have been expelled for some reason. As explored in more detail below, the important question is whether this motivation was proper.⁴² The parties’ intentions as to cause are only relevant to the extent they inform this inquiry. For instance, if a partnership agreement explicitly states that expulsion need not be “for cause,” then this supports an argument that expulsion for minor misconduct is appropriate. But the key question is whether the particular motivation for this expulsion was acceptable. The parties’ expectations concerning the motivation at issue are most telling; their thinking as to cause is one of many pieces of evidence that may shed light on this issue.

The focus on causation is therefore inadequate. The rule explored below, which defines bad faith as precluding certain financially-motivated ousters, is also unsound.

³⁹ See Vestal, *Expulsions*, *supra* note 11.

⁴⁰ Vestal, *Expulsions*, *supra* note 11, at 1134.

⁴¹ Vestal, *Expulsions*, *supra* note 11, at 1135.

⁴² See *infra* Part IV. FORGONE OPPORTUNITY ANALYSIS.

B. *Holman* and its Progeny: Economic Self-Gain and Contractual Plain Meaning

Under economic self-gain analysis, good faith is read only to require that partners not use expulsion to misappropriate property rightfully belonging to the excluded partner. The seminal case is *Holman v. Coie*.⁴³ Here, two brothers, William and Francis Holman, were partners of a 22-member law firm in Washington state.⁴⁴ The partnership agreement to which they were parties provided for expulsion.⁴⁵ The applicable provision, however, was quite terse, permitting expulsion by majority vote of the firm's executive committee, but not specifying what justifications would suffice.⁴⁶

Pursuant to this provision, the executive committee ejected the Holman brothers.⁴⁷ The committee members gave no reason for the expulsion. They did, however, present several possible justifications to the court. In sum, the other partners claimed that the Holmans had disrupted the collegiality of partnership meetings, and that Francis Holman, through his actions as state senator, had angered a major client.⁴⁸

The Holmans challenged the expulsion, alleging they were treated with bad faith because they were not provided with notice, reasons for the action or an opportunity to be heard.⁴⁹ In analyzing these arguments, the court acknowledged that as fiduciaries, partners owe each other a duty of good faith, but said the obligation is only violated when expulsion is used to "gain [a] business or property advantage to the remaining partners."⁵⁰ The *Holman* court found that this was not the case, and therefore the Holmans' expulsion was in good faith.⁵¹

The court, however, did not end its analysis there. It also considered whether the expulsion violated the contractual duty of good faith. This doctrine, according to the court, is used to help interpret contracts.⁵² Since, in the court's eyes, it was "clear from reading the agreement" that expulsion without cause, notice or an opportunity to be heard was a distinct possibility, it found it

⁴³ *Holman v. Coie*, 522 P.2d 515 (Wash. Ct. App. 1974).

⁴⁴ *Id.* at 517, 519.

⁴⁵ *Id.* at 517.

⁴⁶ *Id.*

⁴⁷ *Id.* at 517-19.

⁴⁸ *Id.* at 517-18.

⁴⁹ *Holman*, 522 P.2d at 519.

⁵⁰ *Id.* at 523.

⁵¹ *Id.* at 524.

⁵² *Id.* at 523-24.

unnecessary to appeal to the obligation of good faith for guidance.⁵³ Therefore, this doctrine could not lend support to the plaintiffs' claims. The court found that the agreement unambiguously denied the procedural protections claimed.⁵⁴

Holman's approaches to good faith – both its fiduciary and contractual analyses – have been widely adopted.⁵⁵ Its fiduciary duty rule, which restricts good faith to economic predation, has been subject to two competing interpretations. Some courts have interpreted *Holman* as forbidding expulsion if carried out simply in order to increase the partnership share of the remaining partners. In *Heller v. Pillsbury Madison & Sutro*, a laterally-hired law firm partner repeatedly embarrassed the partnership and was therefore expelled.⁵⁶ When the expelled partner challenged the expulsion on good faith grounds, the court found that, as fiduciaries, “partners cannot expel another partner for self-gain.”⁵⁷ The court, however, concluded that this did not occur: “[w]hile [this partner’s] expulsion from the firm increased all Pillsbury partners’ profit shares, given the large number of partners . . . and the fact that Heller was earning toward the lower end of the firm’s compensation range, the increase was insubstantial.”⁵⁸ Moreover, the court held that the evidence indicated that the small increase in profits-per-partner was not the true motivation; rather, the partners had lost faith in this individual.⁵⁹ The court concluded that expulsion for this latter rationale was proper.⁶⁰

In a similar case, *Cadwalader, Wickersham & Taft v. Beasley*, Beasley, a partner in the law firm’s Palm Beach office, was expelled.⁶¹ At the time, the entire firm was struggling and the partnership was undertaking measures that would allow it to

⁵³ *Id.* at 524.

⁵⁴ *Id.* at 521 (“In this case the express language of the partnership agreement itself must be controlling; that language clearly does not contain any of the [procedural protection] requirements plaintiffs now seek to assert as impliedly applicable. Where the terms of a contract, taken as a whole, are plain and unambiguous, the meaning is to be deduced from the contract alone.”).

⁵⁵ *See, e.g., Heller v. Pillsbury Madison & Sutro*, 58 Cal. Rptr. 2d 336, 347 (Cal. Ct. App. 1996).

⁵⁶ *Id.* at 339-41.

⁵⁷ *Id.* at 348 (quoting *Bohatch v. Butler & Binion*, 905 S.W.2d 597, 602 (Tex. App. 1995)).

⁵⁸ *Id.* at 348 (footnotes omitted).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Cadwalader, Wickersham & Taft v. Beasley*, 728 So. 2d 253, 256 (Fla. Dist. Ct. App. 1998).

remain competitive.⁶² Since Beasley's branch office was unprofitable,⁶³ the firm decided to close it, rendering Beasley's employment unnecessary.⁶⁴ The court found his expulsion to be a breach of the duty of good faith because its primary purpose was to increase the profits allocable to the remaining partners.⁶⁵

The view expressed above is more favorable to the expelled partner than the alternative interpretation of the *Holman* rule. Under the latter approach, expulsion in order to increase profits-per-partner would be acceptable; the only restriction on using this mechanism is that the ousted partner must be fairly compensated for his or her partnership interest when expelled. For example, in *Lawlis v. Kightlinger & Gray*, the firm expelled a partner, Gerald Lawlis, under an expulsion provision that merely stated that "[a] two-thirds (2/3) majority of the Senior Partners, at any time, may expel any partner from the partnership upon such terms and conditions as set by said Senior Partners."⁶⁶ The court, in rejecting Lawlis's argument that his expulsion violated good faith, held that "expelling partners act in 'good faith' regardless of motivation if that act does not cause a wrongful withholding of money or property legally due the expelled partner at the time he is expelled."⁶⁷ Since the severance package in this case was "compassionate," rather than "greedy," there was no evidence that Lawlis was treated wrongfully.⁶⁸

In sum, *Holman's* focus on economic predation has been the subject of two conflicting interpretations: one finds bad faith when expulsion is carried out in order to increase the remaining partners' profit share; the other would strike down use of this mechanism only if the ousted partner is not given a fair buy-out.

To say *Holman* stands for the proposition that partners may not expel for self-gain is an oversimplification. If the rule was interpreted this way, then there would be practically no permissible rationale for its use. In *Holman*, for instance, the firm's main

⁶² *Id.* at 255.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Beasley v. Cadwalader, Wickersham & Taft*, No. CL-94-8646 "AJ," 1996 WL 43877, at *6 (Fl. Cir. Ct. July 23, 1996), *aff'd in part, rev'd in part*, *Cadwalader, Wickersham & Taft v. Beasley*, 728 So. 2d 253 (Fla. Dist. Ct. App. 1998).

⁶⁶ *Lawlis v. Kightlinger & Gray*, 562 N.E.2d 435, 439-40 (Ind. Ct. App. 1990) (emphasis omitted).

⁶⁷ *Id.* at 443.

⁶⁸ *Id.*

client clearly wanted Francis Holman out.⁶⁹ Expulsion to please this client could be interpreted as motivated by self-gain – by getting rid of Holman, the partners help the firm business and indirectly their own personal finances as well. Yet, expulsion in order to save the firm from losing a major client was permitted in *Holman*, and is clearly acceptable under either of the interpretations of the rule discussed above.

No matter how *Holman* is construed, its rule is imperfect. Part of the problem is that the court employed overly simplistic logic in fashioning its rule. *Holman* begins with the premise that fiduciary duties prohibit partners from taking personal advantage of the partnership.⁷⁰ It then recognizes that in the expulsion context there is no claim that the partnership is being abused – the ones claiming malfeasance are the ousted partners.⁷¹ But it presumes that this does nothing to change the focus of the inquiry. Instead, when considering whether expulsion comports with the duty of good faith, it focuses on the same issue mentioned above: whether the remaining partners gained any personal advantage.⁷²

This reading of the fiduciary duty of loyalty fails to consider the full range of conduct to which this doctrine traditionally applies. As discussed above, this obligation encompasses two components.⁷³ The first requires that the partners not exploit the partnership; the second requires that they treat each other with good faith.⁷⁴ Each warrants independent analysis because each implicates unique issues. However, the court in *Holman* does not acknowledge the distinction, and this leads to an under-inclusive rule.

Holman only forbids expulsions where partners seek wrongful financial gain.⁷⁵ This concept is too restrictive. There are many non-financial motivations that could very well constitute bad faith. What if a partner is expelled out of personal spite? Or because of his or her race or gender? It seems that even the most restrictive definition of good faith would forbid expulsion if an

⁶⁹ *Holman v. Coie*, 522 P.2d 515, 518 (Wash. Ct. App. 1974).

⁷⁰ *Id.* at 523.

⁷¹ *See id.*

⁷² *Id.*

⁷³ *See supra* Part II. GENERAL STATUTORY AND COMMON LAW SCHEME.

⁷⁴ *See supra* Part II. GENERAL STATUTORY AND COMMON LAW SCHEME.

⁷⁵ *See supra* Part III. B. *Holman* and its Progeny: Economic Self-Gain and Contractual Plain Meaning.

ousted partner could show such motivations.⁷⁶ The *Holman* rule, however, would allow ejections based on these and other similarly wrongful motives, and this is the central flaw in *Holman*'s analysis of good faith as a fiduciary duty.

The *Holman* court's analysis of good faith as a contractual imperative has also been widely followed⁷⁷ and is also lacking. As discussed above, *Holman* found that expulsion without giving a reason and without affording any procedural protections was clearly permitted by a partnership agreement that made no mention of these topics.⁷⁸ The court believed that there was no reason to look at whether good faith would require these protections, reading the agreement's silence with respect to these issues as an unambiguous denial of such safeguards.⁷⁹ Other cases looking at the contractual duty of good faith in similar circumstances have also restricted their analyses to the partnership agreement itself. In *Heller*, for example, the court found that an expulsion provision that gave little detail beyond authorizing its use unambiguously denied the procedural and substantive safeguards that the plaintiff sought, rendering the duty of good faith irrelevant.⁸⁰

Though the framework for analyzing contract-based good faith adopted in *Holman* is in line with precedent, its application is superficial. The approach is correct when it recognizes that a court generally looks to good faith in trying to determine the parties' obligations when the contract is incomplete or ambiguous.⁸¹ But it is overly simplistic for courts to say that the provision at issue is unambiguous with respect to the procedural and substantive safeguards under consideration just because an agreement is silent regarding these topics. Failure to mention these issues makes the contract ambiguous, leaving the court to deter-

⁷⁶ See, e.g., Leonard M. Baynes, *Falling Through the Cracks: Race and Corporate Law Firms*, 77 ST. JOHN'S L. REV. 785, 830-31 (2003) (arguing that partner fiduciary duties should include nondiscrimination principles).

⁷⁷ See, e.g., *Heller v. Pillsbury Madison & Sutro*, 58 Cal. Rptr. 2d 336, 347 (Cal. Ct. App. 1996).

⁷⁸ See *supra* Part III. B. *Holman* and its Progeny: Economic Self-Gain and Contractual Plain Meaning.

⁷⁹ See *supra* Part III. B. *Holman* and its Progeny: Economic Self-Gain and Contractual Plain Meaning.

⁸⁰ *Heller*, 58 Cal. Rptr. 2d at 347.

⁸¹ See, e.g., *Tymshare, Inc. v. Covell*, 727 F.2d 1145, 1152 (D.C. Cir. 1984) (noting the the significance of the doctrine of good faith in contract law is "in implying terms in the agreement") (quoting E. Allan Farnsworth, *Good Faith Performance and Commercial Reasonableness under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666, 670 (1963)).

mine whether – pursuant to the duty of good faith – these protections should be implied.

Holman's approach to both a status-based duty of good faith and its means of addressing allegations based on the contractual obligation have been widely followed. Despite the case's broad following, however, its does not appear to present an effective framework for addressing these issues.

C. Case-by-Case Analysis

Both approaches toward the fiduciary duty of good faith discussed above analyze the problem in two steps. First, each sets out a rule based on a conception of what the substance of the duty actually is. Second, each looks to see whether the expelling partners' actions violate its rule. In *Gigax*, for example, the court set out the general rule that expulsions require a legitimate business purpose;⁸² then, the court held that the duty of good faith was violated because the plaintiff was not expelled for a good reason.⁸³ In contrast, *Holman* set out a rule that good faith precludes only economic predation.⁸⁴ The *Holman* court then held that the good faith requirement had been met because there was no evidence of such misconduct.⁸⁵

The next group of cases does not attempt to formulate a rule of general application and then apply it to the facts. Instead, the courts simply apply the amorphous doctrine of good faith to the circumstances of the case and make their decisions. One example is *Winston & Strawn v. Nosal*.⁸⁶ In this case, Chester Nosal was expelled from his position as a partner in his law firm.⁸⁷ He claimed he was ejected for his repeated requests for partnership records that, if turned over, would have revealed fraud by certain partners.⁸⁸ The remaining partners contended otherwise. They argued that he "was outplaced because his interest in building a two-pronged tax and international trade practice was incompatible with the interests and resources of the firm, and because he had engaged in 'disturbing' conduct."⁸⁹ The court found that if

⁸² *Gigax v. Repka*, 615 N.E.2d 644, 648 (Ohio Ct. App. 1992) (citing *Crosby v. Beam*, 548 N.E.2d 217, 221 (Ohio 1989)).

⁸³ *Id.* at 650.

⁸⁴ *Holman v. Coie*, 522 P.2d 515, 523-24 (Wash. Ct. App. 1974).

⁸⁵ *Id.* at 524.

⁸⁶ *Winston & Strawn v. Nosal*, 664 N.E.2d 239, 243-45 (Ill. App. Ct. 1996).

⁸⁷ *Id.* at 240.

⁸⁸ *Id.* at 243.

⁸⁹ *Id.* at 244.

Nosal's version was the more accurate, then his expulsion was in bad faith.⁹⁰ It made no attempt to explain its ruling by anything more specific than the fiduciary duty of good faith.

Another case that simply relied on the duty of good faith, without further definition, was *Bohatch v. Butler & Binion*.⁹¹ Colette Bohatch had recently been promoted to partner in her law firm.⁹² As a partner, she began receiving reports detailing the number of hours each attorney billed.⁹³ Based on her review, she became suspicious that the managing partner in her small branch office was overbilling clients.⁹⁴ She reported this to the firm's managing partner, who conducted an investigation.⁹⁵ This investigation showed that Bohatch's contentions were incorrect.⁹⁶

Shortly after this episode, Bohatch was expelled.⁹⁷ She claimed it was for whistle-blowing;⁹⁸ the firm claimed it was because her allegations had created such a schism in her office that it was not feasible for her to continue with the firm.⁹⁹ However, the *Bohatch* court did not choose between these two rationales because under its view expulsion was justified even if the facts were read to support Bohatch's theory that her expulsion was retaliatory. The judge reasoned simply that her expulsion "for reporting suspected overbilling by another partner" was permissible.¹⁰⁰

Nosal and *Bohatch* illustrate the central problem with the case-by-case approach. When courts simply jump from the duty of good faith to a holding on particular facts, the law is unpredictable. In fact, *Nosal* and *Bohatch* are completely at odds with each other. In both cases, the ejected partners were whistleblowers. In *Nosal*, the ejected partner was attempting to gain evidence of suspected misconduct before formally reporting it;¹⁰¹ in *Bohatch*, the ejected partner reported the suspected misconduct

⁹⁰ *Id.* at 246 (noting that there is a triable issue of fact regarding Nosal's expulsion).

⁹¹ *Bohatch v. Butler & Binion*, 977 S.W.2d 543 (Tex. 1998).

⁹² *Id.* at 544.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Bohatch*, 977 S.W.2d at 544-45.

⁹⁸ *Id.* at 546.

⁹⁹ *Id.* at 546-47 (discussing court's concern regarding the fundamental schism that may develop once one partner has accused another of misconduct).

¹⁰⁰ *Id.* at 547.

¹⁰¹ *Winston & Strawn v. Nosal*, 664 N.E.2d 239, 243-44 (Ill. App. Ct. 1996).

prior to his expulsion.¹⁰² The *Nosal* court found that a triable issue of fact existed as to whether the expulsion to prevent the exposure of information would be violative,¹⁰³ but in *Bohatch* expulsion as retaliation was permissible.¹⁰⁴ Lawyers should be able to guide their clients as to when expulsion is allowable under the law. The precedent created by applying good faith without a framework frustrates this task.¹⁰⁵

Moreover, the *Bohatch* result is highly questionable. The duty of good faith should prevent partners from using expulsion to retaliate against another partner for seeking to uncover and address abuse within the partnership. If courts permit expulsion based on retaliation, it is hard to see what the duty of good faith actually forbids. To apply the doctrine in this manner seems to render it virtually meaningless.¹⁰⁶

Bohatch also runs counter to public policy. Self-policing is highly prized in the legal profession – so much so that the attorney professional conduct rules actually require that attorneys report unethical behavior.¹⁰⁷ Yet, *Bohatch* creates exactly the opposite incentive by permitting partners to use expulsion as retaliation for whistleblowing.¹⁰⁸ Now, partners must decide whether to risk their jobs by reporting the conduct or to remain silent and risk violating the attorney conduct rules. When faced

¹⁰² *Bohatch*, 977 S.W.2d at 544-45.

¹⁰³ *Nosal*, 664 N.E.2d at 246.

¹⁰⁴ *Bohatch*, 977 S.W.2d at 547.

¹⁰⁵ Case-by-case analysis of good faith has attracted debate in the contracts arena as well. One commentator argued that it is from this approach that the doctrine garners its definition. In an influential article regarding this topic, Professor Robert S. Summers contends that good faith “is best understood as an ‘excluder’ – it is a phrase which has no general meaning or meanings of its own, but which serves to exclude many heterogeneous forms of bad faith.” Robert S. Summers, “Good Faith” in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 196 (1968) (footnote omitted). This analysis has spurned much controversy. See, e.g., Michael G. Bridge, *Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?*, 9 CAN. BUS. L. J. 385, 398 (1984) (arguing that Summers’s theory “seems tantamount to saying that the good faith duty is breached whenever a judge decides that it has been breached”).

¹⁰⁶ Others have also questioned the wisdom of the *Bohatch* decision. See, e.g., Margaret Kline Kirkpatrick, Comment, *Partners Dumping Partners: Business Before Ethics in Bohatch v. Butler & Binion*, 83 MINN. L. REV. 1767 (1999).

¹⁰⁷ See, e.g., MODEL RULES OF PROF’L CONDUCT R. 8.3 (2002).

¹⁰⁸ See *Bohatch*, 977 S.W.2d at 561 (Spector, J., dissenting) (arguing that “retaliation against a partner who tries in good faith to correct or report perceived misconduct virtually assures that others will not take these appropriate steps in the future”).

with this choice, many lawyers will probably remain silent. Since the *Bohatch* rule makes the prospect of reporting suspected misconduct much more undesirable, it undermines the policy goal of having lawyers monitor themselves.

As the varied results and methodologies of the above cases illustrate, the law of partner expulsion is unsettled. The statutes that govern much of partnership law have left this region alone, providing that expulsion is permissible if provided for in the partnership agreement and executed in good faith.¹⁰⁹ Where courts differ is in how good faith is conceptualized and applied. Good faith, by its very nature, is a tricky phrase to define, but some courts have attempted to give this amorphous doctrine some shape in the expulsion context. One interpretation holds that good faith generally requires that expulsion be justified by legitimate business reasons;¹¹⁰ another reading is nearly the opposite – that good faith only prevents economic predation.¹¹¹ Other cases have not been so bold. Instead, they have simply deemed a particular action to either violate or comply with the duty of good faith without giving an explanation as to how their results fit into a systematic analysis of the doctrine.¹¹²

Each of these approaches has its own flaws. The means of analysis explored below addresses these shortcomings with a contract law framework that incorporates partnership law concepts.

IV. FORGONE OPPORTUNITY ANALYSIS

The difficult issue that arises in partner expulsions is whether the ousted partner was let go in good faith. This inquiry has proven so troublesome because there is no well-accepted framework for analyzing good faith in the partnership context.¹¹³ Traditional partnership law provides that certain actions permissible in an arms-length relationship are not appropriate when partners are dealing with each other;¹¹⁴ it just does not explain

¹⁰⁹ See, e.g., UNIF. P'SHIP ACT § 31(d) (1914); REVISED UNIF. P'SHIP ACT § 601(3) (1997).

¹¹⁰ See, e.g., *Gigax v. Repka*, 615 N.E.2d 644, 650 (Ohio Ct. App. 1992).

¹¹¹ See, e.g., *Holman v. Coie*, 522 P.2d 515, 523 (Wash. Ct. App. 1974).

¹¹² See, e.g., *Winston & Strawn v. Nosal*, 644 N.E.2d 239, 246 (Ill. App. Ct. 1996); *Bohatch v. Butler & Binion*, 977 S.W.2d 543, 547 (Tex. 1998).

¹¹³ See *Dalley*, *supra* note 16, at 183 (“Unfortunately, neither litigants nor courts show a clear understanding of how fiduciary duties and the implied covenant of good faith apply to partner expulsions. Moreover, many courts are uncertain about the differences between fiduciary duty and good faith.”).

¹¹⁴ See REVISED UNIF. P'SHIP ACT § 404 (1997).

which activities these are.¹¹⁵

Good faith has been explored more thoroughly in the contracts arena, where “forgone opportunity analysis” has been posited as a means of analyzing whether one party’s performance pursuant to a contract meets this standard.¹¹⁶ Issues of good faith performance arise in connection with contracts that give one party discretion.¹¹⁷ For instance, in a requirements contract, the buyer agrees to purchase all it requires of a particular product from a certain seller. This type of contract gives the buyer discretion over how much to purchase. Contract law requires that this decision be made in good faith.¹¹⁸ In order to analyze whether this duty has been met, forgone opportunity analysis considers whether the discretion-exercising party used its discretion “to recapture opportunities forgone upon contracting.”¹¹⁹

The approach is two-pronged. The first prong asks what the discretion-exercising party’s intent was when acting.¹²⁰ This is a subjective inquiry into why the party actually exercised discretion in the manner that he or she did.¹²¹ The second prong then asks whether acting for this purpose was an opportunity forgone at the time of the contract.¹²² This analysis is objective, “focusing on the expectations of reasonable persons in the position of the dependent parties.”¹²³ If a dependent party—one subject to the other’s use of discretion—reasonably believed that the other party gave up the freedom to act for a certain purpose, then acting for that purpose is a forgone opportunity, and therefore bad faith.¹²⁴

¹¹⁵See, e.g., UNIF. P’SHIP ACT § 31(d) (1914); REVISED UNIF. P’SHIP ACT § 601(3) (1997).

¹¹⁶See, e.g., Burton, *supra* note 8 *passim*.

¹¹⁷See Burton, *supra* note 8, at 369.

¹¹⁸See U.C.C. § 1-304 (2003); RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

¹¹⁹See Burton, *supra* note 8, at 373.

¹²⁰Burton, *supra* note 8, at 391.

¹²¹See Burton, *supra* note 8, at 391.

¹²²Burton, *supra* note 8, at 390-91.

¹²³Burton, *supra* note 8, at 391.

¹²⁴Notice that the inquiry focuses on expectations at the time of the agreement. See Burton, *supra* note 8, at 391. Arguably, expectations evolve over time, and it is the dependent party’s viewpoint regarding the parameters of the other party’s discretion when that discretion was exercised that should matter. This, however, would not be a conceptually sound approach. Expectations at the time of the parties’ agreement are evidence regarding what the parties intended in their contract. In a way, therefore, the court is looking to expectations in order to imply terms into the agreement. It would not be fair to hold the discretion-

The requirements contract situation illustrates this test. In one case, a buyer was involved in the business of manufacturing a certain type of fertilizer for resale.¹²⁵ The buyer contracted with the seller to buy all it required of one of the raw materials that went into the finished product for a fixed price over the five year term of the contract.¹²⁶ When fluctuations in the market price of the fertilizer's raw materials rendered this business unprofitable, the buyer temporarily gave it up.¹²⁷ Then, the buyer simply began purchasing already-manufactured fertilizer and reselling it to customers.¹²⁸ The buyer alleged that this conduct was proper because, over the period when the buyer did not purchase any of the seller's products, the buyer was still purchasing the business's requirements – zero.¹²⁹

The court disagreed, finding that the contract did not allow discretion to be exercised in this manner.¹³⁰ This result is consistent with forgone opportunity analysis. Under this approach, the first step is to determine the buyer's expectations.¹³¹ Here, the buyer stopped purchasing when market fluctuations involving the seller's product, as well as other raw materials used in the buyer's manufacturing process, made the buyer's method of doing business unprofitable.¹³² Since purchasing under the contract with the seller was not advantageous, the buyer found an alternative.¹³³

The next question is whether the opportunity to completely alter the business in order to avoid unfavorable market fluctuations was given up in the contract.¹³⁴ This is determined by looking at the seller's reasonable expectations.¹³⁵ Here, it appears that the seller would expect that the buyer had given up this opportunity. The seller would anticipate the buyer altering the

exercising party to the recently formed expectations of the dependent party, because these expectations would not serve to interpret an agreement among the parties.

¹²⁵ See *Loudenback Fertilizer Co. v. Tenn. Phosphate Co.*, 121 F. 298, 299 (6th Cir. 1903). Burton uses this case to demonstrate forgone opportunity analysis in his article on the topic. Burton, *supra* note 8, at 395-96.

¹²⁶ *Loudenback*, 121 F. at 298-99.

¹²⁷ *Id.* at 299.

¹²⁸ *Id.*

¹²⁹ *Id.* at 301.

¹³⁰ *Id.* at 302-03.

¹³¹ See Burton, *supra* note 8, at 391.

¹³² *Loudenback*, 121 F. at 302.

¹³³ *Loudenback*, 121 F. at 302.

¹³⁴ See Burton, *supra* note 8, at 390-91.

¹³⁵ See Burton, *supra* note 8, at 390-91.

amount purchased as the needs of its business dictated in the ordinary course; however, the seller would not expect that the business would be totally abandoned if it became commercially disadvantageous.¹³⁶ Thus, the buyer's exercise of discretion in this manner would constitute bad faith.

The same analysis can be applied in the partner expulsion context. The partnership agreement can be viewed as a contract that grants discretion to one of the parties. Just as a buyer in a requirements contract can decide how much to buy, the members of a partnership can decide when and how to expel.¹³⁷ Like the buyer's purchasing decisions, the partnership's expulsion-related decisions must be made in good faith.¹³⁸

These partnership decisions have been challenged on both procedural and substantive grounds. As to the former, plaintiffs have claimed good faith violations when they were not provided with protections reminiscent of due-process, such as the opportunity to be heard before ouster.¹³⁹ Challenges with respect to the latter, on the other hand, focus on the argument that the expulsion decision was made for an improper reason.¹⁴⁰ Forgone opportunity analysis can equitably handle both challenges. According to this methodology, the first step is to look at the motives in connection with the expulsion, and the next is to determine whether acting for those purposes was an opportunity forgone in the partnership agreement.

A. First Element – Subjective Intent of the Expelling Partners

In analyzing the first element, courts should look at evidence relevant to determining the rationale for a particular exercise of discretion relating to expulsion. In *Nosal*, for instance, the court considered much evidence bearing on whether the plaintiff was ousted for business reasons (as the partnership claimed) or to prevent him from uncovering wrongful conduct (the ousted part-

¹³⁶ *Loudenback*, 121 F. at 303.

¹³⁷ UNIF. P'SHIP ACT § 31(d) (1914) ("Dissolution is caused . . . [b]y the expulsion of any partner from the business bona fide in accordance with such a power conferred by the agreement between the partners . . ."); REVISED UNIF. P'SHIP ACT § 601(3) (1997).

¹³⁸ UNIF. P'SHIP ACT § 31(d) (1914); REVISED UNIF. P'SHIP ACT § 404(d) (1997) ("A partner shall discharge the duties to the partnership and the other partners under this [Act] or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing.")

¹³⁹ *See, e.g., Holman v. Coie*, 522 P.2d 515, 521 (Wash. Ct. App. 1974).

¹⁴⁰ *See, e.g., Gigax v. Repka*, 615 N.E.2d 644, 650 (Ohio Ct. App. 1992).

ner's assertion).¹⁴¹

The court cited little that supported the law firm's claim, but found much evidence to suggest Nosal was let go for the reasons he described. In the months preceding expulsion, the other partners praised Nosal's work-product: they informed him that his "contribution to the firm had exceeded projections" and awarded him "increased compensation."¹⁴² All of this suggests that a failure to contribute to the value of the business was not to blame for his ejection. On the other hand, the alternate theory – that his expulsion resulted from his repeated efforts to obtain information about the firm's finances in order to uncover suspected fraud – looked especially compelling in light of the following: Nosal was expelled immediately after threatening the partner he suspected of fraud with a lawsuit related to his rights to inspect firm books.¹⁴³ That partner was "instrumental" in orchestrating Nosal's expulsion, and subsequent review revealed a "fraudulent billing scheme" that Nosal would have likely uncovered if he had not been denied proper access to the books.¹⁴⁴ This type of evidence is exactly what courts should look to when scrutinizing the reasoning behind a particular expulsion.

Moreover, the analysis should still focus on subjective intent even if the ousted partner is not alleging bad faith for why he was expelled, but for how. The key question here is what motivated the partnership to overlook procedural protections. For instance, in *VGS, Inc. v. Castiel*, two members of a limited liability company conspired to reduce the ownership percentage of the third member (and thereby oust this person from control) by voting to merge the LLC into a corporation.¹⁴⁵ In order for their plan to work, they had to do so without giving the remaining member notice of the transaction.¹⁴⁶ The court found that in this situation, the failure to provide notice was bad faith.¹⁴⁷ Under the applicable LLC statute and the company's operating agreement, notice was not required.¹⁴⁸ However, the court found this irrelevant because in this situation, failure to give notice was for the improper purpose of surreptitiously depriving a co-owner of

¹⁴¹ *Winston & Strawn v. Nosal*, 664 N.E.2d 239, 243-44 (Ill. App. Ct. 1996).

¹⁴² *Id.* at 244.

¹⁴³ *Id.* at 243-44.

¹⁴⁴ *Id.* at 245-46.

¹⁴⁵ *VGS, Inc. v. Castiel*, No. C.A. 17995, 2000 WL 1277372, at *1 (Del. Ch. Aug. 31, 2000).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at *4.

his rightful share.¹⁴⁹ As this case illustrates, the motive for denying procedural protections is highly probative of good faith.¹⁵⁰ Once the motivations have been uncovered, the next question is whether actions so motivated were within the reasonable expectations of the ousted partner.

B. Second Element – Reasonable Expectations of the Expelled Partner

As discussed above, plaintiffs challenge expulsion based on substantive and procedural grounds. When the challenge is substantive, the first element resolves the question of what the grounds for expulsion actually were. Once this question is answered, the inquiry becomes whether using expulsion for this purpose is an attempt to recapture a forgone opportunity. This is the case if it appears that the expelled partner would not have reasonably expected the partners to oust him for the reason uncovered above.

Different reasons for expulsions warrant different analyses. If expulsion is found to be undertaken for a purpose that violates public policy, it should automatically be viewed as contrary to the ousted partner's expectations. But if the motivation cannot be characterized as such, then there are many pieces of evidence to which a court can turn in order to determine how to classify the partnership's actions.

1. Expulsion in Violation of Public Policy

Based on public policy, there are certain reasons an employee cannot be terminated. For example, federal statutes protect an employee from firing based on race, gender or religion.¹⁵¹ These laws have repeatedly been found inapplicable to partner expulsions, however, because the statutes literally only extend to

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* A partner may allege that the failure to provide procedural safeguards was in itself bad faith, no matter the purpose. This, however, is not an argument that the partnership inappropriately exercised its discretion; rather, the allegation is that good faith demands that there be no discretion. Since purpose is not at issue, the proper way to analyze such a claim would be to focus on the second element. The question becomes whether the ability to forego procedures was itself an opportunity forgone at the time of the agreement. The same evidence discussed *infra*, Part IV. B. Second Element – Reasonable Expectations of the Expelled Partner, would weigh on this inquiry.

¹⁵¹ See Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-2(a)(1) (West 2003) (prohibiting discrimination based on race, color, religion, sex, or national origin).

“employees.”¹⁵² Though this may be a technically accurate understanding of these statutes, similar protection should be given to partners by reading these safeguards into the duty of good faith.¹⁵³

Basing expulsion on such grounds can be conceived of as attempts to recapture forgone opportunities. When entering a partnership, it is reasonable for partners to believe that they will not be expelled for reasons that would violate public policy. For instance, partners normally do not enter into a partnership agreement with the expectation that they could be expelled because of their race or gender. Since expulsion based on these grounds appears to be outside reasonable expectations, it is a forfeited opportunity.

It is arguable, however, that explicit language in the partnership agreement could defeat the expectation of receiving protections akin to those offered by employee-protection legislation. RUPA, for instance, specifically allows partners to agree on the scope of the duty of good faith.¹⁵⁴ Conceivably, a partner could be asked to specify that the duty of good faith does not encompass the protections of federal or state anti-discrimination laws. In the presence of such language, it would be unreasonable for a partner to believe expulsion could not be used for discriminatory purposes. Therefore, such use would not be a forgone opportunity.

Nevertheless, this type of language should be unenforceable. It is a well-accepted contract law principle that agreements that violate public policy are void.¹⁵⁵ An expulsion provision that seeks to counter anti-discrimination statutes or other employment-related laws should be ignored pursuant to this doctrine.

Codes that prevent termination for public policy reasons are designed to safeguard individuals against unfair and offensive treatment. Partners should be afforded this protection by viewing expulsion in violation of these statutes as bad faith. This should be the result irrespective of the language in the parties' partnership agreement.

¹⁵² See *Wheeler v. Hurdman*, 825 F.2d 257, 277 (10th Cir. 1987) (holding that “bona fide general partners are not employees under the Anti-discrimination Acts”). Note that if the partner alleging discrimination looks more like an employee than a partner, then anti-discrimination protections may apply. See, e.g., *Simpson v. Ernst & Young*, 100 F.3d 436, 443-44 (6th Cir. 1996).

¹⁵³ See Baynes, *supra* note 76, at 831.

¹⁵⁴ REVISED UNIF. P'SHIP ACT § 103(5) (1997).

¹⁵⁵ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981).

2. Expulsions Based on Other Rationales

If the expulsion comports with public policy, then the court must delve deeper into whether the expulsion was in line with the ousted partner's reasonable expectations under the facts and circumstances of the particular case. Much could shed light on this inquiry.

The first item to look at is the contract itself. Its language can provide great insight into partner expectations. For instance, if a contract specified that expulsion had to be "for-cause," a partner likely would not expect to be expelled, unless the motivation for taking this action was particularly compelling.

On the other hand, if an agreement specified the opposite – that no showing of good cause is required – then it appears the partnership gave itself a great degree of freedom in deciding when to expel. Under such a provision, for instance, partners likely could not complain if they were expelled to increase the profits-per-partner of the remaining partners – despite their own excellent performance – because it seems this is precisely the flexibility the partnership sought to achieve when crafting the expulsion provision.

It is rare, however, for an agreement to contain specific language regarding cause as in the examples above; extremely concise provisions are more common. For example, an agreement may state simply that "a vote of two-thirds of the partnership is sufficient to expel a partner." In the face of provisions such as this, which are silent as to acceptable rationales for expulsion, courts must rely on evidence outside the agreement in order to determine which motivations the expelled partner would expect.

One item to look at is whether other partners made any oral assurances to this person. Take, for example, an individual who wishes to become a partner in a large law firm that is unwilling to amend its partnership agreement to satisfy a would-be member. In this situation, it is easy to imagine that an oral assurance would be made if this prospective partner expressed concern about an ambiguous expulsion provision. A senior partner may, for instance, state that expulsion is only used in the case of severe misconduct. Such a declaration would justifiably affect the expectations of this partnership candidate.

Similarly, the past practice of the partnership may be probative of expectations. For example, in *Hogan v. Morton*, the court looked at whether the expulsion of a law partner, Paul Hogan, for having an affair with an associate was legitimate.¹⁵⁶ In examining this question, the court considered Hogan's assertion that in his ten years of experience with the firm, expulsion had only been used for matters relating to a partner's ability to practice law.¹⁵⁷ This experience very likely influenced the partner's expectations about the reasons that could be used to justify his own expulsion.

Finally, courts should consider the formal and informal structure of the partnership. The paradigmatic partnership is one in which there are only a few partners, and each of them share equally in economic gains and losses, as well as management responsibility. In this scenario, the parties would likely have high expectations of one another – and these would likely extend to expulsion. For instance, a partner in this type of arrangement would likely expect expulsion to only be used as a remedy for egregious conduct – and only as a last resort. Each partner likely has given up the ability to unceremoniously cut ties.

However, not all partnerships are structured like this. Large law firms, for instance, bear little resemblance to the prototype presented above: there may be hundreds of partners; management may be the task of only a few; and profits may be allocated unequally among the members. In such a case, partners would seem to have fewer expectations of their fellow partners. In the expulsion context, therefore, it would appear that the partnership would have much greater freedom when exercising its discretion; a reason for expulsion that would be unacceptable in the paradigmatic case may well fall within the expectations of a partner at a firm with a more hierarchical structure.

The formal structure of the firm gives insight into what partners may expect as does the informal structure – or the firm's culture. It may be that a partnership structure deviates from the paradigm, but nevertheless the partners' relationships with each other are closer to those of a small firm marked by trust and cooperation. Here, the partners would expect a great deal from each other and, therefore, the ability to use expulsion would be circumscribed.¹⁵⁸

¹⁵⁶ *Hogan v. Morton*, No. 03A01-9206-CH-00214, 1993 WL 64220, at *1 n.1 (Tenn. Ct. App. March 10, 1993).

¹⁵⁷ *Id.* at *5-6.

¹⁵⁸ Much of the evidence about the informal structure of the firm may relate to conduct after the expulsion provision was agreed to. This does not mean,

The above is a non-exclusive list of evidence bearing on whether expulsion in pursuit of a particular purpose was a forgone opportunity. Though each of the above considerations is relevant, they are not equally straightforward to apply. Ideally, evidence would directly show whether the expelled partner would have reasonably anticipated ouster for the reasons exposed. For example, if a partner was expelled because he was less profitable than his peers, such action would clearly be bad faith in light of evidence that the expelled partner had been told that expulsion would only be used in cases of serious misconduct.

But such evidence will probably be difficult to uncover. It is more likely that a court will be forced to rely on conduct showing the partner's expectations more generally, and from that the court will render its judgment about whether the expulsion at issue was foreseeable. For instance, when considering the scenario in which a partner is expelled for being less profitable, a court may encounter evidence that the expelling partnership has generally been marked by a high degree of trust and loyalty. This information does not directly tell the court whether this partner should have expected expulsion for lackluster results; however, it does at least imply as much. The court must seek out and carefully consider such evidence. If after looking at all the relevant evidence, it appears that the ousted partner would reasonably have expected that the partnership had given up the right to expel for the purpose that it did, then the expulsion is in bad faith.

The same type of evidence is also relevant when analyzing whether the partnership denied procedural protections in pursuit of a forgone opportunity. Above, the focus was on the motivation for the expulsion itself; here, it is on the purpose for denying procedural safeguards – specifically, whether acting for such purpose was outside the ousted partner's expectations.

Each piece of evidence discussed above is potentially relevant to determining these expectations. The contract itself, for example, may be quite probative. In the *VGS* case, two members of an LLC avoided notifying the third member of a pending transaction so that they could use it to oust him from control of the company.¹⁵⁹ Here, the terms of the LLC agreement indicated that this action was outside the parties' expectations: the contractual language was clearly selected to guarantee control to the

however, that it has no bearing on the focus of the inquiry – the expectations of the ousted partner when the provision was drafted. For instance, if a partnership is highly collegial, it is likely that this is what the parties envisioned at formation.

¹⁵⁹ *VGS, Inc. v. Castiel*, No. C.A. 17995, 2000 WL 1277372, at *1 (Del. Ch. Aug. 31, 2000).

ousted member.¹⁶⁰ Thus, control was an opportunity the minority shareholders had to forego at the time they entered the business; their attempt to appropriate such by ignoring proper procedures was therefore in bad faith.

C. Summary

Forgone opportunity analysis can be used to address both substantive and procedural challenges to expulsion. The first step in each case is to determine the expelling partners' motives. With respect to substantive challenges, the focus is on the motivation for the decision to expel; as to procedural complaints, it is the partnership's reason for denying procedural safeguards.

The second step is to decide if acting for the purpose determined above was a forgone opportunity. This depends on the affected partner's expectations: if this individual would have reasonably expected that acting with such motivation was a freedom given up when the partnership agreement was executed, then the partnership has acted to recapture a forgone opportunity, and in doing so, has breached its duty of good faith.

Relevant evidence as to the ousted partner's expectations can come from many sources, including, *inter alia*, the contract itself, the past practice of the partnership, and the firm's structure.

D. Advantages of Forgone Opportunity Analysis

Forgone opportunity analysis is a step forward from the current state of the law. As discussed in Part III, the law in this area has evolved along three trajectories. One approach focuses on whether good faith requires that expulsions be "for cause." It appears some cases would always impose this requirement, though a narrower version of this rule has been suggested, which requires cause only if fair and consistent with the partners' intent.¹⁶¹

Focusing on cause is not the most direct means of analyzing good faith. When looking at this doctrine, the focus should be on determining the expelled partner's thinking about the particular motivation behind his or her expulsion. Analyzing the partners' views about cause may lead to useful insights regarding this inquiry, but it is only one piece of evidence that bears upon it. Forgone opportunity analysis, by directly examining the relevant question, is a more comprehensive framework.

¹⁶⁰ *Id.*

¹⁶¹ See *supra* Part III. A. Legitimate Business Purpose.

Another approach has been to find the duty of good faith applicable only to situations where the expelling partners acted for economic self-gain. This approach is under-inclusive in that it leaves much that could constitute bad faith, such as racial discrimination, outside of the definition.¹⁶² The framework posed in this article does not suffer from this problem; it is designed to uncover all forms of violative conduct.

Finally, some courts have applied the duty of good faith directly to the facts at issue, reaching their holdings without opining on the general nature of the doctrine. This approach is lacking because it does not advance the development of meaningful precedent on the topic.¹⁶³

It can be argued that forgone opportunity analysis suffers from the same flaw. Because this framework relies on a highly contextual inquiry, rather than set rules, it may not lead to perfectly consistent case law. The same flexibility, however, that allows this approach to proficiently address the issue of good faith, is what may prevent it from always being predictable. Therefore, it is a necessary evil. Moreover, because forgone opportunity analysis provides a framework for review, the results should be more consistent than with the case-by-case approach, which leaves good faith to judicial discretion.

The analysis presented here, therefore, improves on the current law. It also presents a means of analysis that treats the parties equitably. The partnership has wide latitude to expel. Its only restraint is the affected partner's reasonable expectations. If the partnership is concerned about these expectations, it can protect itself by specifically providing for how and when expulsion may be used (within the confines of public policy). The expelled partner, on the other hand, is assured that expulsion will only be permitted if in line with reasonable expectations. Thus, this framework makes sure that this individual will not be caught off guard.

V. CONCLUSION

Current partner expulsion analyses are inadequate. A better approach borrows from contract law theory, namely forgone opportunity analysis. This framework focuses on whether the expelling partners were acting to recapture an opportunity given

¹⁶² See *supra* Part III. B. *Holman* and its Progeny: Economic Self-Gain and Contractual Plain Meaning.

¹⁶³ See *supra* Part III. B. *Holman* and its Progeny: Economic Self-Gain and Contractual Plain Meaning.

up at the time the partnership was formed. If this was the case, then they have conducted themselves in bad faith. Considering ouster from this perspective provides fair treatment for both sides of an expulsion dispute.

An Expense out of Control: Rule 33 Interrogatories After the Advent of Initial Disclosures and Two Proposals for Change

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Interrogatories exchanged under Federal Rule of Civil Procedure 33 drain litigation resources while providing few concomitant benefits to litigants. Despite this problem, there is no recent scholarly literature suggesting reform to this device. Other discovery devices, including initial disclosures and requests for admission, better serve parties as relatively fast and cheap exchanges of information in advance of trial. This Essay describes the wastes and benefits of Rule 33 interrogatories as parties use them in practice today. Then, this Essay makes and evaluates two proposals for change. In the first proposal, the Essay suggests creating mandatory, uniform interrogatories keyed to substantive areas of law, following a model that several states have already incorporated into their civil rules. In the second and alternative proposal, this Essay proposes eliminating Rule 33 interrogatories altogether, because most of the work that the Advisory Committee on Civil Rules first intended interrogatories to do is now better accomplished through other discovery devices.

I. INTRODUCTION

In practice, Federal Rule of Civil Procedure 33 interrogatories exchange little substantive information between

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parties. Sending interrogatories costs a litigant more than that party earns in information. Often, filing interrogatories generates nothing but unresponsive, by-the-book objections or otherwise evasive answers from an opponent.¹ The norms of practice encourage a lawyer to file interrogatories, even though the answers to those interrogatories would not help that lawyer's client.²

Interrogatories are the most abused discovery vehicle, and what is more problematic is that their cost generates little value.³ Attorneys ask questions drawn from a stock reserve and those questions return only objections, vague answers, and very little information.⁴ This is due in part to the ease with which one can generate interrogatories, as well as "the proliferation of machine-stored questions."⁵ As a result, interrogatories are often "frustrating, costly, and ineffective for both parties."⁶ The standard objections of "overly broad," "vague," and "unduly burdensome" provide no substantive content to the sender of the interrogatories.⁷ Compounding the problem, adversaries and the courts are normally reluctant to condemn the liberal objector.⁸ Courts want to stay out of discovery disputes except in the worst cases, and adversaries themselves are playing similar games with their own objections.

¹ See ROGER S. HAYDOCK ET AL., FUNDAMENTALS OF PRETRIAL LITIGATION 364-65 (4th ed. 2000) (discussing the "limitations, weaknesses, and risks" of using interrogatories and warning against attorneys who abuse the system).

² See THOMAS E. WILLGING ET AL., FED. JUDICIAL CTR., DISCOVERY AND DISCLOSURE PRACTICE, PROBLEMS, AND PROPOSALS FOR CHANGE: A CASE-BASED NATIONAL SURVEY OF COUNSEL IN CLOSED FEDERAL CIVIL CASES 13 tbl.2 (1997) (reporting one survey of attorneys in federal court showing that in cases involving some discovery, 81% of attorneys used interrogatories).

³ C. Lynn Oliver, Note, *Economical Litigation: Kentucky's Answer to High Costs and Delay in Civil Litigation*, 71 KY. L.J. 647, 659 (1983) (citing Weyman I. Lundquist, *In Search of Discovery Reform*, 66 A.B.A. J. 1071, 1072 (1980)).

⁴ See FRANCIS H. HARE, JR. ET AL., FULL DISCLOSURE: COMBATING STONEWALLING AND OTHER DISCOVERY ABUSES 83-88 (2d prtg. 1995) (describing common tactics for evading disclosure under interrogatories, and under other discovery requests, such as boilerplate objections, use of semantics, unilaterally limiting the scope of relevance, and misleading responses).

⁵ Oliver, *supra* note 3, at 659.

⁶ U.S. Army Legal Servs., *USALSA Report: Litigation Division Note*, 1997 ARMY LAW. 38, 38 (Aug. 1997).

⁷ HARE, *supra* note 4, at 83-84.

⁸ Haydock and his co-authors discuss the "Nightmare" test as a guide for when to know, as a lawyer, if your response to an interrogatory fails Rule 33's reasonableness standard. HAYDOCK ET AL., *supra* note 1, at 394 ("Pretend that the opposing attorney has brought a Rule 37 motion before a judge whom you have recently skunked in racquetball and that the judge asks you, 'How in the discovery world can you justify your response?' If you defend with a winning retort, your interrogatory response is reasonable. If you wake up in a sweat, you need to redraft your response.").

Put broadly, the problem with interrogatories is that lawyers believe, and the system reinforces, that the exchange and answer of interrogatories is a game.⁹ That a lawyer expects an objection causes the sender to wrangle over the form of a question and to hesitate over the proper term with which to define a thought.¹⁰ Historically, “practitioners have used interrogatories as a litigation tactic to harass and to overwhelm an opponent or to delay the resolution of a dispute.”¹¹ In return, an entire body of literature explains how to avoid giving thorough and responsive answers to interrogatories.¹²

At base, the problem with interrogatories is lawyer conduct. Lawyers must somehow be held accountable for their zealous but inefficient use of the device. Burdensome, overreaching, and frivolous questions — and boilerplate, bad-faith objections in return — cause delay instead of enlightenment. Any consideration of how to reform the interrogatory device must acknowledge the lack of incentives for lawyers to exchange and to request information from one another in good faith.

While some critics suggest that only severe sanctions for this stonewalling can prevent such discovery evasion,¹³ the structure of the rules and cooperative norms also play important roles. Reforming the structure of the interrogatory device, or isolating what is good about the device and transferring that to other devices more easily monitored, might structurally solve a problem without harsher sanctions or greater judicial involvement. Any change must attempt to decrease the role of

⁹ When one party has deviated from fair play into the strategic world of objections, tit-for-tat will govern. HAYDOCK ET AL., *supra* note 1, at 387 (“Strategically speaking, objections to borderline interrogatories may also cause the other side to object to borderline interrogatories you submit to them.”).

¹⁰ Ronald J. Schutz & Darren B. Schwiebert, *Interrogatories*, in PATENT LITIGATION STRATEGIES HANDBOOK 135, 139 (Barry L. Grossman & Gary M. Hoffman eds., 2000) (advising a patent litigant that “the specific wording of a well-drafted interrogatory should be strategically calculated to elicit the information useful to your position”).

¹¹ U.S. Army Legal Servs., *supra* note 6, at 38.

¹² *E.g.*, LAWRENCE A. MORSE, OBJECTIONS TO INTERROGATORIES § 1250 (Joan Manno ed., 1990) (explaining several different types of objections that one can use in “avoiding or limiting” responses to interrogatories); *see also* United States Army Legal Services, *supra* note 6, at 40 (“The simple goal of Rule 33 is to ensure that a party answers the relevant questions of an opposing party. That is not to say that a party must divulge all information in his possession to the opposing party. Answers to interrogatories should be responsive, accurate, and complete, but they should be made with the understanding that they will be used against the responding party. Consequently, interrogatories should be approached with a defensive frame of mind. Words should be chosen carefully, with an eye toward their use at trial.”).

¹³ HARE ET AL., *supra* note 4, at 79 (arguing for “severe sanctions” to deter stonewalling in interrogatories and in other discovery devices, a problem that is now in “epidemic proportions” due to the economic incentives of corporate parties to a litigation).

gamesmanship and to increase the profitable exchange of pretrial information between the parties to a lawsuit. Any change should also seek to minimize judicial involvement and help to limit the cost to the litigants of pretrial exchanges of questions while maximizing their value. With these ends in mind, any amendment to Rule 33 should weigh the benefits of retaining the interrogatory device against its expense and efficiency in fairly exposing valuable information between adversaries.

Scholars have failed to address the root cause of the inefficiency of interrogatories. Practitioners have written volumes on how to “game” the interrogatory system. And many states have started to amend their rules of civil procedure to address this gaming, including experimenting with ideas such as uniform interrogatories. Yet, despite the prominence of the problem, scholars have failed to suggest reforming this device.

This Essay seeks to explore the problem, and makes two proposals for change. Part I explores what is useful about interrogatories, both as the device is conceived in theory and as the device is used in practice (where the benefits are much narrower) and should therefore be preserved. Specifically, one finds that interrogatories are useful in three areas: discovery of contentions, discovery of technical or statistical data, and discovery of knowledgeable persons. Such findings are important in evaluating the two proposals for change that follow, as we are then aware of what may be lost through amendment or elimination of Rule 33 interrogatories. The findings of Part I also allow us to evaluate how successful other discovery devices will be at replacing the work that interrogatories are intended to accomplish.

In Part II of the Essay, we describe and evaluate two proposals for change to the interrogatory device that we believe will decrease the role of gamesmanship and increase the profitable exchange of pretrial information between the parties to a lawsuit. The first proposal seeks a rehabilitation of Rule 33 to preserve what was intended as a meaningful pretrial exchange of information between parties. Proposal I suggests limiting interrogatories to certain standardized interrogatories, perhaps organized by substantive areas of the law, to which parties would be unable to object on grounds other than those of privilege. These form interrogatories would include contention interrogatories, technical or statistical data interrogatories, and knowledgeable person interrogatories. Failure to answer these interrogatories would result in sanctions. In forming and evaluating this proposal, we rely on the rules of civil procedure of

a few states that have mandatory interrogatories, uniform interrogatories, and both.

The second proposal is more dramatic: the elimination of Rule 33 interrogatories altogether. The current Federal Rules, which already require certain initial disclosures under Rule 26(a), might benefit from the *elimination* of the Rule 33 device and a concomitant editing of other rules – pertaining to requests for admissions, initial disclosures, and pretrial discovery conferencing – to retain much of the best features of interrogatories. In analyzing this proposal, we discuss how other discovery devices, mainly initial disclosures under Rule 26 and requests for admission under Rule 36, are being used by parties today to perform the issue-narrowing functions that interrogatories were intended to perform.

Finally, we conclude with a summary of our findings and a suggestion to the Advisory Committee on Civil Rules (Committee) for how it might combine the two proposals. The federal discovery rules, including Rule 33, were intended to aid in the “just, speedy, and inexpensive determination of every action,”¹⁴ and the reformation or elimination of Rule 33 interrogatories might rehabilitate what is good about the historically “most abused discovery mechanism.”¹⁵

II. FOR WHAT PURPOSES ARE INTERROGATORIES USEFUL?

Interrogatories are supposed to be cheap, fast, and binding on a party. “In theory, there could not be a simpler, more efficient, and less expensive discovery method than sending written questions to the opposing party and having him send back the sworn written answers.”¹⁶ Therefore, the current form of interrogatories helps lawyers when used efficiently.¹⁷ However, when attorneys spin their wheels to draft unobjectionable questions, and their adversary attorneys retort by spinning their wheels to craft objections, seldom does information change hands. Any cost, then, to a useless device is too high a cost.

¹⁴ FED. R. CIV. P. 1 official cmt; see Meade W. Mitchell, Comment, *Discovery Abuse and a Proposed Reform: Mandatory Disclosure*, 62 MISS. L.J. 743, 764 (1993). “The speedy and inexpensive resolution of civil procedures was recognized as the most important mandate of the rules, embodying the very ‘spirit of the rules.’” Mitchell, *supra*, at 744 n.7.

¹⁵ Oliver, *supra* note 3, at 659 (citing Lundquist, *supra* note 3, at 1072).

¹⁶ United States Army Legal Servs., *supra* note 6, at 38.

¹⁷ See generally HAYDOCK ET AL., *supra* note 1, at 364 (listing the advantages of interrogatories over other forms of discovery).

But interrogatories, in theory, should lead to the inexpensive exchange of information between the parties. An exchange of information early in litigation should lead to a faster resolution of the dispute and might even encourage settlement.¹⁸ Substantive answers to interrogatories should also lead to more targeted discovery requests, which in turn might lead to a faster resolution of the dispute. If the device worked more efficiently, then it should help decrease the cost of litigation and increase its speed.

The question then becomes what about interrogatories is useful and should therefore be preserved. Interrogatories serve a useful function in three areas: “discovery of contentions, discovery of technical or statistical data, and discovery of knowledgeable persons.”¹⁹ At base, interrogatories are useful for the discovery of contentions and the discovery of certain fact lists. For these areas, “there probably is no better way to get information.”²⁰

Contention interrogatories are inquiries that require the identification of positions on issues in the case.²¹ Contention interrogatories “seek to clarify the basis for or scope of an adversary’s legal claims. The general view is that contention interrogatories are a perfectly permissible form of discovery, to which a response ordinarily would be required.”²² An example of a contention interrogatory is: “Do you contend that plaintiff was contributorily negligent regarding the accident on August 6, 1998?”²³

The contention interrogatory is valuable for a few reasons. First, it forces the adversary to reveal her basis for positions

¹⁸ HAYDOCK ET AL., *supra* note 1, at 364 (The interrogatory device “reveals information that will put the parties in realistic and informed positions from which to negotiate a settlement or stipulate to agreed facts.”).

¹⁹ Kenneth R. Berman, *Q: Is This Any Way to Write an Interrogatory? A: You Bet It Is*, in THE LITIGATION MANUAL PRETRIAL 154, 155 (John G. Koeltl & John Kiernan eds., 3rd ed. 1999) (discussing when interrogatories serve a useful and sometimes critical function). This paper relies on Berman’s framework for when interrogatories are useful.

²⁰ *Id.* at 155.

²¹ Rule 33(c) specifically allows these types of interrogatories: “An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact” FED. R. CIV. P. 33(c).

²² *Starcher v. Corr. Med. Sys.*, 144 F.3d 418, 421 n.2 (6th Cir. 1998); *see, e.g., Taylor v. Fed. Deposit Ins. Corp.*, 132 F.3d 753, 762 (D.C. Cir. 1997) (explaining that when a complaint is vague and conclusory, a defendant should not move for dismissal, but rather should serve contention interrogatories); *Vidimos, Inc. v. Laser Lab Ltd.*, 99 F.3d 217, 222 (7th Cir. 1996) (explaining that if a defendant wishes to minimize uncertainty concerning the scope of a plaintiff’s claim, the defendant could serve contention interrogatories).

²³ HAYDOCK ET AL., *supra* note 1, at 370.

taken in the pleadings.²⁴ Second, it is generally immune from evasion because the responding party cannot claim ignorance of the answer when the question is based on the responding party's claims.²⁵ In fact, if in a negligence case, one's adversary responds, "I do not know at this time," she is "invit[ing] a motion for summary judgment or a motion to strike under Rule 11."²⁶ Third, contention interrogatories are often "invaluable in narrowing the issues, laying foundations for motions, and preparing a thorough trial defense."²⁷

In addition, interrogatories target technical and statistical data better than do other forms of discovery, in part because depositions and document requests cannot readily expose this information.²⁸ Technical and statistical interrogatories force opposing counsel to ask the client to prepare the answer, as it is unlikely that the attorney will have all of the necessary information at his or her fingertips.²⁹ Moreover, the only evasion of such an interrogatory appears to be limited to Rule 33(d), which allows one to avoid answering when the answer may be derived from reviewing business records, and when the burden of deriving such information is the same for both the questioner and the answerer.³⁰

The final area in which interrogatories are useful is in the discovery of knowledgeable persons.³¹ An example of such an interrogatory reads: "Please state the name and address of each

²⁴ See Berman, *supra* note 19, at 156 (explaining why contention interrogatories are valuable); HAYDOCK ET AL., *supra* note 1, at 367 (explaining that interrogatories are useful for explaining pleading allegations in specific detail).

²⁵ Berman, *supra* note 19, at 156.

²⁶ Berman, *supra* note 19, at 156 (citing FED. R. CIV. P. 11 Advisory Committee Note to 1993 Amendment).

²⁷ U.S. Army Legal Servs., *supra* note 6, at 39.

²⁸ See Berman, *supra* note 19, at 160 (explaining why interrogatories seeking technical or statistical data are useful); see also HAYDOCK ET AL., *supra* note 1, at 368 (finding that interrogatories may pursue "[s]ummary explanations of technical data and statistics, manuals, reports, studies, and materials containing technical information").

²⁹ Berman, *supra* note 19, at 161.

³⁰ Berman, *supra* note 19, at 161 ("The answerer is more familiar with the documents that contain the information; she will know the meaning of special codes or abbreviations in the documents; and she will know how to use the documents to obtain the answer.").

³¹ It is important to note that asking about "knowledgeable persons" through interrogatories is still helpful even after the 1993 amendments to the Federal Rules of Civil Procedure added initial disclosures. Although under Federal Rule 26(a)(1)(A), "a party must automatically disclose the identity of persons likely to have information relevant to disputed facts alleged with particularity in the pleadings," the term "alleged with particularity" is not always clear, and as such, an adversary who concludes that the complaint alleges facts without particularity may not disclose the names of important witnesses in a Rule 26(a)(1)(A) initial disclosure. Berman, *supra* note 19, at 162-63 (citing FED. R. CIV. P. 26(a)(1)(A) Advisory Committee Note to the 1993 Amendment).

person who has knowledge of a particular subject matter.” One would think that the following two objections to such an interrogatory would be quite common: (1) the interrogatory is overbroad; and (2) the attorney cannot speculate as to the knowledge. However, Rule 26 appears to preclude the latter objection because it assumes that a party answering will in good faith disclose the persons the respondent knows or ought to know has facts relevant to the particular subject matter.³² However, it appears likely that there will always be an “overbroad” objection.

Despite the possible “overbroad” objection to the interrogatory, this particular type of interrogatory adds value to the propounding party’s case when it is answered. First, “the answer will be the next best thing to the adversary’s witness list.”³³ Second, “the answer will guide [one] in framing a deposition program” in that it may help narrow “the cast of characters.”³⁴ Lastly, the answers to these interrogatories “will make document production more meaningful” in that the answers will help an attorney request documents by reference to named individuals, as well as alert him or her to names to search for in the produced documents.³⁵

Essentially, interrogatories work when lawyers ask for specific lists, such as everyone in a company who has information about X.³⁶ What this all means is that contention interrogatories and those interrogatories that seek “lists” as answers are generally the most useful in discovering necessary information. As such, the usefulness of these types of interrogatories must be retained when crafting any type of rule to increase the effectiveness of the discovery process.

III. PROPOSALS FOR CHANGE

A. Proposal I: Create Standardized Interrogatories Based on

³² Berman, *supra* note 19, at 162 (discussing the possible objections to knowledgeable person interrogatories).

³³ Berman, *supra* note 19, at 162 (citing *Brock v. R.J. Auto Parts & Serv., Inc.*, 864 F.2d 677, 679 (10th Cir. 1988)). The majority rule in the federal courts is that witness lists are not discoverable through interrogatories. HAYDOCK ET AL., *supra* note 1, at 369-70; *cf.* FED. R. CIV. P. 26(a)(3)(A) (requiring *pretrial* disclosure of a witness list).

³⁴ Berman, *supra* note 19, at 162 (citing *Eppler v. Ciba-Geigy Corp.*, 860 F. Supp. 1391, 1396 (W.D. Mo. 1994)).

³⁵ Berman, *supra* note 19, at 162 (explaining the benefits of knowledgeable person interrogatories); *see* HAYDOCK ET AL., *supra* note 1, at 364 (discussing how interrogatories can help target people and topics for later discovery).

³⁶ HAYDOCK ET AL., *supra* note 1, at 367 (“Categories of information that interrogatories do disclose in an effective and economical way include specific, objective types of information.”).

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Subject Matter

The first proposal would amend Rule 33 to require answers to certain standardized interrogatories. These non-objectionable interrogatories would be categorized according to substantive areas of the law, such as antitrust or patent cases. This proposal addresses the gamesmanship of the current interrogatory practice by stamping certain questions as non-objectionable.

This amendment to Rule 33 would sacrifice the current breadth of interrogatories in favor of *requiring* answers to certain interrogatories. The proposal would add several forms to Rule 33, each designed with a specific practice area in mind. These forms would list a handful of interrogatory questions to which objections would be impossible. A party would face sanctions immediately upon failure to answer these questions.

This proposal suggests that the 1993 amendments to Rule 33, limiting the number of interrogatories that each party may file, changed the strategic use of interrogatories, but did not eliminate the game playing. That is, historically, parties abused the device by burying an opponent in interrogatories; but today, parties carefully craft the few interrogatories they send and spend an equal time crafting objections.³⁷ So while the 1993 amendments to Rule 33 addressed both overuse and stonewalling, overuse is more easily detected and solved than is stonewalling.³⁸ Prior to the 1993 amendments, many commentators cited interrogatories as the most abused form of discovery.³⁹ Because the 1993 amendments did little to address *abuse*, interrogatories remain a serious drain on client resources with little return on value. Eliminating the possibility for objection, at least for a few categories of substantive law, would eliminate the objection game-playing altogether.

1. Uniform Interrogatories in the State Courts

Included in these standardized interrogatories might be contention interrogatories, technical or statistical interrogatories, and knowledgeable person interrogatories.⁴⁰ Because these

³⁷ Schutz & Schwiebert, *supra* note 10, at 135-37 (reporting how the amendments to Rule 33 in 1993 changed the strategic use of interrogatories from a paper-dump problem to a wordsmithing problem); *see also* Oliver, *supra* note 3, at 659 (describing one problem of interrogatories as “overuse” and another as “abuse”).

³⁸ HARE ET AL., *supra* note 4, at 66, 79.

³⁹ *E.g.*, Schutz & Schwiebert, *supra* note 10, at 135 (citing JOHN J. COUND ET AL., CIVIL PROCEDURE—CASES AND MATERIALS 743 (5th ed. 1989)).

⁴⁰ *See supra* Part I. INTRODUCTION (explaining how these three types of questions are the most useful and fair interrogatories).

interrogatories would be tailored to specific practice areas – the interrogatories for an antitrust suit would differ from the interrogatories for an employment discrimination suit – the adoption of the forms would be highly politicized. However, several states have in fact adopted uniform interrogatories,⁴¹ and these proposals operate in the states with some success.⁴² In writing the federal forms, the Committee should borrow the design of those states that have adopted uniform interrogatories, triggered by certain substantive claims.

For example, Connecticut limits the interrogatories one can use in personal injury actions arising from the operation or ownership of a motor vehicle, or the ownership, maintenance, or control of real property, to those interrogatories set forth in specified forms.⁴³ As such, it appears that if a party wishes to serve interrogatories, she can only use the interrogatories set forth in the forms. However, if a party does not wish to serve certain interrogatories listed on the forms, or does not wish to serve any interrogatories, she is not required to do so.

In contrast, in New Jersey, personal injury claims have *mandatory* uniform interrogatories.⁴⁴ These interrogatories are mandatory in that upon service of the complaint and defendant's answer to the complaint, the uniform interrogatories are deemed automatically served; both sides *must* serve the uniform interrogatories.⁴⁵ Moreover, the responding party *must* answer

⁴¹ See, e.g., N.J. CT. R. 4:17-1 (explaining the rules pertaining to uniform interrogatories in certain actions); CONN. R. CT. § 13-6 (discussing the rules pertaining to interrogatories); ARIZ. R. CIV. P. 33.1 (explaining the rules regarding uniform and non-uniform interrogatories).

⁴² This proposal would benefit greatly from such empirical data as that gathered prior to the Advisory Committee on Civil Rules' changes to Rule 33 in 1993. See JOHN SHAPARD & CARROLL SERON, FED. JUDICIAL CTR., ATTORNEYS' VIEWS OF LOCAL RULES LIMITING INTERROGATORIES (1986) as an example of a study that polled attorneys on how state changes to the interrogatory device helped and hurt those attorneys in practice.

⁴³ CONN. R. CT. § 13-6(b) ("In all personal injury actions alleging liability based on the operation or ownership of a motor vehicle or alleging liability based on the ownership, maintenance or control of real property, the interrogatories served shall be limited to those set forth in Forms 201, 202 and/or 203 of the rules of practice, unless upon motion, the judicial authority determines that such interrogatories are inappropriate or inadequate in the particular action.").

⁴⁴ See N.J. CT. R. 4:17-1(b) (discussing when uniform interrogatories are mandatory).

⁴⁵ The relevant section of N.J. CT. R. 4:17-1(b)(2) reads: "A party defendant served with a complaint in an action subject to uniform interrogatories as prescribed by subparagraph b(1) of this rule shall be deemed to have been simultaneously served with such interrogatories. The defendant shall serve answers to the appropriate uniform interrogatories within 60 days after service by that defendant of the answer to the complaint. The plaintiff in such an action shall be deemed to have been served with uniform interrogatories simultaneously with service of defendant's answer to the complaint and shall serve answers to the interrogatories within 30 days after service of the answer to the complaint."

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the uniform interrogatories within a specified number of days.⁴⁶

New Jersey Rule of Court 4:17-1(b), sets out when a party must use uniform interrogatories.

In all actions seeking recovery for property damage to automobiles and in all personal injury cases other than wrongful death, toxic torts, cases involving issues of professional malpractice other than medical malpractice, and those products liability cases either involving pharmaceuticals or giving rise to a toxic tort claim, the parties *shall be limited to the interrogatories prescribed by Forms A, B, and C of Appendix II*, as appropriate⁴⁷

New Jersey does allow each party to propound ten additional questions without leave of court.⁴⁸ Any additional interrogatories, however, shall be permitted only with the court's permission.⁴⁹

New Jersey and Connecticut are not alone in their creation of uniform interrogatories. There is “[a]n accelerating trend in state civil procedure rules” toward the use of court-created rather than lawyer-initiated discovery.⁵⁰ For example, California provides uniform interrogatories merely as a guide, allowing for other interrogatories and permitting the responding party its full catalog of objections.⁵¹

⁴⁶ N.J. CT. R. 4:17-1(b)(2); N.J. CT. R. 4:17-1(b)(4) (“Except as otherwise provided in subparagraph (b)(3) of this rule, every question propounded by a uniform interrogatory must be answered unless the court has otherwise ordered.”). As such, the only valid objections to these uniform interrogatories are claims of privilege and claims that the information sought “is the subject of an identified protective order issued pursuant to R. 4:10-3.” N.J. CT. R. 4:17-1(b)(3). Examples of some of the uniform interrogatories provided in Appendix II of Rule 4:17-1 are as follows:

1. State: (a) the full name and residence address of each defendant; (b) if a corporation, the exact corporate name; and (c) if a partnership, the exact partnership name and the full name and residence address of each partner.

. . .

3. If you intend to set up or plead or have set up or pleaded negligence or any other separate defense as to the plaintiff or if you have or intend to set up a counterclaim or third-party action, (a) state the facts upon which you intend to predicate such defenses, counterclaim or third-party action; and (b) identify a copy of every document relating to such facts.

N.J. CT. R.4:17-1, app. II.

⁴⁷ N.J. CT. R. 4:17-1(b)(1) (emphasis added).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See Seymour Moskowitz, *Rediscovering Discovery: State Procedural Rules and the Level Playing Field*, 54 RUTGERS L. REV. 595, 616-17 (2002) (discussing the implementation of uniform interrogatories in certain states).

⁵¹ See, e.g., Judicial Council of California, Form Interrogatories—Employment Law (2002), available at <http://www.calbar.ca.gov/calbar/pdfs/sections/laborlaw/2002-form-interrogatories.pdf>.

Arizona also has uniform interrogatories, for specific causes of action, which serve as a guide.⁵² “In Arizona, there are twenty-two standard uniform interrogatories for personal injury actions and twenty-three standard uniform interrogatories for contract actions.”⁵³ Although in Arizona an attorney does not have to use these uniform interrogatories, Arizona’s Special Bar Committee to Study Civil Litigation Abuses proposed the creation of uniform interrogatories to address the same problems presently facing the federal system — namely discovery abuse that leads to inefficiency.⁵⁴ The Arizona Supreme Court’s Comment in accepting Rule 33.1 explained that the creation of uniform interrogatories “was part of a comprehensive set of rule revisions proposed by the Special Bar Committee to Study Civil Litigation Abuse, Cost and Delay, which was specifically charged . . . with the task of proposing rules to *reduce discovery abuse* and to *make the judicial system in Arizona more efficient, expeditious, and accessible to the people.*”⁵⁵ As such, it appears that Arizona attempted to address the problem of abuse, rather than overuse, of its state’s interrogatories.

The state models will help the Committee navigate the political waters of deciding which interrogatories in each substantive area of the law to make non-objectionable, at least as far as federal and state claims overlap.⁵⁶

The state models will also help the Committee decide if the federal uniform interrogatories (1) will be mandatory to ask; (2) will be mandatory to answer; and (3) will be exclusive (the only interrogatories a party may send). The answer to the first question should be “no,” in order to preserve the traditional optional nature of sending interrogatories. The answer to the second question must be “yes,” in order to eliminate the game playing in interrogatory battles, and because the questions have

⁵² ARIZ. R. CIV. P. 33.1(f) (“The use of Uniform Interrogatories is not mandatory. The interrogatories should serve as a guide only, and may or may not be approved as to either form or substance in a particular case. They are not to be used as a standard set of interrogatories for submission in all cases. Each interrogatory should be used only where it fits the particular case.”).

⁵³ Moskowitz, *supra* note 50, at 616.

⁵⁴ ARIZ. R. CIV. P. 33.1 (Court Comment to the 1991 Amendment).

⁵⁵ *Id.* (emphasis added).

⁵⁶ Other sources from which the Committee might pull non-objectionable interrogatories, more keyed to federal claims, are those handbooks that set forth “boilerplate” interrogatories. In fact, lawyers who specialize in certain substantive areas of the law already rely on form interrogatories. See, e.g., DOUGLAS DANNER & LARRY L. VARN, *PATTERN DISCOVERY: TORT ACTIONS* (3d. ed. 2004). Such sources, though, do not have the benefit of having passed through the deliberative process of a state government and may favor one party unduly over another.

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already been screened so as to be non-objectionable.

Answering the third question is more challenging. Amendments to Rule 33 should not permit the parties to set forth any additional interrogatories beyond the uniform interrogatories provided for in the amended Rule 33, without leave of court. If Rule 33 allowed for such additional interrogatories, the room for abuse by attorneys that currently exists would remain. As such, Rule 33 should provide for additional interrogatories only with leave of the court.

2. Possible Objections to the Proposal

The above discussion points to one specific problem with this proposed model: from what sources should the Committee draw non-objectionable interrogatories for each form? Two more objections to uniform interrogatories at the federal level present themselves. First, compound fields, such as environmental law, may not be amenable to uniform interrogatories that are mandatory to answer. Second, these forms breach the trans-substantivity to which the Rules aspire.

First, federal practice does not reduce itself to discrete areas of the law. For example, in an environmental justice suit, claims may include Equal Protection Clause violations, Fair Housing Act violations, and private and public nuisance claims.⁵⁷ At first glance, perhaps Rule 33 uniform interrogatories should not be created for these compound fields. However, in such a compound claim, perhaps a litigant could trigger multiple forms depending on the nature of the complaint. There is a more important question, though, for the Committee to answer: what would happen if a litigant triggered none of the forms? Would that litigant be denied the interrogatory device, or would the forms only modify Rule 33 when that substantive area of the law is part of the complaint?

A preliminary answer denies any interrogatories in this case, without leave of court. If the Committee has yet to approve forms that capture the complaint, the parties will waste their time, as under the current system, designing and evading crafted interrogatories. The Rule should deny the device in this instance.

⁵⁷ See generally *S. Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot.*, 254 F. Supp. 2d 486, 489 (D.N.J. 2003) (plaintiffs alleged that the New Jersey Department of Environmental Protection (NJDEP) violated the Fair Housing Act and the Equal Protection Clause of the Fourteenth Amendment, and that the NJDEP created both public and private nuisances to the citizens of Camden by issuing a permit to an industrial facility in Camden).

Next, what interrogatories are available when the case presents a complaint combining a claim that will trigger a form with one that will not? One sensible answer would be to deny the litigant the free choice of which interrogatories to send. This is because a complaint containing one claim that would trigger a form and one that would not fit under a form might otherwise allow a litigant to sneak in interrogatories related to the form-controlled claim by adding interrogatories related to the other claim.

The second objection to this proposal is the lack of trans-substantivity created by dividing the forms based on the substantive law raised in the complaint. At this time, it appears the Federal Rules of Civil Procedure make few, if any, distinctions based upon the area of law raised in the complaint.⁵⁸ Many Federal Rules “make no policy choice[], . . . thereby insulating the Rules from effective challenges under the statute delegating rulemaking power to the Supreme Court . . .”⁵⁹ However, the Federal Rules “confer discretion on the trial judge[s],” in actuality making Federal Rules “trans-substantive only in the most trivial sense.”⁶⁰

Some scholars contend that if rulemakers consider Rules aimed at specific kinds of litigation, “the resulting rules would favor the interests of those groups that were best able to influence the rulemaking process.”⁶¹ However, other commentators note that “maintaining a facial appearance of trans-substantivity does not remove politics from the rulemaking process.”⁶² Rather, considering substance-specific Rules allows for closer consideration of the possible effects of the proposed Rule on interested groups.⁶³ As such, substance-specific interrogatories are not inherently problematic.⁶⁴

⁵⁸ See Catherine T. Struve, *Doctors, the Adversary System, and Procedural Reform in Medical Liability Litigation*, 72 *FORDHAM L. REV.* 943, 1011 (2004) (discussing the trans-substantivity of the Federal Rules of Civil Procedure).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* at 1012; see Stephen B. Burbank, *The Costs of Complexity*, 85 *MICH. L. REV.* 1463, 1473 (1987) (book review) (surveying books discussing the law of complex litigation).

⁶³ Struve, *supra* note 58, at 1012; see Burbank, *The Costs of Complexity*, *supra* note 62, at 1473 (discussing the impact of procedural and substantive rules); see also Stephen P. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 *NOTRE DAME L. REV.* 693, 716-18 (1988) (promoting the creation and use of separate sets of procedural rules for different bodies of complex substantive law).

⁶⁴ See Struve, *supra* note 58, at 1012. However, it is important to note that substance-specific rulemaking is complicated by the fact that under the Rules Enabling Act, the Federal Rules must not “abridge, enlarge or modify any substantive right.” 28 *U.S.C. § 2072(b)* (2003).

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Amending Rule 33 in this way would not solve all of the problems associated with pretrial written exchanges between parties, but this proposed amendment, which narrows the scope of Rule 33 by requiring answers to approved questions based on the substantive area of the law at issue, might add utility to the device.

B. Proposal II: Eliminate Rule 33 Interrogatories

Perhaps the problems that interrogatories cause outweigh the benefits. The adoption of required disclosures in Rule 26 ensures that information is actually exchanged between parties; this is precisely what interrogatories were originally designed to achieve. Modifying the mandatory disclosure rule, and encouraging the use of requests for admission, might replace the bulk of the function of interrogatories. Considering the benefits of interrogatories after taking into account other discovery devices might tip the balance in favor of eliminating Rule 33 altogether.

Thus, any reform to the interrogatory device benefits from viewing the device as useful only after the exhaustion of requests for admissions, of initial disclosures, and of pretrial and discovery conferencing.⁶⁵ If what remains is too slight to justify the expense of the device, or if amendments to the other devices can reduce to nil what value remains in interrogatories, then the device should be abolished.

1. Initial Disclosures

Much of the benefit that Rule 33 interrogatories traditionally brought to litigation is now provided through other means. Adding a certain provision to Rule 26(a) could preserve those functions unique to Rule 33. If the Committee made these changes, Rule 33 could be eliminated.

Mandatory initial disclosures were “designed to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information.”⁶⁶ Rule 26 requires that each party within fourteen days after the Rule 26(f) conference disclose the identity of any person likely to have

⁶⁵ See HAYDOCK ET AL., *supra* note 1, at 364 (suggesting that attorneys only use interrogatories “when no other discovery request is available to produce the needed information”); Schutz & Schwiebert, *supra* note 10, at 137 (advising that attorneys not “waste” their interrogatories searching for information that can be obtained through other means).

⁶⁶ Angela R. Lang, Note, *Mandatory Disclosure Can Improve the Discovery System*, 70 IND. L.J. 657, 657-58 (1995) (quoting FED. R. CIV. P. 26(a) Advisory Comm. Note).

“discoverable information” about the case, disclose a copy or description of relevant documents, disclose computations related to any category of damages claimed, and disclose any insurance agreement likely to be involved in the case.⁶⁷

Despite debate regarding the effectiveness of mandatory initial disclosures, an empirical study conducted by the Federal Judicial Center found that “[i]nitial disclosure is being widely used and is apparently working as intended, increasing fairness and reducing costs and delays far more often than decreasing fairness or increasing costs and delays.”⁶⁸ As such, in contrast to interrogatories, mandatory initial disclosures increase the efficiency of litigation.

Initial disclosures answer basic questions of fact, and this instrument eliminates much of the work for which parties had historically drafted interrogatories.⁶⁹ “[T]he ‘court-ordered’ interrogatories of Rule 26(a)(1) address one of the historical functions of Rule 33 interrogatories — to explore broadly the source of evidence available to the opposing party by obtaining the identity of witnesses and the existence of documents.”⁷⁰

Rule 26(a) may need to be altered to bear the brunt of the elimination of interrogatories. This must be done carefully, however, to avoid losing the benefits of interrogatories. In order to abandon interrogatories altogether, the Committee should amend Rule 26(a)(1) specifically to allow for the standard exchange of certain lists between parties.

The elimination of Rule 33 interrogatories would, for

⁶⁷ FED. R. CIV. P. 26(a)(1) (requiring these disclosures unless a party objects during the Rule 26(f) conference that initial disclosures are not appropriate in the circumstances of the action and states the objection in the Rule 26(f) discovery plan). The Advisory Committee Note to the 1993 Amendment further provides that: “Unless the court directs a different time, the disclosures required by subdivision (a)(1) are to be made at or within 10 days after the meeting of the parties under subdivision (f). . . . As provided in the last sentence of subdivision (a)(1), a party is not excused from the duty of disclosure merely because its investigation is incomplete. The party should make its initial disclosures based on the pleadings and the information then reasonably available to it.” FED. R. CIV. P. 26(a) Advisory Comm. Note.

⁶⁸ WILLGING ET AL., *supra* note 2, at 2. The result of this study, in part, encouraged the Committee to amend Rule 26 to eliminate the opt-out provision. *See also* Kuo-Chang Huang, *Mandatory Disclosure: A Controversial Device with No Effects*, 21 PACE L. REV. 203, 237-39 (2000) (explaining major findings of the study).

⁶⁹ HAYDOCK ET AL., *supra* note 1, at 363 (explaining how mandatory disclosures have eliminated much of what interrogatories used to accomplish); *see also* Oliver, *supra* note 3, at 660 (describing how Kentucky’s use of initial disclosures “is intended to eliminate the need for lengthy interrogatories”).

⁷⁰ Schutz & Schwiebert, *supra* note 10, at 136. Schutz and Schwiebert later explain that while initial disclosures “do not eliminate the need for interrogatories directed toward these issues,” Rule 26(a) does “allow for fewer and more focused interrogatories about these broad categories.” *Id.*

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example, disallow a party from obtaining information regarding all knowledgeable persons. As noted above, Rule 26(a)(1)(A) requires a party automatically to disclose the identity of persons likely to have information relevant to disputed facts alleged with particularity in the pleadings. However, “whether a disputed fact is ‘alleged with particularity’ is not always clear. Should [an] adversary conclude that [a] complaint alleges facts generally, rather than with particularity,” she will not provide the names of all important witnesses.⁷¹ Therefore, unlike Rule 33 interrogatories, Rule 26(a)(1)(A) does not ensure that an adversary will be able to find out the names of all knowledgeable persons. If Rule 33 interrogatories are eliminated, then the Committee should alter Rule 26(a)(1)(A) to require the discovery of any person who has knowledge of any particular discoverable matter, regardless of whether the disputed fact is alleged with particularity.

Also, the Committee should amend Rule 26(a) to require a party to release a summary of technical or statistical data, if that data is of central concern to the litigation, a disclosure for which at present the Rule does not provide. This technical or statistical data, set forth in list form, is essential because document requests, such as those required by Rule 26(b)(1), cannot readily reveal the needed information.⁷² The Rule as it stands is inadequate for this proposition. Rule 26(a)(1)(B) requires the disclosure of “a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment.”⁷³ The disclosure of documents, although requiring the disclosure of data compilations, significantly differs from the disclosure of technical and statistical data.⁷⁴

Lastly, the Committee should alter Rule 26(a) to preserve the utility of contention interrogatories. Contention

⁷¹ Berman, *supra* note 19, at 162-63.

⁷² See *supra* text accompanying notes 28-30.

⁷³ FED. R. CIV. P. 26(a)(1)(B).

⁷⁴ Technical and statistical data describes, for example, how many different types of bottles a manufacturer produces and in what quantities consumers purchase these types of bottles, rather than just showing invoices. See FED. R. CIV. P. 33(d) (allowing a responding party to direct the propounding party to the primary business records, when both parties could expend equal effort in crafting a list from the source documents). In this view, then, Rule 33(d) does not differ greatly from Rule 26(a) as both now stand, and therefore the Committee might not have to amend Rule 26(a) in this respect were it to eliminate Rule 33.

interrogatories protect parties by eliminating:

the potential prejudice or surprise to the party responding to the fraud claim [for example] that might arise from the insertion at some point in the litigation of unexpected and unpleaded allegations of misrepresentations, and also saves the courts and litigants time spent on litigating the adequacy of the . . . pleading of fraud and the . . . attempt to replead the claim with the requisite particularity.⁷⁵

At this time, however, it is unclear how to obtain the invaluable information from contention interrogatories through Rule 26(a) were Rule 33 eliminated. Conceived in theory, losing the contention interrogatory is a major loss to a party who wants to learn the meat behind their opponents' pleadings. It should be kept in mind, though, that the evasive interrogatory exchange as it now exists rarely exchanges this information anyway; losing the current system of contention interrogatories is not really losing much.

2. Other Discovery Devices

Rule 26 is not the only rule that overlaps with much of what is useful about today's Rule 33.⁷⁶ Increasing the use of requests for admissions might do much of the work that interrogatories could theoretically do, and make up for the resulting elimination of Rule 33's current breadth. Pretrial conferences provide for an additional exchange of meaningful information, albeit at a time further along in the case than when interrogatories would normally be sent.

Requests for admissions are similar to interrogatories in that both allow one party to discover more about how the adversary plans to act at trial and how the adversary views its own case. While the two methods seek the information in different ways — asking for a list of previously unknown parties versus a confirmation of suspected parties — the request for admission mimics the best of what interrogatories have to offer a litigant during early pretrial.⁷⁷ Also, both interrogatories and admissions

⁷⁵ David Hricik, *Wrong About Everything: The Application by the District Courts of Rule 9(b) to Inequitable Conduct*, 86 MARQ. L. REV. 895, 921 n.100 (2003) (quoting *Schaller Tel. Co. v. Golden Sky Sys., Inc.*, 139 F. Supp. 2d 1071, 1099-1100 (N.D. Iowa 2001)).

⁷⁶ See HAYDOCK ET AL., *supra* note 1, at 364 (reporting that many practitioners prefer to use document production requests and depositions instead of interrogatories to obtain the same information).

⁷⁷ Edna Selan Epstein, *Rule 36: In Praise of Requests to Admit*, in THE LITIGATION MANUAL PRETRIAL 150-53 (John G. Koeltl & John Kiernan eds., 3d ed., 1999) (“[A]nswers to interrogatories are rarely as useful as the responses that must be made to well-framed requests to admit.”). *But see* Cecilia H. Gonzalez, *Requests for Admissions*, in PATENT

may be served on parties only.

However, there is no limit in Rule 36 comparable to that in Rule 33 as to how many requests for admission a party may file, so an increased reliance on requests for admission might resurrect some of the problems that the cap on the number of interrogatories solved. Unlike interrogatories, though, courts in complex litigation do not view successive sets of requests for admission as burdensome or oppressive; admissions practice presents different problems than does interrogatories practice.⁷⁸ We also note that, “answers to interrogatories . . . are not admissions, and a party can supplement or amend its answers” to interrogatories, so parties answering admissions are more careful to avoid traps.⁷⁹

Pretrial conferences under Rule 16 and discovery conferences under Rule 26(f) might also carry much of the weight that the drafters of Rule 33 intended that Rule to cover. Both meetings contemplate another set of disclosures, at different distances from trial. Rule 26(f)’s encouragement of settlement discussions might help replace what benefit contention interrogatories brought to the parties under Rule 33. As for timing, parties most often use interrogatories well in advance of trial, before the deposition phase, and reserve the ability to propound more interrogatories after objections or inadequate responses.⁸⁰ This proposed revision to the Federal Rules — eliminating Rule 33 interrogatories and adding certain provisions to Rule 26(a) — would not therefore disrupt the timing of discovery exchange. That is, requests for admissions may be made at any time, like interrogatories; Rule 26(f) contemplates a conference early on in discovery, and Rule 16 contemplates a conference very near to trial. Because interrogatories are most often used early in litigation, and then supplemented as needed later, these alternate devices cover the span of time in which interrogatories are useful. The robustness of the exchange of information at Rule 16 and Rule 26(f) conferences, though, is a question for

LITIGATION STRATEGIES HANDBOOK 183, 188 (Barry L. Grossman & Gary M. Hoffman eds., 2000) (“[T]he request for admission is not the proper tool for discovering general information about the position of the opposing party” but rather “is a basic tool that allows the parties to narrow the issues of the case.”).

⁷⁸ For a comparison of interrogatories and requests to admit related to this point, see Epstein, *supra* note 77, at 150-51 (“The rules recognize the value of requests to admit by not limiting their number.”).

⁷⁹ See Schutz & Schwiebert, *supra* note 10, at 146 (explaining parties’ use of interrogatories and admissions as a tactical measure).

⁸⁰ See HAYDOCK ET AL., *supra* note 1, at 366 (advising parties “that interrogatories are best used in the early stages of discovery” and explaining the timing of the various discovery devices).

further study.

3. Possible Objections to the Proposal

The expanded use of Rule 26 requests for admission and of pretrial and discovery conferences might not replace all of the work that interrogatories do or should do. Requests for admission, for example, require phrasing similar to that of a cross-examination at trial;⁸¹ a request for admission requires that the proponent “have some knowledge of the genuineness of the matter requested.”⁸² Interrogatories, on the other hand, allow for narrative answers, and do not require the sender to have certain knowledge of the opponent.⁸³

The requests for admission device does not perfectly replace the interrogatory, at least not as the interrogatory is conceived in theory. However, the request for admission device in practice today serves the function the drafters intended interrogatories to serve. Requests for admission are a less burdensome discovery device and courts have had fewer problems with them than with the interrogatory exchange. Because requests for admission do most, though not all of what interrogatories were intended to accomplish, and because interrogatories actually accomplish very little, there is little risk in eliminating interrogatories. Consider also the great expense that interrogatories mean for parties as compared to their utility. The expanded use of pretrial conferences, considered here particularly for the conferences’ ability to narrow issues for trial, overlaps with much of what interrogatories might have done, as conceived in Rule 33. Finally, because interrogatories in practice exchange very little substantive information, interrogatories are failing to live up to their expectation and theoretical utility. If the device does not work, if it costs a great deal, and if other discovery devices better accomplish what interrogatories were intended to accomplish, then there is little reason to maintain the device.

⁸¹ See Gonzalez, *supra* note 77, at 192 n.57 (“[M]any do not [even] view the request for admission as a discovery tool . . .”).

⁸² Gonzalez, *supra* note 77, at 194 (adding that “the responding party is not compelled to respond to ambiguous requests”).

⁸³ See HAYDOCK ET AL., *supra* note 1, at 369 (“The interrogatory, ‘State all facts upon which you base your claim of failure to warn in Paragraph 3 of the Complaint,’ is preferable to the request for admission, ‘You know of no facts upon which you base your claim for failure to warn.’”) (quoting CAL. CONTINUING EDUC. OF THE BAR, CALIFORNIA CIVIL DISCOVERY PRACTICE 333 (1975)). Haydock and his co-authors assume, however, that these hypothetical interrogatories will produce a responsive answer.

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IV. CONCLUSION

Any proposal for change to Rule 33 needs to be sensitive to what, if anything, interrogatories can accomplish under the current Rules, taking into account the contribution of initial disclosures. While both of the above proposals would eliminate the objections that automatically fly when parties exchange interrogatories, neither can entirely replace interrogatories because neither allows specific and searching questions as to the other parties' contentions. The Committee should consider whether keeping the opportunity for parties to exchange questions regarding contentions is worth the inefficiency and expense of the interrogatory device, particularly when even contention interrogatories rarely work as the sender intends them to work. After all, as the discussion of the second proposal above shows, existing discovery devices, including requests for admissions, initial disclosures, and discovery and pretrial conferences, can accomplish much of the positive work of interrogatories, such as narrowing the issues that are to be tried. In contrast, the first proposal shows great promise if the Committee could draft uniform questions for certain areas of the law. The proposal should also focus on contentions. The Rules should combine both proposals, keeping the interrogatory device only as far as it allows non-objectionable contention interrogatories in certain areas of the law, and expanding initial disclosures to address whom within the client's reach is a person most knowledgeable.

Lost in the Rubble: How the Destruction of Public Housing Fails to Account for the Loss of Community

Arthur M. Wolfson*

I. INTRODUCTION

Verna Berryman left her home in Chicago's Cabrini-Green public housing complex in 1998.¹ Her building was demolished as part of a celebrated plan to move the city's public housing residents to private housing.² Armed with a voucher to cap her rent, Berryman and her son spent the next four years in four different apartments, encountering arson, overcrowding, and rat infestation.³ She finally settled in an overpriced apartment in an unwelcoming neighborhood.⁴ Four years after she left Cabrini, Berryman reflected, "[s]ometimes I think the better world isn't necessarily better."⁵

Berryman's story is not unique. Throughout the end of the twentieth century and the beginning of the twenty-first, cities across America have destroyed public housing complexes, displacing hundreds of thousands of residents from the communities they called home.⁶ Often viewed as a progressive urban policy, displacement has been justified in three primary ways: (1) the physical site on which public housing developments sit may be put to more economically viable use, thereby benefiting society as a whole;⁷ (2) public housing communities

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¹ David Thigpen & Maggie Sieger, *The Long Way Home*, TIME, Aug. 5, 2002, at 42, 42.

² *Id.*

³ *Id.* at 43-44.

⁴ *Id.* at 44.

⁵ *Id.*

⁶ *Id.* at 42 (noting that major cities such as Atlanta, Boston, Miami, Oakland and Chicago are all "knocking down public housing and relocating tenants").

⁷ See Michael H. Schill, *Distressed Public Housing: Where Do We Go From Here?*, 60

isolate the poor;⁸ and, (3) a pervasive culture of poverty blights the community residents' life chances.⁹ Additionally, proponents of the destruction of public housing point to the compensation afforded the residents of these communities in their search for new housing.¹⁰ They argue the compensation offered not only covers the costs of relocation, but also allows residents to establish a private home in a setting more conducive to success in American society.¹¹

Much has been written on both the inadequacy of modern public housing and what alternatives are best to take its place. This article eschews that argument, taking as a given that public housing is in a state of transformation. Instead, it examines the compensation offered to displaced residents of public housing communities. Particularly, in considering both the theoretical justifications and governmental policies that promote the destruction of public housing, it analyzes whether this compensation adequately accounts for what many residents lose when their communities are destroyed. In doing so, this article will reveal that public housing communities provide their residents with a unique quality of life for which most compensation does not account.

Mindful of the many problems that afflict some public housing communities, Part II of this article briefly surveys these problems and examines corresponding justifications for destroying public housing. Part III examines another reality – the unique social benefits of public housing life, particularly themes of cultural expression, social support, and social activism. Part IV surveys government programs designed to compensate public housing communities' displaced residents, specifically HOPE VI¹² and Section 8.¹³ Part V considers whether, given the unique social good established in Part III, government policies adequately compensate displaced public housing residents. This

U. CHI. L. REV. 497, 534 n.204 (1993) (discussing public housing's economic implications and noting that public housing does not increase surrounding property values).

⁸ *Id.* at 510-11, 518-19 (discussing history of the Fair Housing Act and its isolating effect).

⁹ *Id.* at 519-21 (arguing that poor individuals do not have a good chance of finding viable, mainstream jobs, and that "[c]oncentrated poverty generates social distress"). *Id.* at 521.

¹⁰ Thigpen & Sieger, *supra* note 1, at 43-44 (describing Housing Choice vouchers and rent caps for former public housing residents in the Chicago area).

¹¹ Thigpen & Sieger, *supra* note 1, at 44 (describing the condominiums in which some former Cabrini public housing residents now live, one individual said, "It's got a washing machine. And a big closet.>").

¹² See Ngai Pindell, *Is There Hope for HOPE VI?: Community Economic Development and Localism*, 35 CONN. L. REV. 385, 386-87 (2003) (discussing the HOPE VI development policy and its impact on affordable housing).

¹³ See *infra* Part IV. B. Section 8 (explaining Section 8).

paper concludes that government programs do not adequately compensate such displaced residents for the distinctive benefits forfeited when the government destroys their communities.

II. DISTRESSED PUBLIC HOUSING: EXPERIENCES AND THEORIES

No comprehensive discussion of public housing can overlook the troublesome living conditions that haunt many developments. These conditions are well documented and evident to even the casual observer.¹⁴ Professor Michael H. Schill writes that they fall into three categories: (1) physical problems; (2) deficient management; and (3) social ills.¹⁵ Many developments suffer from a lack of modern amenities.¹⁶ Many border on uninhabitable.¹⁷ Local public housing authorities charged with managing the facilities are often inefficient, under-resourced and unresponsive.¹⁸ Finally, the social ills that haunt public housing include significant levels of joblessness, crime and drug use.¹⁹

The depressing realities existent in many public housing communities have led to calls for their destruction. In support of those calls, three theoretical justifications have emerged: (1) public housing sites can be put to more productive use (better use argument); (2) public housing isolates the poor; and, (3) public housing communities perpetuate a poverty-stricken culture.²⁰

The better use argument generally contends that public housing sites may be put to a more economically viable use, thereby benefiting society at large.²¹ Public housing facilities are often located in urban centers where land is scarce and real estate is expensive.²² Policymakers, understandably, seek to maximize the property value of these sites.²³ Therefore, in weighing the poverty that often plagues public housing and the economic value such land may otherwise provide, the better use argument often serves as a proffered justification for destroying public housing.

¹⁴ Schill, *supra* note 7, at 497 (noting the various problems and negative public images of public housing communities).

¹⁵ Schill, *supra* note 7, at 497.

¹⁶ Schill, *supra* note 7, at 501-05.

¹⁷ See Robert George, *Breaking Away*, THE TIMES-PICAYUNE (New Orleans, La.), Dec. 16, 2001, at 1 (chronicling the experience of one public housing resident and her children).

¹⁸ Schill, *supra* note 7, at 505-06.

¹⁹ Schill, *supra* note 7, at 507.

²⁰ Schill, *supra* note 7, at 510-11, 518-21, 534 n.204.

²¹ See Schill, *supra* note 7, at 534 n.204.

²² Schill, *supra* note 7, at 504.

²³ Schill, *supra* note 7, at 534, 534 n.204 (noting that public housing does not maximize the value of a site nor the property surrounding it, and considers how public housing sites may be used most productively).

Others who advocate destroying public housing assert that these communities isolate the poor and screen their residents from economic opportunities available elsewhere.²⁴ Adherents of this position note that the United States Housing Act of 1937 called for establishing public housing explicitly for “families of low income.”²⁵ That combined with the Housing Act of 1949 – which placed income ceilings on public housing residents – “clearly sent the message that only the very poor” belong in public housing.²⁶ Though subsequent federal legislation is aimed towards reversing this trend, some public housing communities remain characterized by high numbers of poor residents living in small geographic areas.²⁷

Closely related, yet importantly distinct, is the argument that public housing communities internally breed a culture of poverty.²⁸ While the isolation argument focuses on restricting residents from advantages available elsewhere, the culture of poverty argument focuses on the disadvantages perpetuated from within.²⁹ A culture of poverty, the argument follows, is born out of a community with exclusively poor residents.³⁰ In such communities, the role models do not represent models of financial success.³¹ As a result, community members do not focus on monetary success.³² Through this system of development, the argument concludes, the culture of poverty perpetuates itself.³³

III. THE PUBLIC HOUSING COMMUNITY

Despite the stark examples of despair that characterize the ills of public housing, another reality competes for attention. Public housing life frequently gives rise to a palpable sense of

²⁴ Schill, *supra* note 7, at 519.

²⁵ Schill, *supra* note 7, at 510 (quoting United States Housing Act of 1937, Pub. L. No. 75-412, § 2(2), 50 Stat. 888, 888 (1937)).

²⁶ Schill, *supra* note 7, at 511.

²⁷ See, e.g., Thomas McNulty L. & Steven R. Holloway, *Race, Crime, and Public Housing in Atlanta: Testing a Conditional Effect Hypothesis*, 79 SOC. FORCES 707, 715 (2000) (noting that 32% of households in Atlanta’s public housing system receive welfare).

²⁸ See Schill, *supra* note 7, at 519 (describing a recent study in which “[it was estimated] that the presence of a public housing development in a census tract increases that tract’s poverty rate by eleven percentage points”).

²⁹ Schill, *supra* note 7, at 519.

³⁰ Schill, *supra* note 7, at 519.

³¹ Schill, *supra* note 7, at 519 (“[A] poor individual who grows up in an environment without employed role models is more likely to have a weak attachment to the labor force than someone who has regular contact with employed persons.”).

³² Schill, *supra* note 7, at 519-20 (noting that low-income housing residents often turn to crime instead of focusing on achieving monetary success via more mainstream channels).

³³ Schill, *supra* note 7, at 520.

community. Unlike the well-documented negative aspects of public housing culture,³⁴ this unique good of the public housing community often goes unnoticed to the passing outsider. However, to residents and guests alike, the distinctive sense of community that pervades public housing is very real indeed.

In a landmark article arguing for “spatial equity,” Professor John Calmore first defines the common, yet elusively ambiguous term, “community.”³⁵ For Calmore, “[c]ommunities are based on things people hold in common. A community implies that its members’ relationships are solidified by ties providing a feeling of collective identity, self-awareness, and affiliation.”³⁶

Upon first arriving at Chicago’s Wentworth Gardens in 1982, Sheila Radford-Hill took immediate note of exactly what Professor Calmore describes.³⁷ Radford-Hill recalled, “I was struck by the sense of neighborhood that these people of meager resources had somehow captured like lightning in a bottle.”³⁸ Radford-Hill’s initial inclination proved to be correct but not novel; public housing residents often exhibit a fervent sense of identification with their neighbors.³⁹ That sense of community is generally evident to both visitors and residents alike. Indeed, visitors frequently comment that the sense of community is almost palpable while residents often remark that it left an indelible impression on their lives.⁴⁰

This section closely considers this special sense of community exhibited by public housing residents. Relying heavily on anecdotal and empirical information, this piece identifies and examines three examples of public housing culture: (1) cultural expression; (2) social support networks; and (3) environments conducive to social activism. Each reflects the steadfast commitment to place and neighbor uniquely found in public housing communities.

³⁴ See, e.g., Schill, *supra* note 7 *passim*.

³⁵ John O. Calmore, *Spatial Equality and the Kerner Commission Report: A Back-to-the-Future Essay*, 71 N.C. L. REV. 1487, 1501 (1993).

³⁶ *Id.* at 1501.

³⁷ Sheila Radford-Hill, *Foreword* to ROBERTA M. FELDMAN & SUSAN STALL, *THE DIGNITY OF RESISTANCE: WOMEN RESIDENTS’ ACTIVISM IN CHICAGO PUBLIC HOUSING*, at xi (2004).

³⁸ Radford-Hill, *supra* note 37, at xi.

³⁹ Jim Fuerst & D. Bradford Hunt, *Public Housing Needs to Understand its Past to Grasp its Future*, J. OF HOUS. & CMTY. DEV., Jan.-Feb. 2003, at 6, 7 (Residents repeatedly noted that “they felt that they were a part of a community that was really an extended family.”).

⁴⁰ See Doug MacCash, *Neighborhood Project*, THE TIMES-PICAYUNE (New Orleans, La.), June 28, 2002, at 15 (describing how a volunteer at a local school was particularly struck by the sense of community of a public housing community).

A. Cultural Expression

Public housing complexes are epicenters of a genuine culture that is both a product and a reflection of those who live there. Indeed, the artistic and musical expression that emerges from public housing could only develop in such a setting.⁴¹ This is so for two primary reasons: (1) the physical structure of the community is conducive for production of these cultural forms; and (2) what the residents express reflects their particularized lifestyle.⁴² These two reasons are interdependent – the physical form of public housing gives rise to much of the lifestyle, which, in turn, gives human meaning to the physical form. What results is a cultural product that could not easily develop anywhere else.

This cultural product is evident in both musical and artistic expression. Public housing's musical tradition dates back to the 1950s and 1960s when Motown sound developed in Detroit.⁴³ Public housing communities provided a conducive social structure and physical space for developing this unique musical genre.⁴⁴ Close living arrangements allowed new musicians to meet and work together.⁴⁵ The buildings' hallways and stairwells gave young singers space to hone their skills.⁴⁶ The concrete walls and floors of public housing architecture provided the "perfect acoustics" for the vocal development so crucial to the Motown sound.⁴⁷ Suzanne Smith summarizes the development of Motown and its reflection of the unique culture of public housing: "[t]hrough music, [residents] personalized and transformed institutional environments and produced a distinctly urban culture in the process."⁴⁸

This musical tradition has continued more recently with the development of rap. Rap's use of physical site and ascription of meaning to place embody public housing's unique cultural expression.⁴⁹ Teenaged public housing residents speak of specific places where people meet within their communities.⁵⁰ Often found in building hallways or on rooftops, these places are inconspicuous enough to escape an outsider's eye, but central

⁴¹ See SUZANNE E. SMITH, *DANCING IN THE STREET: MOTOWN AND THE CULTURAL POLITICS OF DETROIT* 156-57 (1999).

⁴² *Id.*

⁴³ *Id.* at 154-57.

⁴⁴ *Id.* at 156-57.

⁴⁵ *Id.*

⁴⁶ *Id.* at 157.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See TERRY WILLIAMS & WILLIAM KORNBLUM, *THE UPTOWN KIDS: STRUGGLE AND HOPE IN THE PROJECTS* 91-92 (1994).

⁵⁰ *Id.*

enough to attain a place of prominence within the public housing community.⁵¹ Moreover, residents fondly describe these places as locations where young adults seek shelter from and make sense of the outside world.⁵² A teenaged public housing resident from New York City explained, “[w]e have places of peace all over the [projects] . . . if we wanna be by ourselves this is the place to be. We talk, do rap, we in-tel-ec-tu-al-ize.”⁵³ Once tried out informally by the small group, a new piece of rap often reaches its first audience in the larger public housing community; street disc jockeys who perform at larger community functions often disseminate the original rap created by members of that particular community.⁵⁴

The substance of rap tends to be unique to public housing, originating as a musical form designed to express the lifestyle of the community members.⁵⁵ Describing how rap began with this aim in mind, a prominent rapper recalled, “[i]t was like finally somebody was telling the world how we live and what we’re going through.”⁵⁶ While rap has recently gained both sources and audiences in communities outside its own, it stands as a representation of public housing residents’ experiences and sentiments.⁵⁷

Public housing’s unique cultural expression also takes the form of visual art. Street art, or graffiti, is a common feature of the public housing landscape. Though many negatively view graffiti as destruction of property, it is also necessary to recognize the expression of cultural meaning graffiti embodies.⁵⁸ Graffiti artists are often motivated by a desire to publicly express their creativity.⁵⁹ It is the publicity – or desire to be noticed – that provides such a strong impetus for the proliferation of graffiti.⁶⁰ The public housing setting provides both the public

⁵¹ *Id.*

⁵² *Id.* at 91-92.

⁵³ *Id.* at 91.

⁵⁴ See *id.* at 111; see also Sandra Barrera & Fred Shuster, *Whole New Flava*, THE DAILY NEWS OF L.A., Oct. 5, 2004, at U4 (discussing performing at community events).

⁵⁵ Barrera & Shuster, *supra* note 54.

⁵⁶ Barrera & Shuster, *supra* note 54.

⁵⁷ See Blair Cameron Stone, Comment, *Community, Home, and the Residential Tenant*, 134 U. PA. L. REV. 627, 633-34 (1986) (quoting Thomas C. Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 STAN. L. REV. 877, 895 (1976) (“[P]eople develop their world view and absorb their basic values from [their] society or community . . . ; they form their deepest emotional attachment to persons, places and institutions; they learn as part of themselves a language, a culture and a tradition.”); see also WILLIAMS & KORNBLUM, *supra* note 49, at 103 (quoting a teenaged resident claiming that rap born in communities other than public housing is “inauthentic”).

⁵⁸ WILLIAMS & KORNBLUM, *supra* note 49, at 114.

⁵⁹ See WILLIAMS & KORNBLUM, *supra* note 49, at 114.

⁶⁰ WILLIAMS & KORNBLUM, *supra* note 49, at 114-15.

canvas and immediate audience to meet these desires. Indeed, much of what constitutes graffiti is creatively “tagging” a public surface so that the audience may instantly identify the artist.⁶¹ Another form of graffiti is “wall writing,” in which the artist covers the entire side of a building with a scene.⁶² Wall writing scenes typically serve as tributes or memorials to local personages.⁶³ Thus, graffiti is a cultural expression both made for and reflective of the public housing environment.

B. A Network of Social Support

Public housing communities provide residents with a unique social support network, a cultural facet which is both a reflection of and a response to the residents’ particularized life experiences.⁶⁴ Specifically, this social support reflects the population density and sense of community that mark the public housing experience,⁶⁵ and is also a response to the common obstacles many residents face, including poverty, stigmatization and social inequity.⁶⁶ Consider three elements of that support: (1) a personal sense of belonging; (2) a means for communication; and (3) a communal sense of parentage.⁶⁷ While this article treats each element as distinct, they combine to create a vibrant network.

1. Personal Sense of Belonging

A personal sense of belonging is central for any locale to become someone’s “community.”⁶⁸ This feeling of “home,” however, is distinctively strong for public housing residents, commonly surviving both the presence of social ills and even physical moves away from the community itself.

Public housing residents often have a multitude of objective reasons for wanting to leave the community, including

⁶¹ WILLIAMS & KORNBLUM, *supra* note 49, at 114.

⁶² WILLIAMS & KORNBLUM, *supra* note 49, at 114.

⁶³ WILLIAMS & KORNBLUM, *supra* note 49, at 114.

⁶⁴ See Radford-Hill, *supra* note 37, at 95 (stating that “the creation and nurturing of . . . social networks are rooted in women activists’ experiences . . . Networks are shaped by the skills and experiences of older black women residents who migrated north from the rural South . . .”).

⁶⁵ See Fuerst & Hunt, *supra* note 39, at 7.

⁶⁶ See Michelle Wilde Anderson, Comment, *Colorblind Segregation: Equal Protection as a Bar to Neighborhood Integration*, 92 CAL. L. REV. 841, 847 (2002) (noting that in public housing, residents are often segregated by race, which in and of itself “generates tragic conditions of social isolation, economic abandonment, and neighborhood stigmatization.”).

⁶⁷ See Fuerst & Hunt, *supra* note 39, at 7 (describing residents’ feelings of community and communities’ “rich social environment[s]”); see also J.S. FUERST, WHEN PUBLIC HOUSING WAS PARADISE: BUILDING COMMUNITY IN CHICAGO 198 (2003).

⁶⁸ Stone, *supra* note 57, at 635.

deteriorating buildings,⁶⁹ poor management⁷⁰ and crime-ridden surroundings.⁷¹ However, in the face of these objective pressures to leave, the personal sense of belonging tugs fiercely as a motive to stay. Such was the case for two women interviewed for J.S. Fuerst's *When Public Housing was Paradise*.⁷² Hazel Johnson, a long-time resident of Chicago's Altgeld development noted that, despite her neighborhood's recent troubles, she preferred to stay out of a sense of security and comfort.⁷³ Johnson commented:

I don't want to leave this community because I know just about everybody. . . . I feel secure out here. I wouldn't feel comfortable walking in Hyde Park or anywhere else at two or three or four o'clock in the morning. But out here, a lot of people know me, and I'd feel comfortable walking at that time of night.⁷⁴

Myrtle Morrison, a resident of Chicago's Wentworth Gardens, echoed Johnson's sentiments, stating, "I can stay here because [my neighbors] respect me like I respect them."⁷⁵

Furthermore, many who do leave public housing retain their personal attachment to their public housing home. In her memoir, *Project Girl*, attorney Janet McDonald recalls her struggle for personal identity upon entering affluent Vassar College after growing up in New York City public housing.⁷⁶ Caught between her college world of privilege and a personal sense of belonging to her public housing home, McDonald reflected, "I had deliberately chosen a school far from home, and now I felt lost and fearful. As awful as the projects were in some respects, their world was my home."⁷⁷ Years later, after earning a law degree at prestigious New York University, McDonald still embraced her public housing past.⁷⁸ She wrote, "I know where my heart is, and I *can* go home again, whenever I like."⁷⁹

2. Communication Network

Public housing residents often have an uncanny way of knowing about the affairs and needs of their neighbors. This knowledge results from the special communication network that frequently develops in these communities.⁸⁰ Sometimes, this

⁶⁹ See Schill, *supra* note 7, at 497.

⁷⁰ Schill, *supra* note 7, at 497.

⁷¹ Schill, *supra* note 7, at 497.

⁷² FUERST, *supra* note 67, at 189-90.

⁷³ FUERST, *supra* note 67, at 189-90.

⁷⁴ FUERST, *supra* note 67, at 190.

⁷⁵ FUERST, *supra* note 67, at 190-92.

⁷⁶ JANET McDONALD, *PROJECT GIRL* 57-76 (1999).

⁷⁷ *Id.* at 64.

⁷⁸ *Id.* at 199-200, 231.

⁷⁹ *Id.* at 231.

⁸⁰ See, e.g., ROBERTA M. FELDMAN & SUSAN STALL, *THE DIGNITY OF RESISTANCE:*

grapevine is the product of residents' purposeful efforts to acquaint themselves with and subsequently fill each other's needs.⁸¹ Other times, powerful communicative ties develop naturally as a product of the unique combination of physical proximity and strong personal connection to each other.⁸² Whatever the source, the residents' strong communication network counts as a central feature of the public housing experience.

Sometimes, the communication network outlives the time the individuals actually live amongst one another. Dr. Pedro Pedrazza, who grew up in New York City's Amsterdam Houses, saw that the web of friendships from his childhood remained intact years after he left.⁸³ When Dr. Pedrazza's son suddenly died, his former neighbors quickly spread the word and rushed to support him:

'We buried my son two days after the shooting. I was a basket case, couldn't call anybody for the funeral. But you know what? Over sixty people from the Amsterdam Houses who knew him and who knew me showed up at the funeral. Some people I had not seen for ten years. The word went out. They came to the funeral out of love and respect.'⁸⁴

3. Communal Sense of Parentage

The public housing communication network fosters a communal sense of parentage. Public housing residents often consider themselves an extended family.⁸⁵ Like all functional families, these too provide nurturing, guidance and discipline for their children.⁸⁶ Bert Ellis, who grew up in Chicago's Ida B. Wells development, described this part of his childhood, recalling, "[i]f somebody else's mom saw you doing something, she just picked up the phone, and when you got home you had to answer to that."⁸⁷

Many residents feel an informal, yet definite responsibility

WOMEN RESIDENTS' ACTIVISM IN CHICAGO PUBLIC HOUSING 91 (2004).

⁸¹ See *id.* (quoting Wentworth Gardens resident Monica Ramsey, "[E]verybody looks out for each other. . . . Some people don't have a telephone; they'll let you use their telephones. . . . You receive calls there or whatever. Anything that's needed you can always go to any of your neighbors and ask for it and get it.").

⁸² See *id.* at 91 ("For Mrs. Rias, the distinction between the space and activities of her home and those of her development blur. Her caretaking and nurturing roles in the private space of her home spill outside her doors into the community, and often the needs of community members are met within her home.").

⁸³ WILLIAMS & KORNBLUM, *supra* note 49, at 52.

⁸⁴ WILLIAMS & KORNBLUM, *supra* note 49, at 53.

⁸⁵ FUERST, *supra* note 67, at 198.

⁸⁶ FUERST, *supra* note 67, at 198.

⁸⁷ FUERST, *supra* note 67, at 198.

toward the community's children.⁸⁸ For some, parenting the community's children is a seamless continuation of parenting their own.⁸⁹ For others, it serves as a call to fill the neighbors' needs.⁹⁰ Whatever the reason, the communal approach to parenting left an indelible mark on many who grew up in public housing. As Janet McDonald put it, "[t]he projects were full of kids, and all the adults played parent to all the children."⁹¹ These extended family practices give rise to more formal networks of community organizing and illustrate how the various aspects of public housing culture work together to create a unique lifestyle.

C. An Environment Conducive for Social Activism

Public housing communities are hotbeds of social and political activism, a characteristic attributable to an environment conducive to organizing.⁹² The propensity for activism is often born out of the shared circumstances and strong social ties among residents and is often fueled by the communication network.⁹³ Formal organizations develop in a variety of ways; however, no matter the form, that development tends to be distinctively reflective of a given community.⁹⁴ Sometimes, organizations develop as an outgrowth of smaller groups representing individual buildings in a development.⁹⁵ Others develop as a continuation of the communal sense of parenting.⁹⁶

The Local Advisory Council (LAC) at Chicago's Wentworth Gardens is one such formal organization. Housed in an office on the development's grounds, the organization promotes its constituents' interests in a manner unique to public housing.⁹⁷ LAC addresses issues related to physical site and building maintenance.⁹⁸ However, it also serves as a vehicle to further the development's culture, youth activities, job training, grounds cleanups, food and clothing distributions, crime prevention programs and social events.⁹⁹

⁸⁸ See FELDMAN & STALL, *supra* note 80, at 91.

⁸⁹ FELDMAN & STALL, *supra* note 80, at 92.

⁹⁰ FELDMAN & STALL, *supra* note 80, at 92.

⁹¹ MCDONALD, *supra* note 76, at 10.

⁹² See FELDMAN & STALL, *supra* note 80, at 113.

⁹³ See FELDMAN & STALL, *supra* note 80, at 94 (citing Helene Clark, *Sites of Resistance: Place, "Race," and Gender as Sources of Empowerment*, in CONSTRUCTIONS OF RACE, PLACE AND NATION 121, 134 (Peter Jackson & Jan Penrose eds., University of Minnesota Press 1994)).

⁹⁴ Clark, *supra* note 93, at 134.

⁹⁵ See FELDMAN & STALL, *supra* note 80.

⁹⁶ FELDMAN & STALL, *supra* note 80, at 95-114.

⁹⁷ FELDMAN & STALL, *supra* note 80, at 115-16.

⁹⁸ FELDMAN & STALL, *supra* note 80, at 116.

⁹⁹ FELDMAN & STALL, *supra* note 80, at 116.

In New Orleans, a public housing-based community group provided a more specific benefit for its residents.¹⁰⁰ When the city approved a plan to destroy the St. Thomas Housing Development and replace it with a mixed-income housing community and Wal-Mart store, the residents organized to negotiate the most favorable terms possible for their relocation.¹⁰¹ The groups retained counsel to negotiate the construction of replacement units, the residents' return after construction and even a guaranteed number of jobs for displaced residents at the new Wal-Mart.¹⁰²

From its indigenous art forms to its social support networks to its propensity for activism, the public housing culture is unique to the community that spawns it. It is a reflection of common struggle the residents share, their means for survival amidst that struggle, and, most importantly, the particularized human meanings ascribed to those strategies. When Chicago's Cabrini-Green or New Orleans's St. Thomas buildings collapse, a piece of the community's culture cascades into the rubble.

IV. COMMON REMEDIES FOR DISPLACEMENT FROM PUBLIC HOUSING

Throughout the last decade of the twentieth century and the beginning of the twenty-first, local housing authorities across the United States have called for the destruction of public housing facilities.¹⁰³ These policies destroyed huge numbers of units and displaced large numbers of people.¹⁰⁴ Between 1993 and 2002, cities razed over 100,000 public housing units.¹⁰⁵ Chicago alone has moved over 60,000 people out of public housing.¹⁰⁶ In New Orleans, St. Thomas's destruction cost the city 1,500 apartments,¹⁰⁷ and five other developments in the city were either completely or substantially demolished.¹⁰⁸

Policies calling for public housing destruction often come with names that connote a sense of forward-looking optimism. A

¹⁰⁰ See Constance L. Hays, *For Wal-Mart, New Orleans is Hardly the Big Easy*, N.Y. TIMES, Apr. 27, 2003, § 3, at 1.

¹⁰¹ *Id.* at § 3, at 11.

¹⁰² *Id.* at § 3, at 11. The developers did not follow through on many of the negotiated guarantees for the residents. However, what is important for this section is the ability of residents to negotiate because of public housing-based community organizations.

¹⁰³ See Thigpen & Sieger, *supra* note 1, at 42 (noting that Atlanta, Boston, Chicago, Miami and Oakland have demolished or have plans to demolish some public housing).

¹⁰⁴ Thigpen & Sieger, *supra* note 1, at 42.

¹⁰⁵ See LAWRENCE J. VALE, RECLAIMING PUBLIC HOUSING 1 (2002).

¹⁰⁶ Thigpen & Sieger, *supra* note 1, at 42.

¹⁰⁷ Hays, *supra* note 100, at § 3, at 11.

¹⁰⁸ Robert George, *Razing Developments Leaves Some Families Struggling to Find Housing*, THE TIMES-PICAYUNE (New Orleans, La.), Dec. 16, 2001, at A9.

national initiative to replace public housing is called HOPE VI, Housing Opportunities for People Everywhere.¹⁰⁹ The Chicago Housing Authority named its program the Plan for Transformation.¹¹⁰ Proponents of these plans typically offer the better use, isolation of the poor and culture of poverty arguments as justification.¹¹¹

To pursue the public housing elimination policy, several strategies have emerged. One such strategy, HOPE VI, seeks to replace public housing facilities, occupied almost exclusively by impoverished residents, with mixed-income communities that are occupied only in part by the former development's residents.¹¹² Section 8, another strategy, provides displaced residents with vouchers to defray the rental cost of private housing.¹¹³ Particular consideration should be paid to the design, rationales, outcomes, and common criticisms for each.

A. HOPE VI

Participation in a HOPE VI program serves as a possible remedy for displaced public housing residents. HOPE VI is a federally funded program in which local public housing authorities compete for grants that fund revitalization efforts for distressed public housing facilities.¹¹⁴ A successful HOPE VI project calls for demolishing a public housing facility, and replacing it with a combination of public, market-rate rental and privately-owned housing.¹¹⁵ A HOPE VI project may also include developing commercial enterprises in the new neighborhood.¹¹⁶ A portion of the units in the new complex are set aside for residents from the former development.¹¹⁷ The residents receive Section 8 vouchers¹¹⁸ to meet their housing needs during construction.¹¹⁹ Those unable to obtain housing in the new development tend to rely on Section 8 permanently.¹²⁰

The HOPE VI program rests on several theoretical foundations. First, it addresses the "better use" critique of public

¹⁰⁹ Hays, *supra* note 100, at § 3, at 11.

¹¹⁰ Thigpen & Sieger, *supra* note 1, at 42.

¹¹¹ See *supra* Part II. DISTRESSED PUBLIC HOUSING: EXPERIENCES AND THEORIES (discussing these three arguments).

¹¹² Pindell, *supra* note 12, at 387, 393-95.

¹¹³ Pindell, *supra* note 12, at 415.

¹¹⁴ Pindell, *supra* note 12, at 386-87.

¹¹⁵ Pindell, *supra* note 12, at 386-87.

¹¹⁶ See Hays, *supra* note 100, at § 3, at 11 (describing the Wal-Mart Store planned for the site of St. Thomas in New Orleans).

¹¹⁷ George, *supra* note 108.

¹¹⁸ For a discussion of Section 8, see *infra* Part IV. B. Section 8.

¹¹⁹ Pindell, *supra* note 12, at 387, 415.

¹²⁰ See Pindell, *supra* note 12, at 405-06.

housing¹²¹ by attempting to put favorably located real estate to a more economically viable use.¹²² Such was the case with the HOPE VI redevelopment of New Orleans's St. Thomas, a site located just blocks from both the affluent Garden District and the downtown business district.¹²³ Through HOPE VI, developers seek to bring a number of high-rent apartments to public housing areas.¹²⁴ Another common justification for HOPE VI is that it breaks the isolation and concentration of poor citizens.¹²⁵ By including mixed income residents in the new community, low-income residents are no longer isolated.¹²⁶ Finally, HOPE VI seeks to combat the culture of poverty that exists in public housing through its focus on economic vitality.¹²⁷ To that end, the presence of economic success within the community will lead to increased opportunity and life chances for low-income residents.¹²⁸

The most common criticism of HOPE VI is that it leaves too many former residents without a place in the new development.¹²⁹ Indeed, new developments frequently contain significantly fewer public units than old developments.¹³⁰ Charlotte's Earle Village is illustrative: of the 367 families who occupied the original housing community, only 44 of them - or 12 percent - found a home in the new community.¹³¹ Moreover, this outcome is often surprising to many residents who were either promised or led to believe that they would have a place in the new development.¹³² What results is displaced residents' greater reliance on Section 8 or other public housing facilities.¹³³

B. Section 8

Section 8 voucher issuance may occur in conjunction with participation in a HOPE VI program or it can serve as a stand-alone program.¹³⁴ Codified in the Housing and Community Development Act of 1974, which revised Section 8 of the United States Housing Act of 1937,¹³⁵ the Section 8 voucher program

¹²¹ See *supra* notes 21-23 and accompanying text.

¹²² Pindell, *supra* note 12, at 387-93.

¹²³ Hays, *supra* note 100, § 3, at 11.

¹²⁴ See Hays, *supra* note 100, § 3, at 11.

¹²⁵ See *supra* notes 21-25 and accompanying text.

¹²⁶ See Pindell, *supra* note 12, at 393-95.

¹²⁷ See Pindell, *supra* note 12, at 404.

¹²⁸ Pindell, *supra* note 12, at 404.

¹²⁹ Pindell, *supra* note 12, at 404-06.

¹³⁰ Pindell, *supra* note 12, at 405.

¹³¹ Pindell, *supra* note 12, at 405-06.

¹³² See Hays, *supra* note 100, § 3, at 11.

¹³³ See Pindell, *supra* note 12, at 405-06.

¹³⁴ See *supra* Part IV. A. HOPE VI.

¹³⁵ See Housing and Community Development Act of 1974, 42 U.S.C. § 5301 (2003).

subsidizes a low-income tenant's private housing rent.¹³⁶ Funded by the federal government's Department of Housing and Urban Development ("HUD"), Section 8 issues rental subsidy payments directly to the landlord from the local public housing authority.¹³⁷ Verna Berryman's case illustrates that the tenant is responsible for the portion of the rental payment that exceeds the amount of the subsidy.¹³⁸ To rent their properties through Section 8, landlords must maintain them according to HUD's quality standards.¹³⁹

Several theoretical justifications support the Section 8 voucher program. Primary among them is that the program reverses the concentration of poor citizens at a particular site.¹⁴⁰ According to this theory, impoverished citizens, aided by vouchers, will have greater housing choices and increased mobility.¹⁴¹ This, in turn, will lead to increased housing integration, thereby easing the isolation of the poor.¹⁴²

Along with the support it has enjoyed, Section 8 has also drawn sharp criticism. In particular, tenants frequently have difficulty obtaining affordable housing that meets the program's standards.¹⁴³ Furthermore, as Verna Berryman discovered, it may also prove inadequate in meeting total housing costs.¹⁴⁴ Finally, the broader goal of integration often flounders due to unwelcoming landlords and prejudiced neighbors.¹⁴⁵

¹³⁶ Dan Nnamdi Mbulu, *Affordable Housing: How Effective are Existing Federal Laws in Addressing the Housing Needs of Lower Income Families?*, 8 AM. U. J. GENDER SOC. POL'Y & L. 387, 397-98 (2000).

¹³⁷ *Id.* at 398. The particulars of the Section 8 program may take several different forms. Principally, the program applies to either tenant-based housing or project-based housing. The former pertains to the rental of a single unit. In the latter, the landlord owns an entire complex and divides it among individual tenants. Either way, the property is privately-owned and the rent is governmentally subsidized. See Amy R. Bowser, Comment, *One Strike and You're Out- or Are You?: Rucker's Influence on Future Eviction Proceedings for Section 8 and Public Housing*, 108 PENN ST. L. REV. 611, 617-18 (2003).

¹³⁸ See Thigpen & Sieger, *supra* note 1, at 43; see also Mbulu, *supra* note 136, at 398.

¹³⁹ Mbulu, *supra* note 136, at 397-98.

¹⁴⁰ See *supra* notes 20-25 and accompanying text.

¹⁴¹ Lisa M. Krzewinski, *Section 8's Failure to Integrate: The Interaction of Class-Based and Racial Discrimination*, 21 B.C. THIRD WORLD L.J. 315, 318 (2001) (reviewing STEPHEN GRANT MEYER, *AS LONG AS THEY DON'T MOVE NEXT DOOR* (2000)).

¹⁴² *Id.* at 318-19.

¹⁴³ See Thigpen & Sieger, *supra* note 1, at 43-44 (describing the difficulties Berryman had in securing adequate housing).

¹⁴⁴ See Thigpen & Sieger, *supra* note 1, at 43 (noting that Berryman's voucher covered only a fraction of her actual rent in a privately owned apartment); see also George, *supra* note 108 (noting that because Section 8 only applies to rent costs, many participants in the program are unable to meet their utility bills).

¹⁴⁵ See Krzewinski, *supra* note 141, at 319-22.

V. THE FAILURE OF GOVERNMENTAL REMEDIES TO ACCOUNT FOR COMMUNITY

Seen in one light, the government initiatives discussed above are forward-looking corrective actions designed to provide unilateral benefits for public housing residents. At least in part, however, these programs must also be construed as remedies designed to compensate displaced residents for the loss of their homes. A draft of the *Restatement (Second) of Restitution* outlines the underlying principles that give rise to a right to restitution.¹⁴⁶ The *Restatement* includes “[l]oss suffered by claimant [and an] infringement of [claimant’s] interest” as separate but related bases for the right to restitution.¹⁴⁷ With respect to displaced public housing residents, the loss of physical space and relocation requirement constitute a “[l]oss suffered” while forced abandonment of familiar settings and adaptation to new surroundings constitutes “infringement of interest.”¹⁴⁸ Therefore, despite its progressive intentions, government initiatives directed at displaced public housing residents constitute, at least in part, remedies for a loss incurred.

However, these remedies do not provide sufficient compensation to displaced public housing residents for the loss they incur. They overlook how much of modern public housing life is a unique, and typically a uniquely black, experience. A consideration of some lessons gleaned from Cornel West’s discussion of black nihilism sheds light on both why much of the public housing experience is uniquely black and why that experience is inherently valuable.¹⁴⁹ “When the federal government first built public housing in the 1930s, most project tenants were white.”¹⁵⁰ However, beginning in the latter half of the twentieth century, a pronounced statistical trend reflected a heavy concentration of blacks in public housing.¹⁵¹ Indeed, two independent studies reveal that today, over sixty percent of non-elderly public housing households are black.¹⁵² As such, issues relating to modern public housing are inextricably linked to issues of race.

¹⁴⁶ RESTATEMENT (SECOND) OF RESTITUTION foreword (Tentative Draft No. 1, 1983).

¹⁴⁷ RESTATEMENT (SECOND) OF RESTITUTION § 1 cmt. g (Tentative Draft No. 1, 1983).

¹⁴⁸ See *id.* The Restatement explicitly states that it is not necessary to demonstrate both “[l]oss suffered” and “infringement of interest” to give rise to a right to restitution. A demonstration of only one is sufficient. *Id.*

¹⁴⁹ CORNEL WEST, RACE MATTERS 11-20 (1993).

¹⁵⁰ See Martha Mahoney, Note, *Law and Racial Geography: Public Housing and the Economy in New Orleans*, 42 STAN. L. REV. 1251, 1252 (1990).

¹⁵¹ See *id.* at 1252-53 (asserting that in the latter half of the twentieth century, public housing has become increasingly black to the point where it is now “predominantly black”).

¹⁵² Schill, *supra* note 7, at 518 n.133.

It is because of this statistical trend that the issue of remedies offered to displaced public housing residents inherently relates to race. Therefore, Cornel West's discussion of black nihilism becomes relevant. West's theory is premised on the idea that many Americans construe black life as something outside the mainstream, only legitimized when included in that mainstream.¹⁵³ West argues that black Americans occupy a distinct social space in American life, but one that exists legitimately without any prerequisite of inclusion.¹⁵⁴

Based on both liberal and conservative Americans' failure to recognize this point, West offers that, "the most basic issue now facing black America: [is] the nihilistic threat to its very existence."¹⁵⁵ West defines that threat as "the lived experience of coping with a life of horrifying meaninglessness, hopelessness, and (most important) lovelessness."¹⁵⁶ West focuses less on what spawned black nihilism and more on what sustains it.¹⁵⁷ To that end, he addresses the responsibility of three groups in its perpetuation: (1) white liberals; (2) white conservatives; and (3) blacks.¹⁵⁸ West posits that white liberals have allowed black nihilism to develop by focusing too much on economic and political aspects of black life at the expense of an appreciation for the cultural aspects.¹⁵⁹ Conservative whites, West charges, conversely fail to give proper credence to the political and economic structural challenges blacks face in daily life.¹⁶⁰ Finally, West charges blacks with furthering this threat by abandoning strong internal structures that have historically provided support in the face of nihilism.¹⁶¹

West defines and establishes his theory of black nihilism by demonstrating what different segments of America *do not* recognize.¹⁶² From this position, we glean a more affirmatively constructed argument of what these groups *should* recognize if they correctly perceived the "presence and predicaments" of blacks in American society.¹⁶³ In doing so, a picture of the distinctive black social space becomes clear, characterized by

¹⁵³ WEST, *supra* note 149, at 3.

¹⁵⁴ WEST, *supra* note 149, at 3 (stating that "the presence and predicaments of black people are neither additions to nor defections from American life, but rather *constitutive elements of that life*").

¹⁵⁵ WEST, *supra* note 149, at 12 (emphasis omitted).

¹⁵⁶ WEST, *supra* note 149, at 14 (emphasis omitted).

¹⁵⁷ WEST, *supra* note 149, at 20-25.

¹⁵⁸ See WEST, *supra* note 149, at 20-27.

¹⁵⁹ WEST, *supra* note 149, at 20.

¹⁶⁰ WEST, *supra* note 149, at 21.

¹⁶¹ WEST, *supra* note 149, at 24.

¹⁶² WEST, *supra* note 149, at 20-25.

¹⁶³ WEST, *supra* note 149, at 6.

three essential elements: (1) a powerful and particular culture; (2) victimization by adverse societal structures; and (3) strong community institutions.¹⁶⁴

West's criticism of white liberals suggests a need to recognize culture as central to black life.¹⁶⁵ He charges white liberals with failing to recognize both the role and content of black culture.¹⁶⁶ West notes that culture is important for all people, but that it is particularly important for blacks as a "degraded and oppressed people."¹⁶⁷ He describes culture as a structural element of life that exists as a human-created "set of behavioral attitudes and values" developed in response to struggle.¹⁶⁸ As such, a culture offers a particular meaning and identity to those who exhibit it.¹⁶⁹ Because it is born out of struggle, and the black struggle in America has been unique, the resultant culture is correspondingly distinctive. Therefore, West suggests that black culture is particular in both power and form.¹⁷⁰

West's criticism of white conservatives further reveals his conception of a distinctive black experience.¹⁷¹ He asserts that certain American political and economic structures exist to keep blacks at the bottom of the socioeconomic ladder.¹⁷² White conservatives, according to West, give little or no consideration to the effect of these structures, focusing instead on personal agency in self-determination.¹⁷³ However, ignoring the pervasive effect of American political and economic structures on blacks neglects a crucial piece of the black experience, a distinctive victimization, born "out of historical context and contemporary circumstances."¹⁷⁴

Finally, West's criticism that blacks perpetuate their own nihilism reveals the importance of black institutions.¹⁷⁵ He charges modern blacks with failing to sustain religious and civic institutions that have provided communal support throughout history.¹⁷⁶ These institutions - such as schools, churches, and media outlets¹⁷⁷ - stood as a symbol of black culture and

¹⁶⁴ See WEST, *supra* note 149, at 23-25.

¹⁶⁵ WEST, *supra* note 149, at 20.

¹⁶⁶ WEST, *supra* note 149, at 20.

¹⁶⁷ WEST, *supra* note 149, at 20.

¹⁶⁸ WEST, *supra* note 149, at 19.

¹⁶⁹ See WEST, *supra* note 149, at 23-24.

¹⁷⁰ See WEST, *supra* note 149, at 23-24.

¹⁷¹ WEST, *supra* note 149, at 21.

¹⁷² WEST, *supra* note 149, at 21-22.

¹⁷³ WEST, *supra* note 149, at 21-22.

¹⁷⁴ WEST, *supra* note 149, at 22.

¹⁷⁵ WEST, *supra* note 149, at 23-24.

¹⁷⁶ WEST, *supra* note 149, at 24-25.

¹⁷⁷ WEST, *supra* note 149, at 19.

resistance to a victimizing political and economic climate.¹⁷⁸ West contextualizes contemporary black social ills in part as a result of weakened black institutions.¹⁷⁹ Accordingly, we may take from his critique, the role of such institutions in a uniquely black social space.

These lessons offer profound insights into an analysis of the insufficient remedies the government offers to displaced public housing residents. Indeed, both the policies and their underlying justifications fail to account for the loss of community that occurs when public housing communities are destroyed.

The first justification, the better use argument, falls short when considering West's teachings.¹⁸⁰ It overtly and explicitly places other interests ahead of displaced public housing residents' interests. Such a rationale speaks directly to West's critique of white liberals.¹⁸¹ As previously noted, public housing communities exhibit a special and unique culture.¹⁸² A rationale explicitly stating that such a site could be put to better use undervalues what is lost. For its part, the better use argument overlooks West's valuation of black cultural institutions.¹⁸³ The community activist organizations can no longer play a role in the lives of displaced residents who obtain Section 8 housing. Furthermore, the community activist organizations will be significantly weakened in a rebuilt HOPE VI community. However, because this reality takes a backseat to "better use," this justification additionally undervalues the unique social good that exists in public housing developments.

An application of the principles underlying black nihilism to the belief that public housing isolates the poor also renders the remedies in question insufficient. HOPE VI and Section 8 are often premised on the theory that they disperse poor citizens and relocate them in integrated communities.¹⁸⁴ However, in doing so, they deprive the displaced residents the valuable benefits derived from isolation. Indeed, as noted earlier, the cultural expressions that emanate from public housing communities only happen because of public housing's unique physical place.¹⁸⁵

¹⁷⁸ WEST, *supra* note 149, at 25.

¹⁷⁹ WEST, *supra* note 149, at 25.

¹⁸⁰ WEST, *supra* note 149, at 24.

¹⁸¹ WEST, *supra* note 149, at 20.

¹⁸² See *supra* Part III. THE PUBLIC HOUSING COMMUNITY.

¹⁸³ See WEST, *supra* note 149, at 23-24 (describing black cultural structures and institutions).

¹⁸⁴ See *supra* Part IV. COMMON REMEDIES FOR DISPLACEMENT FROM PUBLIC HOUSING.

¹⁸⁵ See *supra* Part IV. COMMON REMEDIES FOR DISPLACEMENT FROM PUBLIC HOUSING.

Moreover, the notion that isolating the poor deprives them of economically successful role models and status symbols undervalues those they do have.¹⁸⁶ As such, remedies based on the justification that public housing isolates the poor render those remedies insufficient in providing compensation for the loss displaced residents incur.

The lessons gleaned from West similarly shed light on the insufficiency of remedies based on a goal curtailing the culture of poverty. Indeed, this rationale stands in direct conflict with West's construction of the black experience. The argument contends that the most powerful responses to poverty are negative. West, conversely, acknowledges that struggle exists in poor communities; however, he contends that there is valuable meaning and identity forged in the responses to that struggle.¹⁸⁷ It is recognizing this meaning that gives culture value. Additionally, the culture of poverty argument views the public housing environment as the primary vehicle for perpetuating the economic disadvantage of its residents.¹⁸⁸ This contention fails to recognize the role of political and economic structures.¹⁸⁹ Similarly, it fails to account for the organizations born out of public housing culture- such as the LAC- that serve as a vehicle for progress.¹⁹⁰ The culture of poverty argument, consequently, also fails to adequately consider the importance of black institutions.¹⁹¹ Therefore, basing HOPE VI and Section 8 on this rationale is equally inadequate in compensating former residents for their losses.

Professor Derrick Bell provides analogous support.¹⁹² Bell similarly argues that school desegregation plans of the mid-twentieth century failed to recognize a unique loss that black schoolchildren incurred.¹⁹³ To meet the mandates of desegregation, many school districts closed schools located in black neighborhoods, establishing the newly integrated facilities in formerly all-white schools.¹⁹⁴ Black teachers and administrators frequently lost their jobs as a result of these

¹⁸⁶ Cf. Schill, *supra* note 7, at 519 (“[A] poor individual who grows up in an environment without employed role models is more likely to have a weak attachment to the labor force than someone who has regular contact with employed persons.”).

¹⁸⁷ See WEST, *supra* note 149, at 23-24.

¹⁸⁸ See *supra* Part II. DISTRESSED PUBLIC HOUSING: EXPERIENCES AND THEORIES.

¹⁸⁹ WEST, *supra* note 149, at 21.

¹⁹⁰ FELDMAN & STALL, *supra* note 80, at 115-16.

¹⁹¹ WEST, *supra* note 149, at 23-24 (describing black cultural structures and institutions).

¹⁹² See DERRICK BELL, AND WE ARE NOT SAVED 102-21 (1987).

¹⁹³ See *id.*

¹⁹⁴ Derrick A. Bell, Jr., *Waiting on the Promise of Brown*, 39 LAW & CONTEMP. PROBS. 341, 368-69 (1975).

closings, and black students had to travel to sites far from their homes to attend school.¹⁹⁵ In Bell's account, we get a sense of a uniquely black cultural institution- a school located in a black neighborhood, staffed by black teachers and populated by black students.¹⁹⁶ Therefore, desegregation plans stripped black students of a central feature of their community and imposed on them a distinctive but certain loss. That school districts failed to "provide educational compensation to black children" reflects a failure to recognize and account for the particular loss those children incurred.¹⁹⁷

Both public housing life and black schools provide unique cultural forms. Initiatives calling for the destruction of both fail to recognize as much. They also fail to properly recognize the importance of black institutions to the community. Thus, in crafting these remedies, both plans fail to account for lost elements of the black community, and in doing so, devalue its culture accordingly.

In contrast to such a devaluation is the story of Bayview, Virginia residents. This story provides an example of a government initiative designed to assist impoverished residents, which values that community's unique culture.¹⁹⁸ Bayview is a historically impoverished community located on Virginia's eastern shore.¹⁹⁹ For most of its history, Bayview residents, nearly all of whom are black, have lived in dilapidated shacks without indoor plumbing or modern electricity.²⁰⁰ In 1998, buoyed by a successful effort to thwart the construction of a new state prison nearby, Bayview residents appealed to state and federal officials for assistance in building modern infrastructure for the town.²⁰¹ After a tireless campaign, government officials obliged.²⁰² The Commonwealth of Virginia granted over four million dollars and various federal agencies added another four million dollars to rebuild Bayview's infrastructure.²⁰³ Included in this rebuilding effort was a block of housing aimed at replacing

¹⁹⁵ *Id.* at 369. See also MICHELE FOSTER, BLACK TEACHERS ON TEACHING 56-57 (1997) (describing how black students in Richmond, Virginia were bused to far away schools after desegregation).

¹⁹⁶ See Bernie D. Jones, *Critical Race Theory: New Strategies for Civil Rights in the New Millennium?*, 18 HARV. BLACKLETTER L.J. 1, 51 (2002) (describing Bell's writings about desegregation).

¹⁹⁷ BELL, *supra* note 192, at 110.

¹⁹⁸ See 60 MINUTES: Alice Coles of Bayview (CBS television broadcast, July 18, 2004).

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

the shacks that characterized Bayview for so long.²⁰⁴ The houses featured modern amenities, including kitchens and central heating and cooling.²⁰⁵ But each new home included an even more telling feature - a front porch.²⁰⁶ Bayview residents demanded that the homes include porches because of the central role they played in local culture.²⁰⁷ As activist Alice Coles explained,

that's where our family life was spent, on the porch. And so if you take the porch, just like taking a farm, you take a part of our past. That's where old stories were told and songs were taught, and our poems and the scriptures of the Bible were all taught on the front porch. We rehearsed everything from the Gettysburg Address to the "Creation" James Johnson's 'Creation,' on the front porch. We held the books for others, and others held the books until we learned together. So a part of this village concept was the porch.²⁰⁸

Thus, in contrast to the government initiatives aimed at providing remedies for displaced public housing residents, the government initiative to improve Bayview's infrastructure represents a tangible accounting of the community's culture.

VI. CONCLUSION

The remedies offered to displaced public housing residents need to account for the community's unique culture. The current remedies are inadequate in light of what residents lose. When developers construct a HOPE VI site, they should consider how physical form gave rise to culture and include these features in the new construction. In administering Section 8, public housing authorities should consider the communities in which they place residents, not merely the quality of the housing. As it is now, however, the destruction of a public housing complex often results in a loss of a community-based culture unique to that setting. By failing to account for this quality of life, the remedies offered provide insufficient compensation to residents for something lost that may never be regained.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

The Privacy Advantages of Homeschooling

*Louis P. Nappen**

The legitimate object of government, is to do for a community of people, whatever they need to have done, but can not do, *at all*, or can not, *so well do*, for themselves—in their separate, and individual capacities.

In all that the people can individually do as well for themselves, government ought not to interfere.

—*Abraham Lincoln*¹

I. INTRODUCTION

In 1969, the Supreme Court stated in its landmark *Tinker v. Des Moines* decision that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”² However, over thirty years later, courts and legislatures still curtail a multitude of other student rights while those students attend school.³ The deterioration of student civil liberties is most evident when considering *public* school students’ loss of privacy.⁴ Public schools collect, extract, assimilate and distribute a sundry of personal information, including residential data, discipline reports, test scores and comparative rankings, registration and classification records, medical accounts and

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¹ ABRAHAM LINCOLN, *Fragment on Government*, in THE COLLECTED WORKS OF ABRAHAM LINCOLN 220, 220 (Roy P. Basler ed., 1953).

² *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (holding that school regulation limiting freedom of expression must be justified by a reasonable forecast of substantial disruption).

³ *See, e.g.*, *Wallace v. Jaffree*, 472 U.S. 38, 61 (1985) (period for in-school meditation or voluntary prayer violates the establishment clause); Gun-Free Schools Act of 1994, 20 U.S.C. § 8921 (1994) (requiring schools to adopt anti-gun procedures to receive federal funding).

⁴ *See infra* Part II. EDUCATIONAL INSTITUTIONS AND PRIVACY.

psychological assessments.⁵

In contrast to students' loss of privacy rights while in schools, the Supreme Court expressly protects citizens' privacy rights while in their homes.⁶ In 1961, the Supreme Court stated that physical invasion of the home "by even a fraction of an inch" is too much.⁷ In 2001, the Court continued, by stating that, "to explore details of the home that would previously have been unknowable without physical intrusion . . . is a 'search' and is presumptively unreasonable without a warrant."⁸

Although the Fourth Amendment right against unreasonable searches and seizures traditionally protected "people, not places,"⁹ the contemporary standard is determined by a "reasonable expectations of privacy" test.¹⁰ Nowhere else do people expect privacy more than in their homes; consequently, most homeschooled students preserve more personal privacy than those who attend public schools.¹¹ In other words, to extend *Tinker's* metaphor, students tend to retain more constitutional protections behind "picket fences" than behind "schoolhouse gates."¹²

"Homeschooling"¹³ is, basically, when parents teach their children at home instead of sending their children to formal schools.¹⁴ A variety of homeschool programs and cooperatives

⁵ See *infra* Part II. EDUCATIONAL INSTITUTIONS AND PRIVACY.

⁶ *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (limiting technological invasions of the home).

⁷ *Silverman v. United States*, 365 U.S. 505, 512 (1961).

⁸ *Kyllo*, 533 U.S. at 40.

⁹ *Katz v. United States*, 389 U.S. 347, 351 (1967).

¹⁰ *Id.* at 362 (Harlan, J., concurring); see also BLACK'S LAW DICTIONARY 262 (2d pocket ed. 2001) ("[E]xpectation of privacy. A belief in the existence of the right to be free of governmental intrusion in regard to a particular place or thing.").

¹¹ Although private schools are not a primary focus of this paper, parents may also conscribe away many of their family's privacy rights by sending their children to so-called "private" schools.

¹² See *supra* text accompanying note 2.

¹³ "Homeschooling," "home education" or "home instruction."

¹⁴ "Homeschool" is a fairly modern term (and may serve as a noun, adjective or verb). Over the last three decades, "home" and "school" have gradually been co-joined and are now most commonly phrased as one compound word. See, e.g., *Angstadt v. Mid-West Sch. Dist.*, 377 F.3d 338, 341 (3d Cir. 2004) ("In 2001, she stopped *home schooling* . . .") (emphasis added); *Olson v. Stevens*, 730 A.2d 432, 433 (N.J. Super. Ct. App. Div. 1999) (consisting of various phrases which use the term "home school," such as: "Stevens began *home schooling* her daughter . . .") (emphasis added); DAVID H. ALBERT, *HOMESCHOOLING AND THE VOYAGE OF SELF-DISCOVERY* (2003) (emphasis added); MARY LEPPERT & MICHAEL LEPPERT, *HOMESCHOOLING ALMANAC 2002-2003* (2001) (emphasis added). Perhaps to establish grammatical consistency when discussed among "public school" and "private school," statutes and court rulings for the most part continue to record "home" and "school" as separate words (except when used as an adjective, whereby the words are sometimes hyphenated). Another reason the two words remain separated by government agencies, however, may be to re-enforce the customary separation of home

exist,¹⁵ and a variety of state regulations govern homeschools.¹⁶

The purpose of this paper is two-fold: 1) to expose the expansion of information gathering and dissemination via the United States public school system; and 2) to facilitate parental choices on how best to educate their children if privacy issues are a concern. Privacy is fundamentally the omission of outside interference; therefore, in attempting to demonstrate the privacy advantages of homeschooling, this work, for the most part, proves a negative by comparatively cataloguing how much privacy is denied, or potentially denied, when students attend public schools.

Section II compares and contrasts students' legal requirements regarding the types of information students *must* provide to government educational institutions and the information public schools and homeschools *must* or *may* gather or release. Section III examines homeschooling's legal foundations and regulatory issues. Section IV postulates challenges facing the future of homeschooling's privacy advantages.

II. EDUCATIONAL INSTITUTIONS AND PRIVACY

A. Applicable Law

1. Congressional Acts

Two congressional acts substantially affect collection and dissemination of otherwise private information originally collected for educational purposes: the Family Educational Rights and Privacy Act (FERPA, commonly known as the Buckley Amendment),¹⁷ and the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 (PATRIOT Act).¹⁸ The federal Privacy Act of 1974,¹⁹ the Freedom of

and school. *See Olson*, 730 A.2d at 433 (separating "home" and "school" throughout the opinion, except once, where J.A.D. Rodriguez consigns the term via hyphens and quotes: "She also sought enforcement of an agreement . . . so she could 'home-school' their daughter.").

¹⁵ However, detailed clarifications of how to operate homeschools are beyond the scope of this paper.

¹⁶ *See infra* Part III. LEGAL FOUNDATIONS AND REGULATIONS OF HOMESCHOOLING; *see also* Robin Cheryl Miller, Annotation, *Validity, Construction, and Application of Statute, Regulation, or Policy Governing Home Schooling or Affecting Rights of Home-Schooled Students*, 70 A.L.R. 5th 169 (1999).

¹⁷ 20 U.S.C. § 1232g (2000).

¹⁸ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115

Information Act²⁰ and state laws also, to varying degrees, affect the dissemination of school records.²¹

FERPA creates a federal minimum standard limiting the unauthorized release of electronically or physically stored information about students.²² Under FERPA, education records include all records, files, documents, or other materials maintained by an educational agency, or anyone on behalf of the educational agency, containing or possessing information directly related to a student.²³

A school record is like a short chronicle of a student's academic life. School records contain information such as test scores, IQ, subjects studied, grades, teacher evaluations, psychological and psychiatric reports, and disciplinary information. Some schools even record information about religious and political beliefs in students' records—only a few states have laws against keeping a record of students' political activity.²⁴

However, FERPA forbids unauthorized release of law enforcement records and health and psychological records.²⁵ Some courts have ruled that school disciplinary proceedings against students do not constitute "education records" either.²⁶

Under FERPA, students may review their records,²⁷ request explanations of their contents,²⁸ and correct or amend any

Stat. 272 (2001) [hereinafter USA PATRIOT ACT].

¹⁹ 5 U.S.C. § 552a (2000) (protects personal information maintained in government record systems).

²⁰ *Id.* at § 552 (2000) (right to access, inspect and copy personal information maintained in government record systems).

²¹ David A. Banisar, *Privacy of Education Records*, ELEC. PRIVACY INFO. CTR., Jan. 1994, <http://www.epic.org/privacy/education/school.html>.

²² See 20 U.S.C. § 1232g (2000).

²³ *E.g., id.* at § 1232g(a)(4)(A) (2000) ("information directly related to a student"); *id.* at § 1232g(b)(1) (2000) ("personally identifiable information").

²⁴ Dana Textoris, ACLU of Ohio, *Student Privacy: Student Records*, 2, http://www.acluohio.org/get_involved/cllc/student_records.pdf (last visited Nov. 9, 2005).

²⁵ 20 U.S.C. § 1232g(a)(4)(B) (2000).

²⁶ See, e.g., *Red & Black Publ'g Co., v. Bd. of Regents*, 427 S.E.2d 257, 261 (Ga. 1993); *State ex rel. Miami Student v. Miami Univ.*, 680 N.E.2d 956, 959 (Ohio 1997).

²⁷ ACLU, *Ask Sybil Liberty About Your Right to Keep Your School Records Private*, Dec. 31, 1997, <http://www.aclu.org/StudentsRights/StudentsRights.cfm?ID=9070&c=161> [hereinafter ACLU, *School Records Private*] (Schools may request a reasonable fee for copying records. Legal guardians and students themselves, if 18 or older, may view records. Access age may differ from state to state. Some information, such as psychiatric reports and other non-educational records, may only be accessible to guardians.).

²⁸ 20 U.S.C. § 1232g(a)(2) (2000) (Students have the right to hearings before neutral or impartial officials to challenge records' contents. The hearings must allow for assistance or representation and evidentiary presentations.). See also SPARC, *Correcting School Records Form Letter*, <http://www.deltabravo.net/custody/correction.php> (last visited Nov. 9, 2005).

records they feel are incorrect, misleading, or violate their privacy rights.²⁹ FERPA allows disclosure of student information without prior consent: to officials within the school or institution who the school or institution determines have a legitimate educational interest,³⁰ for limited access by federal and state educational authorities,³¹ and in emergency situations.³²

FERPA supposedly grants both civil and criminal penalties for violators of the Act.³³ However, in a 2002 Supreme Court case, a mother claimed that FERPA forbade school administrators from reading aloud her son's grades in class during peer grading, but the Court decided otherwise.³⁴ In a companion case, the Court ruled that FERPA does not even create personal rights under 42 U.S.C. § 1983³⁵ to enforce FERPA's nondisclosure provisions.³⁶ The Court stated that FERPA only directs the Secretary of Education to enforce its nondisclosure provisions and other spending conditions, and not the rights of private individuals.³⁷ It seems, therefore, that the government has rendered civil and criminal penalties nearly useless as it rarely finds the Act is violated.

The PATRIOT Act curtails some of the privacy rights

²⁹ 20 U.S.C. § 1232g(a)(2) (2000) (If students' requests are denied, students have the right to include statements in their files stating why they believe the information is wrong and/or otherwise should not be in their records.); ED.gov, *Family Educational Rights and Privacy Act (FERPA)*, available at <http://www.ed.gov/print/policy/gen/guid/fpco/ferpa/index.html> (last visited Nov. 9, 2005) (Questions regarding FERPA may be directed to: Family Policy Compliance Office, U.S. Department of Education, 400 Maryland Avenue, SW, Washington, D.C., 20202-5920; (202) 260-3887 or via TTD (800) 877-8339.).

³⁰ 20 U.S.C. § 1232g(b)(1)(A) (2000).

³¹ *Id.* at § 1232g(b) (2000).

³² *Id.* at § 1232g(h) (2000) (situations that threaten the health or safety of the student or other individuals).

³³ See Banisar, *supra* note 21 ("Individuals who willfully violate the disclosure provisions can be convicted of a misdemeanor and fined up to \$5,000. Any party who knowingly or willfully obtains a person's record also faces criminal penalties. Civil liability for willful or intentional acts includes injunctions against further acts, damages of not less than \$1,000, attorney fees and costs."); see also 20 U.S.C. § 1232g(a)(1)(C)-(D) (2000) (conversely, students may waive their privacy rights in writing, which allows identified third parties to access some or all of their records.).

³⁴ *Owasso Indep. Sch. Dist. v. Falvo*, 534 U.S. 426, 429-30 (2002); see also Daniel R. Dinger, *Johnny Saw My Test Score, So I'm Suing My Teacher: Falvo v. Owasso Independent School District, Peer Grading, and a Student's Right to Privacy Under the Family Education Rights and Privacy Act*, 30 J.L. & EDUC. 575 (2001); 20 U.S.C. § 1232g(a)(4) (2000) (defining "education records"); 20 U.S.C. § 1232g(b)(1) (2000) (FERPA cuts off funding to programs that allow the dissemination of, among other things, test scores or other personal information that is identifiable by name or Social Security number.).

³⁵ 42 U.S.C. § 1983 (Supp. V 1999).

³⁶ *Gonzaga Univ. v. John Doe*, 536 U.S. 273, 276, 287-89 (2002).

³⁷ *Id.* at 287, 289; see also 20 U.S.C. § 1232g(f) (2000); 20 U.S.C. § 1232g(g) (2000).

apparently granted in FERPA.³⁸

The PATRIOT Act changes the standards for sharing student records in two important ways:

- i. It makes it much easier for law enforcement to gain access to student records.³⁹ Prior to the PATRIOT Act, law enforcement agents needed to prove they had 'probable cause' before getting access to a student's record, which requires specific evidence of wrong doing. Now under the PATRIOT Act, law enforcement only need to have 'reasonable suspicion,' a much lower standard.⁴⁰ This means student records aren't protected as strongly as they were before.
- ii. FERPA required that schools notify students if their records had been released to law enforcement agents. Under the PATRIOT Act, schools are no longer required to notify students. Students have no idea if their records have been turned over to law enforcement or for what reason.⁴¹

Sentinel newspaper reporter, Thomas Ryan, summarizes, "[t]he Patriot Act creates an exception to the privacy protections of the FERPA⁴² to require 'emergency disclosure' if specified federal officials obtain a court order relevant to a terrorism investigation, which is very broadly defined in the Act."⁴³ FERPA, however, already contains an exception for "safety or well-being" that is arguably sufficient to deal with a true emergency caused by a terrorist suspect.⁴⁴

Any educational records that school systems⁴⁵ collect and keep about public-schooled students or home-schooled students fall under the purview of FERPA.⁴⁶

³⁸ USA PATRIOT ACT §§ 215, 507 (Section 215 can be used to access purchase records, computer files, educational files, library records and generic information, and § 507 amends section 404 of the General Education Provisions Act, 20 U.S.C. § 1232g by allowing the Attorney General to "collect education records in the possession of the educational agency or institution that are relevant to an authorized investigation . . .").

³⁹ USA PATRIOT ACT §§ 215, 507.

⁴⁰ *New Jersey v. T. L. O.*, 469 U.S. 325, 347 (1985) ("The discovery of the rolling papers concededly gave rise to a reasonable suspicion that T. L. O. was carrying marihuana as well as cigarettes in her purse.")

⁴¹ Textoris, *supra* note 24, at 2 (footnotes added).

⁴² 20 U.S.C. § 1232g(j)(1)(A)-(B) (Supp. II 2002) (FERPA aids in the investigation and prosecution of terrorism.)

⁴³ Thomas Patrick Ryan, *Another Look at the Patriot Act*, THE SENTINEL NEWSPAPERS, Nov. 29, 2004 (on file with Chapman Law Review).

⁴⁴ 20 U.S.C. § 1232g(h) (2000).

⁴⁵ See, e.g., *id.* at § 1232g(a)(2) (2000) (so long as the systems accept federal funding).

⁴⁶ Student education records fall under FERPA. Kathleen Lucadamo et al., *Secret School Files Dumped*, DAILY NEWS, Nov. 14, 2004, at 2 ("Under the [FERPA], a school must protect the confidentiality of student education records that it maintains," said Susan Aspey, Press Secretary of the U.S. Department of Education, regarding alleged mismanagement of homeschooling records.)

2. Judicial Decisions

Although nothing in the U.S. Constitution specifically mentions privacy rights, other rights hint at it.⁴⁷ The Fourth Amendment specifically grants:

[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁴⁸

However, the Supreme Court currently permits a variety of exigency and “special needs” exceptions to the Fourth Amendment.⁴⁹ The Court has also found privacy privileges in the First Amendment’s rights to freedom of speech, religion and association,⁵⁰ the Third Amendment’s prevention against forced quartering of soldiers,⁵¹ and the Fifth and Fourteenth Amendments’ due process rights, equal protection provisions, and protections against self-incrimination.⁵² The Ninth Amendment ensures that just because the Constitution or the Bill of Rights does not mention a particular right it does not mean that it is not a right of the people.⁵³ Thus, the Supreme Court has interpreted the Ninth Amendment to provide some privacy protection.⁵⁴

In 1977, the Supreme Court recognized child-rearing and education as within the scope of the right to privacy.⁵⁵ However, Ninth Amendment protections have been applied, with few exceptions, only to out-of-school or at-home privacy protection, as delineated by landmark cases decided throughout the 1960’s, 70’s and 80’s, concerning issues such as prophylactic issues,⁵⁶ sexual behavior,⁵⁷ abortion rights,⁵⁸ and wiretapping.⁵⁹ Perhaps, then, it

⁴⁷ *Griswold v. Connecticut*, 381 U.S. 479, 483-85 (1965).

⁴⁸ U.S. CONST. amend. IV.

⁴⁹ See discussion *infra* Part II. C. 2. Information That School or Government Officials May By Law Require From *Some* Students.

⁵⁰ U.S. CONST. amend. I; see, e.g., *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342 (1995) (right to speak anonymously); *NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (striking down compulsory disclosure of names and addresses of organization members).

⁵¹ U.S. CONST. amend. III.

⁵² U.S. CONST. amend. V, § 1 (restricts the government from forcing individuals to divulge certain information about themselves); U.S. CONST. amend. XIV § 1 (same); e.g., *Whalen v. Roe*, 429 U.S. 589, 598-99 (1977) (explaining substantive due process privacy protection to information privacy).

⁵³ U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).

⁵⁴ *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

⁵⁵ *Carey v. Population Servs. Int’l*, 431 U.S. 678, 684-85 (1977).

⁵⁶ See *Griswold*, 381 U.S. at 482-84 (also recognizing the right to educate one’s child as one chooses as part of the right to privacy).

⁵⁷ *Lawrence v. Texas*, 539 U.S. 558, 578-89 (2003).

⁵⁸ *Roe v. Wade*, 410 U.S. 113, 153-54 (1973).

is not coincidental or surprising that the modern rise in homeschooling⁶⁰ follows the wave of privacy rights pursued in the late twentieth century.

B. The Rise of Homeschooling

The National Center for Education Statistics (NCES) reports that in 2003 about 1.1 million U.S. students were homeschooled, up from 850,000 in 1999,⁶¹ a 29% increase in just five years.⁶² Ian Slatter, spokesman for the National Center for Home Education (NCHE), however, claims that the NCES statistic *underestimates* the number of children actually being homeschooled.⁶³ Slatter claims that the true figure is two million children.⁶⁴ This million-or-so student discrepancy exposes the informational obfuscation provided by not registering children in traditional school systems.

Nonetheless, it is estimated that homeschooled children currently represent 2.2% of the five- to seventeen-year-old population in the United States.⁶⁵ The top reasons parents give for homeschooling their children are:

- 31% Concern about school environment.⁶⁶
- 30% To provide religious/moral instruction.⁶⁷
- 16% Dissatisfaction with academic teaching.⁶⁸
- 7% Child has mental/physical health problem.⁶⁹
- 7% Child has special needs.⁷⁰

Thus far, statistics do not reveal concern of personal

⁵⁹ Katz v. United States, 389 U.S. 347, 353 (1967).

⁶⁰ See, e.g., Susan Saiter, *The Learning Society; Schooling in the Home: A Growing Alternative*, N.Y. TIMES, Apr. 14, 1985, at §12, pg. 45.

⁶¹ Shannon Reilly & Alejandro Gonzalez, *Home-schooling Up*, USA TODAY, Sept. 1, 2004, at A1.

⁶² *More Kids Learning at Home, U.S. Says*, ASBURY PARK PRESS, Aug. 4, 2004, at A5.

⁶³ *Id.* See, e.g., Abby Goodnough, *Kitchen-Table Classrooms*, N.Y. TIMES, Sept. 24, 1995, at §13, N.J., pg.1 ("Since New Jersey has no specific statute governing home schooling, the State Department of Education does not count the children involved from year to year.")

⁶⁴ *More Kids Learning at Home, U.S. Says*, *supra* note 62, at A5.

⁶⁵ *More Kids Learning at Home, U.S. Says*, *supra* note 62, at A5.

⁶⁶ E.g., David Andreatta, *Teacher-Bust Rate More Than One a Day*, N.Y. POST, Oct. 25, 2004, at 2 (1,416 Department of Education employees were arrested between July 1, 2003, and June 30, 2004); Carl Campanile, *Scared Kids Flee Schools*, N.Y. POST, Aug. 23, 2004, at 2 ("More than 2,500 city students fled their public schools last year out of fear for their safety . . ."); NANCY DAY, *VIOLENCE IN SCHOOLS: LEARNING IN FEAR 8-12* (1996).

⁶⁷ Reilly & Gonzalez, *supra* note 61, at A1.

⁶⁸ See, e.g., GUY STRICKLAND, *BAD TEACHERS: THE ESSENTIAL GUIDE FOR CONCERNED PARENTS* 12, 148 (1998).

⁶⁹ Reilly & Gonzalez, *supra* note 61, at A1.

⁷⁰ Reilly & Gonzalez, *supra* note 61, at A1.

confidentiality as a major rationale for homeschooling children, even though government officials, school administrators, and faculty members collect large amounts of information about the students who attend public schools.⁷¹ Few people realize or recognize that homeschooling provides an additional over-arching advantage over public schooling. And that advantage is privacy.

C. Information Gathering

In 1973, the Supreme Court stated, “[e]ducation, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.”⁷² Although the federal Constitution does not necessarily provide a right to education, every state has a public school education provision in its constitution.⁷³ States must ensure that their education statutes do not conflict with any privacy rights. States may, and often do, provide privacy protections greater than protections granted by the federal constitution;⁷⁴ therefore, states must balance educational and privacy standards to justify collecting otherwise private information for educational purposes.

Why should students and parents be concerned about information privacy? As a HSLDA *National Privacy Report* stressed:

[a] transfer of information about a private citizen to the government cannot be viewed as harmless. Once a private citizen gives personal information to a government official, the citizen no longer has any control over where that information is stored, or the purposes to which it will be put. The more information a government collects on its citizens, the greater its ability to control the citizens. Informational privacy is an important right. Home school families are concerned about family privacy in choosing to direct the education of their children.⁷⁵

“Privacy” generally refers to people’s right to control

⁷¹ See discussion *infra* Part II. C. Information Gathering.

⁷² *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973).

⁷³ KERN ALEXANDER & M. DAVID ALEXANDER, *AMERICAN PUBLIC SCHOOL LAW* 978-82 (5th ed. 2001) (N.Y. CONST. art. XI, § 1 provides, “[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.” Many state constitutions, such as Maryland, Minnesota, New Jersey, Ohio, Pennsylvania, and West Virginia, utilize a “thorough and efficient” educational standard.). *Id.* at 981.

⁷⁴ *E.g.*, CAL. CONST. art. I, § 1 (“protect[s] property, and pursuing and obtaining safety, happiness, and *privacy*”) (emphasis added).

⁷⁵ Home School Legal Defense Association, *HSLDA’s National Privacy Report*, Mar. 2001, available at <http://www.hslda.org/docs/nche/000010/200104260.asp> [hereinafter *HSLDA, Privacy Report*].

information about themselves and their families. Even when considering the many state-mandated homeschooling statutes, homeschooled students and their parents overwhelmingly control much more of their personal and private information than do publicly schooled children and their parents.⁷⁶

Privacy and education issues interact daily. Parents must provide personal data even before their children may attend most public schools.⁷⁷ Sometimes, schools extract private information before students may participate in school-sponsored programs.⁷⁸ Parents and students “consent” – for a variety of reasons, not the least of which include frustration, ignorance, or subtle coercion – to divulging information that their families may not necessarily want others to know.⁷⁹ The types of personal information that public schools gather can, basically, be organized into three general categories:

Information that most school or government officials require by law from *every* student;⁸⁰

Information that school or government officials *may* by law require from *some* students;⁸¹ and,

Information legally permitted to be garnered through less obvious means.⁸²

1. Information that Most School or Government Officials

⁷⁶ See discussion *infra* Part II. C. 1. Information That Most School or Government Officials Require By Law From *Every* Student.

⁷⁷ See discussion *infra* Part II. C. 1. a. Registration.

⁷⁸ See discussion *infra* Part II. C. 2. a. Corporal Testing.

⁷⁹ As in criminal Due Process cases, which require voluntary confessions, factors such as age, educational background, and mental capabilities, should, arguably, come into play when students and guardians are asked to provide information. When students are called into guidance counselors’ or principals’ offices, the situations mirror the world of law enforcement custodial interrogations prior to *Miranda v. Arizona*, 384 U.S. 436 (1966). As noted in the landmark case, police interrogation techniques were officially:

‘[i]f at all practicable, the interrogation should take place in the investigator’s office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and more reluctant to tell of his indiscretions or criminal behavior within the walls of his home. Moreover his family and other friends are nearby, their presence lending moral support. In his office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law.’

Id. at 449-50. This denotes the atmospheric benefit of a home environment versus an administrative institutional environment.

⁸⁰ See discussion *infra* Part II. C. 1. Information That Most School or Government Officials Require By Law From *Every* Student.

⁸¹ See discussion *infra* Part II. C. 2. Information That School or Government Officials *May* By Law Require From *Some* Students.

⁸² See discussion *infra* Part II. C. 3. Legally Garnering Information Through Less Obvious Means.

Require by Law from *Every Student*

a. Registration

A straightforward way to comprehend the type and amount of information public schools require is to review what a typical school district requests each student to submit. One school district⁸³ requires parents to divulge at least four different types of information: residential, emergency contact, directory and medical.⁸⁴ Parents *must by law* complete, sign and submit a Parental/Guardian Consent Form on a yearly basis for each child they wish to register.⁸⁵ In accordance with FERPA,⁸⁶ parents may opt their students out of inclusion in any student directory and other photo/image identifiers.⁸⁷

The sample district's Student Information and Emergency Form (SIEF) is by far the most intrusive.⁸⁸ In addition to the student's address information, the school requests that the parents/guardians supply, among other information, the student's Social Security number, date of birth, age, emergency and alternative emergency contact information, personal physician's name contact information, a listing of any medical needs, parents' and/or guardians' contact information including employers and home and business phone numbers, and all siblings' names, birthdates and schools.⁸⁹ Courts generally do not protect names, addresses and phone numbers as confidential.⁹⁰ The SIEF also asks, "[w]ith whom does [the]

⁸³ Ocean Twp. Sch. Dist. (OTSD), Ocean Twp., N.J. This school district is the sample district referred to throughout this article.

⁸⁴ See *infra* notes 85, 87, 88 and 91.

⁸⁵ Twp. of Ocean Sch. Dist., Student Info. and Emergency Form (unpublished form, on file with Chapman Law Review). In addition to the above forms, the envelope distributed by the Ocean Township School District to parents and guardians also contain letters of welcome from the principal and PTA president, transportation department information, a PTA Committee Volunteer Interest Sheet, a PTA Membership envelope requesting dues money, a voter registration form/envelope, and open house information.

⁸⁶ 20 U.S.C. § 1232(g)(5) (2000) (requires notice be given before directory information is released).

⁸⁷ Twp. of Ocean Sch. Dist., Parental/Guardian Consent Form (unpublished form, on file with Chapman Law Review). Ironically, a directory opt-out will only occur after a student submits the appropriate form, which requires the student's and parent's names and dated signature.

⁸⁸ See Twp. of Ocean Sch. Dist., Student Info. and Emergency Form, *supra* note 85 (requiring student to submit, among other things, student's social security number, emergency contacts, personal physician, parents' employer(s) and a current utility bill).

⁸⁹ *Id.*

⁹⁰ *Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt County*, 124 S. Ct. 2451, 2456, 2460 (2004) (State law enforcement may reasonably compel people to "stop and identify" themselves. "In every criminal case, it is known and must be known who has been arrested and who is being tried. . . . Even witnesses who plan to invoke the Fifth Amendment privilege answer when their names are called to take the stand." (citation

student reside?" and lists check-boxes for "both parents," "mother," "father," or "guardian,"⁹¹ and requires the dated signature of a parent or legal guardian.⁹² The sheet notes twice in bold, capital letters that a current utility bill must be submitted with the completed form.⁹³ This information is far beyond the theoretically benign requests for basic contact and medical information.

The sample school district supplies copies of this "carbon-backed" triplicate form to the district's health office, guidance department and attendance controller.⁹⁴ Text at the top of the SIEF orders that parents "complete this form and return it immediately to your student's homeroom teacher."⁹⁵ The form permits countless eyes access to this sensitive information.⁹⁶

It does not take a conspiracy theorist to recognize that this seemingly benign information gathering and dissemination may, in the aggregate, be detrimental.⁹⁷ For instance, online and hardcopy student directories may provide access for molesters and harassers to learn the names and contact information of potential victims.⁹⁸ Further, school systems' (mis)use of Social Security numbers is particularly alarming.⁹⁹ "Courts have ruled that there are only four (4) instances when Social Security numbers MUST be used. These are: 1. For tax purposes[;] 2. To receive public assistance[;] 3. To obtain and use a driver's

omitted)). *Id.* at 2461. *Contra* cases titled "*Doe*," "*Roe*," "*In re*," *etc.*, and witness protection programs, where witnesses are not necessarily required to identify themselves.

⁹¹ Twp. of Ocean Sch. Dist., Student Info. and Emergency Form (unpublished form, on file with Chapman Law Review).

⁹² *Id.*

⁹³ *Id.* ("YOU MUST INCLUDE A CURRENT UTILITY BILL WITH THIS FORM" and "FILL OUT COMPLETELY AND ATTACH A CURRENT UTILITY BILL").

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See Kathleen Vail, *Privacy Rights Versus Safety: Should Juvenile Records be Open to Schools?*, AM. SCH. BOARD J., April 1997, available at <http://www.asbj.com/security/contents/0497vail.html> (Many states, including California, Florida, Missouri, Texas, and West Virginia, require that law enforcers notify school officials when students are charged with some crimes whether or not the offenses occurred on school property or at a school function.)

⁹⁸ See Andrew Sickinger, *A Few Words of Western Wisdom*, WESTERN COURIER, Aug. 27, 2004, available at <http://www.westerncourier.com/media/paper650/news/2004/08/27/Opinion/A.Few.Words.Of.Western.Wisdom-706368.shtml> ("The *stalker book*, also known as the 'student directory,' includes your name, year, major, local address and phone number and your home address. Although the school claims it doesn't sell the book to credit card companies, you will get bombarded with offers from them shortly after the book comes out, through the mail and over the phone.") (emphasis added).

⁹⁹ Schools often use Social Security numbers as Student ID numbers and require disclosure of Social Security number for a variety of reasons. Stealing Social Security numbers is often a major component of identity theft.

license[; and,] 4. To register a motor vehicle.”¹⁰⁰ School attendance is not one of these instances.¹⁰¹ Nonetheless, Social Security numbers have become a *de facto* national ID number and many, if not most, schools use Social Security numbers as students’ ID numbers.¹⁰² Social Security cards, however, initially stated in capital letters, “NOT TO BE USED FOR IDENTIFICATION.”¹⁰³ Some homeschooling parents have objected to Social Security identifiers based on religious convictions.¹⁰⁴ Regardless of what information school systems claim that students must provide, the Privacy Act states: “[i]t shall be unlawful . . . to deny to any individual any right, benefit, or privilege provided by law because of such individual’s refusal to disclose his social security account number.”¹⁰⁵

Since education is regulated variably by each state, homeschooling “registration” requirements fluctuate.¹⁰⁶ In 1995, at least sixteen states lacked any homeschooling statutes and eleven states did not even require homeschoolers to notify their local school districts at all regarding their status.¹⁰⁷ As of 2003, “[n]ine states allow parents to remove children from school without reporting that they are doing so. An additional 14 states require home-schoolers to report that they are keeping their

¹⁰⁰ CLAIRE WOLFE, 101 THINGS TO DO ‘TIL THE REVOLUTION 34-35 (rev. ed. 1999) (citing the Heritage Caucus); accord Flavio L. Komuves, *We’ve Got Your Number: An Overview of Legislation and Decisions to Control the Use of Social Security Numbers as Personal Identifiers*, 16 J. MARSHALL J. COMPUTER & INFO. L. 529, 540, 545, 548 (1998).

¹⁰¹ See Banisar, *supra* note 21 (“[Social Security numbers] are considered an education record under FERPA and its [sic] collection and disclosure by government agencies is [sic] generally prohibited by the Privacy Act of 1974.”); see also Plyler v. Doe, 457 U.S. 202, 205, 215, 223 (1982) (requires undocumented children of alien immigrants be educated at public schools; such children apparently would not be able to submit Social Security numbers).

¹⁰² See Komuves, *supra* note 100, at 531-32, 537-38.

¹⁰³ WOLFE, *supra* note 100, at 30; see also Home School Legal Defense Association, *Social Security Inspector General Testifies Before Congress*, July 27, 2001, available at <http://www.hslda.org/docs/news/hslda/200107270.asp?> [hereinafter HSLDA, *Social Security Inspector*] (“Social Security was created in 1935 for the sole purpose of tracking Americans’ earnings in order to properly credit their wages. Americans were promised that it would not be used for anything else. The Department of Defense now uses the SSN for armed forces and draft registration, and the Internal Revenue Service requires it for income tax returns and bank deposits to ensure that all income has been declared. . . . Federal, state, and local governments also use the SSN for issuing food stamps and driver’s licenses, to marriage licenses and water and sewer bills.”).

¹⁰⁴ HSLDA, *Social Security Inspector*, *supra* note 103 (Some argue that *The Bible* presses for a separation of church and state functions and that Social Security numbers are “a mark” which may “one day lead to chip implantation or biometric identification;” and, therefore, First Amendment freedom of religion rights should keep Social Security numbers out of school requirements.).

¹⁰⁵ 5 U.S.C. § 552a (2000).

¹⁰⁶ See *infra* notes 107, 108, 247, 303 and accompanying text.

¹⁰⁷ Goodnough, *supra* note 63, at §13, N.J., pg.10.

children at home, but require very little else.”¹⁰⁸

b. Examinations

i. Academic Classifications

Public school systems generally rank students and organize classes according to many factors, including, among other things, students' ability levels and disabilities,¹⁰⁹ whereas homeschoolers are not subject to class rankings or limited by aptitude placements.¹¹⁰ It is common knowledge that school systems across the country assess students using a battery of mandatory standardized tests, such as the CAT, HSPT, GEPA, ESPA, Stanford, and Regency.¹¹¹ However, only about half the states require homeschoolers to submit to standardized testing,¹¹² and a number of states do not supervise parents who keep their children out of public or private schools.¹¹³ States' use of achievement tests to monitor home instruction has been found constitutional,¹¹⁴ and homeschooled children who wish to enter or re-enter public schools may be required to pass performance and classification examinations.¹¹⁵

Actual requirements to assess homeschoolers' achievements vary from state to state.¹¹⁶ The *Homeschooling Almanac 2002-2003* advises:

[y]ou can obtain an academic record of your [homeschooled] child's schooling career in two ways. The first way is to keep records yourself

¹⁰⁸ Editorial, *Make Home Schooling Safe for Children*, N.Y. TIMES, Nov. 15, 2003, at A12.

¹⁰⁹ Telephone Interview with Diana Panigrosso, English Teacher, Marlboro High Sch., Marlboro, N.J., and Past English Dept. Chairperson, St. Mary's High Sch., South Amboy, N.J. (Dec. 9, 2004).

¹¹⁰ Telephone Interview with Dawn Lincoln, parent who has homeschooled two children in both Connecticut and New Hampshire (Dec. 10, 2004) (on file with author).

¹¹¹ See State Education Profiles for Use with NAEP, 2000-2001 School Year, State Assessments: MATH (source on file with Chapman Law Review) (testing differs from state to state); see also No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2001) (No Child Left Behind Act requires performance testing); see, e.g., John Mooney, *State Must Devise Tests to Comply with No Child Left Behind*, STAR-LEDGER (Newark, N. J.), Dec. 6, 2004, at 13 (“By rule, [New Jersey] must have standards in place and test students in grades three through eight by 2006.”).

¹¹² See, e.g., LINDA DOBSON, THE HOMESCHOOLING BOOK OF ANSWERS 173, 329-41 (1998) (No forced standardized testing of homeschoolers in: Alabama, Arizona, California, Idaho, Illinois, Indiana, Kansas, Kentucky, Maryland, Michigan, Mississippi, Missouri, Montana, New Jersey, Oklahoma, Texas, Utah, Wisconsin, Wyoming, American Samoa, or Washington, D.C.).

¹¹³ Editorial, *Make Home Schooling Safe for Children*, *supra* note 108, at A12.

¹¹⁴ *Murphy v. Arkansas*, 852 F.2d 1039, 1040, 1044 (8th Cir. 1988).

¹¹⁵ *E.g.*, *Vandiver v. Hardin County Bd. of Educ.*, 925 F.2d 927, 929, 931 (6th Cir. 1991).

¹¹⁶ See *infra* Part III. LEGAL FOUNDATIONS AND REGULATIONS OF HOMESCHOOLING.

and then create a transcript format document for such use The other way is to enroll in an independent study program (ISP), either public or private, that maintains records and generates transcripts for you.¹¹⁷

Many homeschooling parents assess and record their children's performance in some way; however, what gets revealed beyond the home is, for the most part, a familial decision.¹¹⁸

ii. Medical Exams

Public schools may garner medical information.¹¹⁹ A separate letter to parents from the sample township's health office informs:

[t]he State of New Jersey requires that all Kindergarten, 1st, 2nd [,] 3rd and 4th grade students have their HEPATITIS B VACCINE SERIES completed by the beginning of the 2004-05 school year. It is also required that all Kindergarten students have one dose of the VARICELLA VACCINE before entering Kindergarten or the date of chickenpox illness. It is recommended that 1st grade students have their Varicella Vaccine completed as well.¹²⁰

Vaccinations requirements vary by state; however,

[p]arents who choose to have their child abstain from vaccinations fall into a gray area – with little wiggle room. New York State requires that all children receive required vaccinations before entering the day care or school systems. While the Department of Education will accept a medical deferment in instances of children who are immunodeficient, exemption for parental concerns dealing with religious or philosophical issues are reviewed and granted only on a case-by-case basis.¹²¹

Since public schools require nearly all students to receive certain vaccinations, people can make general assumptions about individual students' medical information.¹²² In this way, public

¹¹⁷ LEPPERT & LEPPERT, *supra* note 14, at 166.

¹¹⁸ Telephone Interview with Dawn Lincoln, *supra* note 110 (“Assessment can also include more subtle forms of direct observation.”).

¹¹⁹ See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 659 (1995) (“[R]equiring advance disclosure of medications” prior to a urinalysis test is not “*per se* unreasonable.”); see also *Skinner v. Ry. Labor Executives' Ass'n*, 498 U.S. 602, 626 n.7 (1989) (The Court “[did] not view this procedure as a significant invasion of privacy.”).

¹²⁰ Letter from Ocean Twp. Elementary Sch. to students' parents/guardians [hereinafter Letter from Ocean Twp. Elementary Sch.] (on file with Chapman Law Review) (emphasis omitted).

¹²¹ Shannon Heaney, *Vaccinations: What Every Parent Should Know*, DAILY NEWS, Sept. 28, 2004, at Family Health 2.

¹²² Letter from Ocean Twp. Elementary Sch., *supra* note 120 (State administrative code no longer requires that physical examinations be performed at specific grade levels; however, the sample district still *requests* any updated student health information. New Jersey state law prevents students from bringing personal medications into school; however, students may carry medically necessary inhalers and epi-pens if parents submit

school students' personal medical privacy is compromised, but such data remains ambiguous for homeschoolers.

iii. Psychological Exams

In 2000, the Third Circuit held that “[s]chool-sponsored counseling and psychological testing that pry into private family activities can overstep the boundaries of school authority and impermissibly usurp the fundamental rights of parents to bring up their children, as they are guaranteed by the Constitution.”¹²³ In spite of this, in October 2004, a U.S. House of Representatives appropriations bill included a new, mandatory mental health screening of every child in America, including preschool children.¹²⁴ Moreover, the pharmaceutical industry supported the bill because it has also been interpreted to require drugging of children deemed mentally ill, even when parents refuse.¹²⁵ The bill has yet to pass the Senate; whether the program would be enforced or tabulated through school system rosters is also not yet apparent.¹²⁶ The state of Illinois has already implemented a similar mandatory mental health screening program via its school systems.¹²⁷ Arguably, homeschooled students, especially those “living off the grid,”¹²⁸ can avoid government-imposed psychological screenings.

Many public schools utilize school psychologists and

the proper forms to the health office. Parents may come to the school and deliver medications, or the school nurse may administer medications after parents and physicians file the required health forms.).

¹²³ Gruenke v. Seip, 225 F.3d 290, 307 (3d Cir. 2000).

¹²⁴ Ron Strom, *Forced Mental Screening Hits Roadblock in House*, WORLDNETDAILY, Sept. 9, 2004, http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=40365 (The “New Freedom Initiative” is a result of the New Freedom Commission on Mental Health, which President Bush established in 2002); H.R. 438, 108th Cong. (2004) (Rep. Paul’s amendment to stop the program failed.).

¹²⁵ Strom, *supra* note 124. See also The Liberty Committee, *Mental-health Screening of Children*, Sept. 7, 2004, available at <http://www.thelibertycommittee.org/update09.07.04.htm>. *Contra* The Child Medication Safety Act of 2003, S. 1390, 108th Cong. (1st Sess. 2003) (read twice and referred to the Committee on Health, Education, Labor, and Pensions) (prevents schools from forcing parents to drug their child as a condition of attending school).

¹²⁶ As of November 11, 2005, the bill had not passed the Senate.

¹²⁷ CHILDREN’S MENTAL HEALTH ACT of 2003, 405 ILL. COMP. STAT. 49/1-15 (2003) (“The Illinois State Board of Education shall develop and implement a plan to incorporate social and emotional development standards as part of the Illinois Learning Standards for the purpose of enhancing and measuring children’s school readiness and ability to achieve academic success. . . . Every Illinois school district shall develop a policy for incorporating social and emotional development into the district’s educational program.”); see also Illinois Leader, *Leader Readers Express Outrage with Mental Health Screening Plan for Expectant Mothers and Children 18 Yrs and Younger*, July 26, 2004, available at <http://www.illinoisleader.com/opinion/opinionview.asp?c=17967> (letters from readers commenting on the Act).

¹²⁸ Slang for self-reliant living.

counselors.¹²⁹ These professionals must abide by duties of confidentiality.¹³⁰ Psychotherapist-patient privilege protects much of the parties' communication;¹³¹ however, confidentiality may be breached in most states if revealing the information would prevent serious harm to the patient or a third party.¹³²

Sometimes, psychological exams are mandatory, particularly before students may re-enter schools after suspension or expulsion.¹³³ Many parents who homeschool their children, though, allege that public school atmospheres are the source of many children's discipline problems.¹³⁴ "Parents and students alike have reported a great release of pressure because of the move from institutional schools to home. Problems often disappear."¹³⁵ Homeschooled children do not accumulate school-related discipline or psychological records unless parents decide to maintain them.¹³⁶

2. Information that School or Government Officials *May* by Law Require from *Some* Students

a. Corporal Testing

Nowhere is the loss of students' privacy in schools more apparent than in Supreme Court rulings on compulsory drug testing.¹³⁷ The Court currently permits a variety of "special

¹²⁹ Daniel J. Reschly, *The Present and Future Status of School Psychology in the United States*, 29 SCH. PSYCHOL. REV. 507, 510 (2000), available at <http://www.nasponline.org/pdf/spr294reschly.pdf>.

¹³⁰ American School Counselor Association, *Ethical Standards for School Counselors*, § A.2., <http://www.schoolcounselor.org/files/ethical%20standards.pdf> (last revised June 26, 2004) ("The professional school counselor: . . . b. Keeps information confidential unless disclosure is required to prevent clear and imminent danger to the student or others or when legal requirements demand that confidential information be revealed.").

¹³¹ BLACK'S LAW DICTIONARY 555 (2d pocket ed. 2001) ("[P]sychotherapist-patient privilege. A privilege that a person can invoke to prevent the disclosure of a confidential communication made in the course of diagnosis or treatment of a mental or emotional condition by or at the direction of a psychotherapist. The privilege can be overcome under certain conditions, as when the examination is ordered by a court.").

¹³² *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 340 (Cal. 1976) (holding that psychologists may have duties to warn third parties).

¹³³ See *Demers ex rel. Demers v. Leominster Sch. Dep't*, 263 F. Supp. 2d 195, 204 (D. Mass. 2003) (upholding student expulsion because he refused to see a psychiatrist). *But see Boman v. Bluestem Unified Sch. Dist. No. 205*, No. 00-1034-WEB, 2000 U.S. Dist. LEXIS 5297, at *8-10 (D. Kan. Feb. 14, 2000) (granting student a permanent injunction after school administration refused to reinstate her until she underwent a psychological evaluation).

¹³⁴ DOBSON, *supra* note 112, at 56-57.

¹³⁵ DOBSON, *supra* note 112, at 57.

¹³⁶ Telephone Interview with Dawn Lincoln, *supra* note 110.

¹³⁷ See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 664-65 (1995) (holding that public school's athlete drug testing policy is legal and constitutional); *Bd. of Ed. v. Earls*, 536 U.S. 822, 838 (2002) (students engaging in competitive extra-curricular activities may

needs” exceptions to the Fourth Amendment.¹³⁸ A “special-needs analysis” is a “balancing test used by the Supreme Court to determine whether certain searches (such as administrative, civil-based, or public-safety searches) impose unreasonably on individual rights.”¹³⁹ In school settings, special needs exceptions permit such personal invasions as: mandatory drug testing of any students involved in school-sponsored sports¹⁴⁰ or extra-curricular activities,¹⁴¹ unwarranted locker and handbag searches,¹⁴² and other such involuntary or unwarranted searches and seizures of students’ persons, papers and effects.¹⁴³

The landmark 1995 case *Vernonia School District v. Acton* opened the door to mandatory urine tests for any students involved in school-sponsored sports.¹⁴⁴ Seven years later, in *Board of Education v. Earls*, the Supreme Court expanded school officials’ rights to drug test any student participating in any school-sponsored extra-curricular activity.¹⁴⁵ School officials across the country have initiated programs in line with these rulings.¹⁴⁶ For instance, in October 2004, the Alvin School District in Texas began random weekly drug testing of 25 to 50 students, many of whom were involved in extra-curricular

be subject to urinalysis).

¹³⁸ See *Acton*, 515 U.S. at 653; *Earls*, 536 U.S. at 829.

¹³⁹ BLACK’S LAW DICTIONARY 656 (2d pocket ed. 2001); see also *id.* at 626 (Government agents may also invoke administrative searches: “[a] search of public or commercial premises carried out by a regulatory authority to enforce compliance with health, safety, or security regulations. The probable cause required for an administrative search is less stringent than that required for a search incident to a criminal investigation.”).

¹⁴⁰ *Acton*, 515 U.S. at 664-65.

¹⁴¹ *Earls*, 536 U.S. at 838.

¹⁴² See, e.g., *In re Isiah B. v. Wisconsin*, 500 N.W.2d 637, 641 (Wis. 1993) (holding that students have no reasonable expectation of privacy for personal items stored in school lockers); *Desilets v. Clearview Reg’l Bd. of Educ.*, 627 A.2d 667, 673 (N.J. Super. Ct. App. Div. 1993) (holding that search of hand luggage prior to a field trip was justified under the Fourth Amendment); *New Jersey v. T. L. O.*, 469 U.S. 325, 346-47 (1985) (upholding a handbag search for cigarettes).

¹⁴³ See *infra* Part II. C. 2. b. Searches and Seizures.

¹⁴⁴ *Acton*, 515 U.S. at 664-65.

¹⁴⁵ *Earls*, 536 U.S. at 829-31 (citing *Acton*, 515 U.S. at 652-56) (applying a “special needs” analysis and finding a diminished expectation of privacy because students are temporary custodial wards of the state). *Contra* Brad Setterberg, Note, *Privacy Changes, Precedent Doesn’t: Why Board of Education v. Earls was Judged by the Wrong Standard*, 40 HOUS. L. REV. 1183, 1217 (2003) (arguing *Earls* “is disingenuous and contrary to the established precedent of Fourth Amendment analysis”).

¹⁴⁶ See *ABC13 Eyewitness News: School District to Begin Random Drug Testing Next Week* (ABC television broadcast Oct. 30, 2004) (transcript on file with Chapman Law Review); Andrew Dunn, *Drug Czar Praises Local School’s Test Program*, THE LEDGER (Lakeland, Fla.), Oct. 28, 2004, available at <http://www.theledger.com/apps/pbcs.dll/article?AID=/20041028/NEWS/410280398&SearchID=73216563726179>.

activities (approximately 2,000 students a year).¹⁴⁷ Such tests are in line with U.S. Department of Education grants to seven school districts nationwide to create student drug testing programs in, what U.S. Drug Czar John P. Walters described as, “hopes of expanding random student drug testing to more places.”¹⁴⁸ Drug or alcohol testing of individual students while they are in school usually falls under a “reasonable suspicion” rationale,¹⁴⁹ but the allowance of such searches varies from state to state.¹⁵⁰ In contrast, narcotics policemen are not likely to patrol homeschoolers’ residences, absent voluntary consensual invitations¹⁵¹ or probable cause.¹⁵²

Aside from testing for drugs, courts generally have not allowed schools to require other medical tests from students.¹⁵³ For instance, in early 2004, the New York chapter of the American Civil Liberties Union settled a lawsuit against the U.S. Department of Education and school officials after a school required a group of female students to submit gynecological records as a condition of reinstatement.¹⁵⁴ “Under the terms of the agreement, school officials are barred from demanding that

¹⁴⁷ *ABC13 Eyewitness News: School District to Begin Random Drug Testing Next Week*, *supra* note 146.

¹⁴⁸ Dunn, *supra* note 146.

¹⁴⁹ *New Jersey v. T. L. O.*, 469 U.S. 325, 337 (1985) (“Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, what is reasonable depends on the context within which a search takes place. The determination of the standard of reasonableness governing any specific class of searches requires ‘balancing the need to search against the invasion which the search entails.’”) (citation omitted).

¹⁵⁰ ACLU, *School Records Private*, *supra* note 27.

¹⁵¹ A search is considered reasonable when there is voluntary consent, even absent a warrant or suspicion. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (“It is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.”); *United States v. Drayton*, 536 U.S. 194, 207 (2002) (“Although Officer Lang did not inform respondents of their right to refuse the search, he did request permission to search, and the totality of the circumstances indicates that their consent was voluntary, so the searches were reasonable.”). *But see* *United States v. Lindsay*, 506 F.2d 166, 173 (D.C. Cir. 1974) (holding that silence does not equal consent).

¹⁵² The Fourth Amendment mandates a showing of probable cause as justification for a search warrant, unless exigent circumstances, “plain view,” or another exemption applies. See *Aguilar v. Texas*, 378 U.S. 108, 114 (1964) (holding that the information supporting an application for a search warrant must demonstrate that an informant is credible or that his information is reliable); *Spinelli v. United States*, 393 U.S. 410, 419 (1969) (holding that probability of criminal activity is the standard for probable cause); *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (re-affirming the “totality-of-the-circumstances” approach to probable cause).

¹⁵³ Press Release, ACLU, NYCLU Hails Victory for Students’ Privacy Rights Following Lawsuit Over Forced Gynecological Exams (Jan. 31, 2004), available at <http://www.aclu.org/StudentsRights/StudentsRights.cfm?ID=14854&c=31> [hereinafter Press Release, ACLU, NYCLU Hails Victory].

¹⁵⁴ *Id.*

students undergo or reveal the results of pregnancy, STD [Sexually Transmitted Disease] and HIV testing and may not exclude students for being pregnant, HIV-positive or having an STD.”¹⁵⁵ Schools may not force students to submit to HIV tests.¹⁵⁶ However, if personal medical situations are made known to school officials, they may act in the interests of school safety.¹⁵⁷

Although public schools are generally not permitted to gather highly confidential medical information beyond drug test results, some states have begun different types of physical testing, thereby obtaining, to a certain degree, additional medical information. Arkansas, for example, “is now the only state that screens every student in public school for body mass index. [Schools] weigh [the students] and measure their height, and with that, . . . compute their body mass index and mail the results home to the parents. We let them know if their child is overweight.”¹⁵⁸ Whether gathering this type of information and disclosing the results will fall under the realm of impermissible testing remains to be seen.

b. Searches and Seizures

In 1985, the Supreme Court case *New Jersey v. T. L. O.* set forth the standard for conducting student searches.¹⁵⁹ School officials may constitutionally search students if the search is based on reasonable suspicion and is not excessively intrusive.¹⁶⁰ Strip searches,¹⁶¹ locker searches,¹⁶² and backpack/handbag searches¹⁶³ have generally been upheld.

School officials, though, sometimes push the boundaries of acceptable searches.¹⁶⁴ For instance, in 1996, Georgia school

¹⁵⁵ *Id.*

¹⁵⁶ ACLU, *Ask Sybil Liberty About Your Right to Privacy*, Dec. 31, 1997, <http://www.aclu.org/StudentsRights/StudentsRights.cfm?ID=9068&c=161>.

¹⁵⁷ 20 U.S.C. § 1232g(h) (2000) (situations that threaten the health or safety of the student or other individuals); *see also* Honig v. Doe, 484 U.S. 305, 328-29 (1988) (holding that a school district may suspend a disabled child who is dangerous to himself, herself or others for up to ten days without violating stay-put provision).

¹⁵⁸ Deborah Solomon, *Questions for Mike Huckabee: The Skinny on Politics*, N.Y. TIMES, Aug. 7, 2005, at § 6, pg. 14.

¹⁵⁹ *New Jersey v. T. L. O.*, 469 U.S. 325, 341 (1985).

¹⁶⁰ *Id.* at 341-42.

¹⁶¹ *See* *Cornfield v. Consol. High Sch.*, 991 F.2d 1316, 1323 (7th Cir. 1993) (upholding a strip search of a student that was deemed reasonable).

¹⁶² *See In re Isiah B.*, 500 N.W.2d 637, 638 (Wis. 1993) (upholding a random locker search at school).

¹⁶³ *See* *DesRoches v. Caprio and Sch. Bd.*, 156 F.3d 571, 572 (4th Cir. 1998) (upholding search of a student's backpack for missing tennis shoes because reasonable suspicion existed); *New Jersey v. T. L. O.*, 469 U.S. 325, 332-33 (1985) (upholding search of a student's purse).

¹⁶⁴ *See generally* *Thomas v. Clayton County Bd. of Educ.*, 94 F. Supp. 2d. 1290 (N.D.

officials and law enforcement strip-searched an entire class of fifth graders in search of a missing \$26.¹⁶⁵ Although the search was deemed unconstitutional, the judge refused to allow a jury to address the issue of damages because none of the adults involved could be held liable for their actions.¹⁶⁶ In 2000, Michigan school officials allegedly strip-searched over twenty students in an effort to recover \$354 that was supposedly stolen.¹⁶⁷ Four years later, another Michigan school system allegedly subjected its entire student body to a mass physical search.¹⁶⁸ According to an ACLU press release:

[t]he unlawful sweeps were planned and scheduled in advance and therefore not based on reasonable suspicion or probable cause to believe that any particular student or group of students had committed or was about to commit a crime or violated the law in any way. No guns or drugs were found¹⁶⁹

In 2001, the ACLU of Southern California sued the Los Angeles Unified School District alleging that school officials chose to search some students who were late to school and that school officials randomly selected students for pat-downs in front of their classmates during class time; allegedly, none of the searches followed reasonable suspicion.¹⁷⁰ Once again, unwarranted, government authorized, in-school strip searches are not a homeschooler concern.

Courts have ruled that general use of metal detectors on those entering school facilities is minimally invasive, and is permissible under the Fourth Amendment.¹⁷¹ Courts have

Ga. 1999).

¹⁶⁵ *Id.* at 1293-95.

¹⁶⁶ Press Release, ACLU, ACLU of GA Says School Strip Search Ruling Ignores Students' Rights (Oct. 4, 1999), *available at* <http://www.aclu.org/CriminalJustice/CriminalJustice.cfm?ID=8711&c=51>.

¹⁶⁷ Press Release, ACLU, ACLU of Michigan Sues School District Over Strip Search of Students (Aug. 15, 2000), *available at* <http://www.aclu.org/StudentsRights/StudentsRights.cfm?ID=8073&cfm> ("Approximately 20 boys were ordered into the shower room one at a time. Each boy was directed to remove his pants, lift his shirt and drop his underwear while a teacher examined him. . . . The five girls in the gym class were then forced to stand in a circle in the locker room, and pull down their shorts and lift up their shirts so the teachers could inspect their underwear. The money was never recovered.")

¹⁶⁸ Complaint for Declaratory and Injunctive Relief and Damages and Jury Demand at 3, *Wells v. City of Detroit*, (E.D. Mich. June 10, 2004), *available at* <http://www.aclu.org/StudentsRights/StudentsRights.cfm?ID=15930&c=31>.

¹⁶⁹ Press Release, ACLU, ACLU Challenges Detroit Police Over Mass Searches of Public School Students (June 10, 2004), *available at* <http://www.aclu.org/StudentsRights/StudentsRights.cfm?ID=15931&c=31>.

¹⁷⁰ Press Release, ACLU, ACLU of Southern California Sues to Stop Intrusive Searches at High School (June 19, 2001), *available at* <http://www.aclu.org/StudentsRights/StudentsRights.cfm?ID=7322&c=161>.

¹⁷¹ *See, e.g., Day v. Chi. Bd. of Educ.*, 1998 U.S. Dist. LEXIS 1376, at *15-16 (N.D. Ill.

allowed governments to facilitate in-school searches with drug-sniffing canines.¹⁷² However, in 2002, South Dakota officials “brought in a German Shepherd to conduct a suspicionless drug sweep” of elementary and high school classrooms, and the dog allegedly terrorized schoolchildren when it escaped its leash and chased them around the classroom.¹⁷³

[A school official] instructed the students to put their hands on their desks and avoid petting or looking at the dog or making any sudden movements. In some classrooms, a school official told students that any sudden movement could cause the dog to attack. In at least one instance . . . the dog escaped its leash in a kindergarten class and chased students around the room. . . . Many [students] began crying and trembling and at least one [student] urinated involuntarily.¹⁷⁴

Students learning at home are, arguably, not subject to such unwarranted searches.¹⁷⁵

3. Legally Garnering Information Through Less Obvious Means

a. Information Gleaned by Individual Faculty Members

It is common practice that during the first week of public school, teachers require students to fill out index cards or some other worksheet detailing, among other things, parent or guardian contact information, home address(es), and phone numbers.¹⁷⁶ Many teachers also ask students to brief their personal interests, likes and dislikes, and/or clubs and organizations to which they belong.¹⁷⁷ Students usually fill out one index card worth of personal information for each teacher they have.¹⁷⁸ Schools collect this information for allegedly benign

Feb. 4, 1998); *In re Latasha W.*, 70 Cal. Rptr. 2d 886, 866 (Cal. App. 4th 1998) (“Random metal detector weapon searches of high school students do not violate the Fourth Amendment constitutional ban on unreasonable searches and seizures.”); *Smith v. Norfolk City Sch. Bd.*, 46 Va. Cir. 238, 256 (Va. Cir. Ct. 1998) (students may be scanned with a hand-held metal detector).

¹⁷² *E.g.*, *Zamora v. Pomeroy*, 639 F.2d 662 (10th Cir. 1981); *Doe v. Renfrow*, 475 F. Supp. 1012, 1019 (N.D. Ind. 1979), *cert. denied*, 451 U.S. 1022 (1981).

¹⁷³ Press Release, ACLU, South Dakota School Officials Terrorized Kindergarten Classes with Drug-Sniffing Dogs, ACLU Charges (July 25, 2002), available at <http://www.aclu.org/DrugPolicy/DrugPolicy.cfm?ID=10548&c=230>.

¹⁷⁴ *Id.*

¹⁷⁵ See *supra* notes 151 and 152 and accompanying text.

¹⁷⁶ Telephone Interview with William Alusik, Sci. Teacher, Westfield High Sch., Westfield, N.J. (Dec. 5, 2004) (unpublished interview, on file with author); Telephone Interview with Evan Billig, Student, Ocean Twp. Intermediate Sch., Ocean, N.J. (Dec. 5, 2004) (unpublished interview, on file with author).

¹⁷⁷ Telephone Interview with William Alusik, *supra* note 176; Telephone Interview with Evan Billig, *supra* note 176.

¹⁷⁸ Telephone Interview with William Alusik, *supra* note 176; Telephone Interview with Evan Billig, *supra* note 176; cf. AOL Instant Message Interview with Brooke DeKolf,

purposes; however, most of this information could be obtained through the main school office or other school records.¹⁷⁹ Teachers generally do not guarantee that they will destroy student data sheets at the end of the school year and there is no telling into whose hands this personal information may eventually fall.¹⁸⁰

Student information cards are only the beginning of a school-year's worth of subtle information gathering. Viewing how students are dressed, assigning in-class presentations, and performing other commonplace interactions create opportunities for overt and covert information gathering. Personal information is particularly abundant in liberal arts classes, such as social studies or English, where teachers routinely require students to comment on current events, debate, and journal write.¹⁸¹ For instance, the classic first essay of the year – “What did you do this summer?” – illustrates how school employees may easily glean familial and personal information.¹⁸²

For obvious reasons, slight or subtle invasions of privacy rarely instigate legal proceedings; however, in 1999, parents of some Ridgewood, New Jersey, students brought suit in protest of a proposed 156 question, in-school “voluntary and anonymous” survey that touched on issues such as students’ personal substance abuse, criminal activities, sexuality, sexual activity, and relationships with parents.¹⁸³ The court found that, although one teacher may not have informed his students that the survey was voluntary and another teacher may have told students that they would be “cutting class” if they left the survey room, the school “did everything reasonably necessary to ensure its voluntary nature” and no privacy violation occurred.¹⁸⁴

FERPA allows releasing statistical information that is not

Student, James A. McDivitt Elementary Sch., Old Bridge Twp., N.J. (Dec. 6, 2004) (Sometimes, students fill out only one such form in their homerooms; then, photocopies are sent to each student's teachers.) (unpublished interview, on file with author).

¹⁷⁹ See *supra* Part II. C. 1. a. Registration.

¹⁸⁰ Telephone Interview with Evan Billig, *supra* note 176; AOL Instant Message Interview with Brooke DeKolf, *supra* note 178.

¹⁸¹ Telephone Interview with JoAnn Testa, Librarian and German Teacher, St. Mary's High Sch., S. Amboy, N.J. (Dec. 9, 2004).

¹⁸² *Id.*

¹⁸³ C.N. v. Ridgewood Bd. of Ed., 319 F. Supp.2d 483, at 486-87 (D. N.J. 2004) (citation omitted); see also, Jim Brown, *Attorneys Appeal Decision Upholding School Sex and Drugs Survey*, Oct. 1, 2004, AGAPEPRESS, <http://headlines.agapepress.org/archive/10/12004e.asp>.

¹⁸⁴ *Ridgewood Bd. of Ed.*, 319 F. Supp. 2d at 487, 492. However, such public school situations, arguably, fit the Supreme Court's rationale when it outlawed school prayer. Subtle pressures to cooperate and conform existed, though no students technically had to recite school prayers and theoretically could excuse themselves from the room.

personally identifiable.¹⁸⁵ In contrast, the HSLDA¹⁸⁶ opposes any federal government method of tracking or registering homeschooling.¹⁸⁷ Government agents rarely, if ever, accumulate data or statistics regarding homeschoolers' opinions, religion, home-life or emotions.¹⁸⁸

b. Information Gleaned by Collateral Means, and Other Concerns

i. Commuting

Commuting to and from school can be an issue. Citizens retain practically no Fourth Amendment rights when inside (or recently outside)¹⁸⁹ vehicles.¹⁹⁰ Law enforcement is entitled to search drivers with little cause.¹⁹¹ Vehicle passengers, too, have minimal expectations of privacy.¹⁹² Many school systems have purchased video equipment to survey students while they are passengers on school buses.¹⁹³ In response to a series of bombings in London, other public transportation systems like the

¹⁸⁵ FERPA, 20 U.S.C § 1232g (1998).

¹⁸⁶ Home School Legal Defense Association, *HSLDA Fights for Privacy Rights*, July 20, 2001, available at <http://www.hslda.org/docs/news/hslda/200107201.asp>? (“HSLDA is primarily interested in preventing government intrusions into family rights in the areas of medical privacy, financial records, and social security number abuse, identity theft and private educational records.”).

¹⁸⁷ HSLDA, *Privacy Report*, *supra* note 75 (The U.S. Dept. of Education attempted to survey homeschoolers' parents about: “[p]reschool programs and learning activities at home for young children; [a]ctivities and programs that school-age children may participate in after school, and [t]ypes of educational activities, including training at work, in which adults may take part in [sic].”).

¹⁸⁸ Telephone Interview with Dawn Lincoln, *supra* note 110. *Contra* Lawrence M. Rudner, *Scholastic Achievement and Demographic Characteristics of Home School Students in 1998*, EDUC. POL'Y ANALYSIS ARCHIVES, Mar. 23, 1999, <http://epaa.asu.edu/epaa/v7n8/> (university study providing statistics about homeschoolers).

¹⁸⁹ *Michigan v. Long*, 463 U.S. 1032, 1034-35, 1051 (1983) (reasonable to search a vehicle after the driver exits).

¹⁹⁰ *United States v. Stanfield*, 109 F.3d 976, 981 (4th Cir. 1997) (law enforcement may open and visually inspect inside of vehicle).

¹⁹¹ *Pennsylvania v. Mimms*, 434 U.S. 106, 111-12 (1977) (upholding police officer's request to have driver get out of vehicle and onto shoulder for expired license plate stop; the officer may then frisk the driver for weapons if he reasonably concludes that the person might be armed and dangerous).

¹⁹² *Maryland v. Wilson*, 519 U.S. 408, 415 (1997) (“[A]n officer making a traffic stop may order passengers to get out of the car pending completion of the stop.”); *Wyoming v. Houghton*, 526 U.S. 295, 302-03 (1999) (passengers possess reduced expectation of privacy with regard to property they transport in cars).

¹⁹³ Honeywell - Silent Witness, <http://www.silentwitness.com/schoolbus/> (last visited Nov. 10, 2005) (“Silent Witness is the industry leader in researching, designing and manufacturing video monitoring systems installed in school buses. Over 100,000 Silent Witness systems have been installed in buses across North America keeping children in their seats and discipline problems off the bus.”).

New Jersey rail lines and New York City bus lines are subjecting their passengers to random bag searches.¹⁹⁴ Also, “police in Washington, D.C., are considering conducting random searches on the capital’s subways.”¹⁹⁵

Because homeschooled students do not commute to and from school, law enforcement officers are afforded fewer chances to interact with and possibly search homeschooled students, their cars, and their belongings.

ii. Electronic Surveillance and Faculty Member Observations

Throughout the school year, schools record student behaviors in a multitude of ways. Under safety rationales, some government officials have posted video surveillance equipment in schools.¹⁹⁶ Arizona state officials and a local school board have experimented with facial recognition video systems.¹⁹⁷ Virginia Sheriff’s Captain Fred Pfeiff summarizes: “[w]e are following national trends to use technology to make our schools safer and provide us with reasonable intelligence information in case a crisis situation occur[s].”¹⁹⁸ Many schools speaker systems allow for two-way communications with classrooms; in other words, some school administrators may listen in on classroom conversations.¹⁹⁹

Most school systems require that teachers be officially observed; this entails administrators monitoring faculty members’ classroom performances and, hence, collateral observations of student behaviors.²⁰⁰ Sometimes, teachers incorporate video observation into their classrooms; although this is often for reasonable purposes such as self-improvement

¹⁹⁴ Mimi Hall, *Bag Searches on New York Subway to Begin*, USA TODAY, July 25, 2005, at 7A, available at http://www.usatoday.com/news/nation/2005-07-25-nyc-bag-searches-begin_x.htm?csp=N009.

¹⁹⁵ *Id.*

¹⁹⁶ See *ACLU Protests Cameras in Colorado Schools*, THE DAILY CAMERA (Boulder, Colo.), Jan. 25, 2001, available at <http://www.aclu.org/Privacy/Privacy.cfm?ID=6962&c=130> (\$840,000 for new security cameras in schools); Graeme Zielinski & Christine B. Whelan, *Fauquier to Use Cameras to Keep Eye on Students*, WASH. POST, Aug. 6, 2000, at V1 (installed \$60,000 worth of cameras “even though there has been no serious violence at [the schools] in recent years”).

¹⁹⁷ Press Release, ACLU, *ACLU Asks Arizona School District to Reject Face-Recognition Checkpoints* (Dec. 17, 2003), available at <http://www.aclu.org/news/newsprint.cfm?ID=14598&c=253> (face-recognition system allegedly installed to identify sex offenders and missing children who visit the school).

¹⁹⁸ Zielinski & Whelan, *supra* note 196 (school system also installed new telephone system that tracks callers).

¹⁹⁹ Telephone Interview with JoAnn Testa, *supra* note 181.

²⁰⁰ Telephone Interview with Diana Panigrosso, *supra* note 109.

analysis, as requested for viewing by another potential employer, or as part of a performance-oriented lesson plan.²⁰¹

iii. Libraries and Computers

Students who write, research, and communicate on public computers retain less privacy than those who research at home. School facilities are public facilities; students' expectations of privacy on public machines may be reasonably lower than on home equipment. In fact, many schools utilize internet content filters to block objectionable material, but they can also track users' Internet surfing habits.²⁰² A 1988 *Washington Law Review* article foresaw that "[n]ot only does computer-assisted testing and instruction . . . threaten to invade privacy insidiously, its use with young schoolchildren poses the additional threat of arresting development of their privacy expectations."²⁰³ Since their expectation of privacy is greater, students using home computers may have fewer worries about government monitoring, password retrieval or program/website blocking.²⁰⁴ For the most part, families remain in control of their electronic domains and access.

Similarly, students who utilize public school libraries may be subjected to lower expectations of privacy.²⁰⁵ For example, in 2004, the FBI requested the names and addresses of everyone who had checked out the book, *Bin Laden: The Man Who Declared War On America*, from a Washington state public library.²⁰⁶ The library, however, did not submit to the request, and the FBI eventually withdrew its subpoena (but kept the

²⁰¹ Telephone Interview with Diana Panigrosso, *supra* note 109. Various legal and non-legal *non*-school sponsored video-taping instances occur on school grounds; *see, e.g.*, Dolores Orman, *Former Student Sues over Videos*, ROCHESTER DEMOCRAT AND CHRONICLE, Nov. 7, 2004, at 1B (custodian allegedly videotaped students undressing and using bathroom facilities).

²⁰² HSLDA, *Privacy Report*, *supra* note 75. As with student records, Web pages designed or amended by students may still be used against students in school-related (or other) criminal matters. *See also* Banisar, *supra* note 21 (In 1992, the Higher Education Act created an exception for records collected for "law enforcement purposes."). A famous example is the Web page maintained by the Columbine shooters. *See, e.g.*, John Temple, *It's Impossible to Ignore Pain of Columbine*, ROCKY MOUNTAIN NEWS, Feb. 28, 2004, at 2A (discussing heightened security and seriousness of internet threats after Columbine shootings).

²⁰³ Charles R. Tremper & Mark A. Small, *Privacy Regulation of Computer-Assisted Testing and Instruction*, 63 WASH. L. REV. 841, 841-42 (1988) (footnotes omitted).

²⁰⁴ *But see* Jennifer C. Wasson, *FERPA in the Age of Computer Logging: School Discretion at the Cost of Student Privacy?*, 81 N.C. L. REV. 1348, 1349 (2003) (explaining that college students are unaware how much information universities collect based on their computer usage).

²⁰⁵ *See* April Zepeda, *Small Town Library Takes on the Feds*, Oct. 5, 2004, <http://www.komotv.com/stories/33363.htm>.

²⁰⁶ *Id.*

book).²⁰⁷

[The PATRIOT] Act does allow government access to library circulation records listing books checked out by patrons, or records of internet use. The library again may not disclose the existence of a warrant or the fact that records were produced, not even to the patron. The Act overrides any state library privacy laws.²⁰⁸

Therefore, if federal agents had demanded the book records under the USA PATRIOT Act, the library would have most likely had to surrender them without question or legal recourse.²⁰⁹ The amount of these requests is increasing.²¹⁰ However, librarians are forbidden to talk about requests from the state regarding PATRIOT Act-based information gathering.²¹¹ “In a surreal twist, librarians are suddenly the ones being shushed.”²¹²

This thesis specifically examines government interference with privacy, as activities by private citizens do not invoke the Fourth Amendment.²¹³ However, the general public also has enhanced access to conversations, research and personal actions made outside of one’s home. “[I]t is now possible to eavesdrop on a typist’s keystrokes and, by exploiting minute variations in the

²⁰⁷ *Id.*

²⁰⁸ Ryan, *supra* note 43; USA PATRIOT ACT §§ 215, 507 (§ 215 allows the Director of the Federal Bureau of Investigation to “make an application for an order requiring the production of any tangible thing (including books, records, papers, documents, and other items) for an investigation” Section 507 allows for the collection of education records possessed by educational institutions and agencies); U.S. CONST. art. VI, cl. 2 (Under this “Supremacy Clause,” absent any delegated, implied or inherent powers, federal law may pre-empt state law. Also, when Congressional acts conflict, it is traditionally implied that the more recent law is to be followed, unless specifically overruled by other provisions in the Constitution as interpreted by the Supreme Court.).

²⁰⁹ *Doe v. Gonzales*, 126 S. Ct. 1 (2005) (denying emergency application to vacate order staying preliminary injunction in case of librarian challenging the constitutionality of 18 U.S.C. § 2709(c), which prohibits disclosure that the Federal Bureau of Investigation requested information concerning electronic communications of an individual or entity); see also Associated Press, *Libraries Lose Appeal of Patriot Act Gag*, Oct. 17, 2005, <http://www.livejournal.com/users/mparent7777/3703160.html>.

²¹⁰ Christine V. Baird, *Even the Library is Now Open to Expanded Powers of Spies*, STAR-LEDGER, Sept. 11, 2005, at §1, pg. 1 (“Since October, 2001, 63 public libraries and 74 academic libraries surveyed received legally executed requests.”). *Id.* at §1, pg. 16.

²¹¹ *Id.*

²¹² *Id. But cf. id.* (Some provisions of the PATRIOT Act may serve to help libraries—and perhaps the country— remain safe: “[a]nother little-noted provision of the Patriot Act, Section 217—known as the computer trespasser provision—could assist librarians who believe someone is using a computer in [an] unauthorized way, such as showing false identification when signing up for access.”).

²¹³ STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY 35 (7th ed. 2004) (“[T]he Fourth [Amendment] is interpreted as providing protection only against the government and those acting in conjunction with it.”). Although beyond the scope of this paper, civil tort and property law afford some protections against non-governmental privacy invasion.

sounds made by different keys, distinguish and decipher what is being typed.”²¹⁴ As technology advances – and camera/video phones, digital binoculars, and other such devices become more commonplace – so does the capability for unwanted intrusion.

In summary, students’ personal-computer and home-library research – unless compromised via utilization of public resources – holds greater privacy protection than public research and communication venues.

III. LEGAL FOUNDATIONS AND REGULATIONS OF HOMESCHOOLING

The Supreme Court has long recognized that students need not solely attend public schools, but may attend private or parochial schools.²¹⁵ Two cases opened the gates for students to attend non-public schools.²¹⁶ In 1925’s *Pierce v. Society of Sisters*, the Supreme Court held that children do not have to attend public schools in order to fulfill state educational requirements.²¹⁷ Then, in 1972’s *Wisconsin v. Yoder*, the Supreme Court held that Amish children did not have to attend public school after the eighth grade.²¹⁸ The Supreme Court has yet to rule on the legitimacy of homeschooling programs; however, the *Pierce* Court did recognize “the liberty of parents and guardians to direct the upbringing and education of children under their control.”²¹⁹

In 2000, the Supreme Court re-emphasized “the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”²²⁰ However, the Supreme Court has also expressed “that the privacy right [does] not restrict the government ‘from regulating the implementation of parental decisions concerning a child’s education.’”²²¹ Thus, “parents ‘have

²¹⁴ Stephen Mihm, *The 4th Annual Year in Ideas*, N.Y. TIMES MAGAZINE, Dec. 12, 2004, at 50.

²¹⁵ See *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534 (1925) (requiring all children to attend public school violates due process clause); *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972) (holding that First and Fourteenth Amendments prevent state from compelling Amish students to attend school beyond eighth grade).

²¹⁶ *Pierce*, 268 U.S. at 534; *Yoder*, 406 U.S. at 234.

²¹⁷ *Pierce*, 268 U.S. at 533-34.

²¹⁸ *Yoder*, 406 U.S. at 234.

²¹⁹ *Pierce*, 268 U.S. at 534-35. *Contra* *People v. Bennett*, 501 N.W.2d 106, 115 (Mich. 1993) (finding no fundamental constitutional right of parents to direct the education of their children); Daniel E. Witte, Notes and Comments, *People v. Bennett: Analytic Approaches to Recognizing a Fundamental Parental Right Under the Ninth Amendment*, 1996 BYU L. REV. 183, 198 (1996) (*Bennett* is considered “one of the last offensive campaigns to effectively eradicate alternative education on a statewide basis.”).

²²⁰ *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

²²¹ *State v. DeLaBruere*, 577 A.2d 254, 274 (Vt. 1990) (quoting *Runyon v. McCrary*, 427 U.S. 160, 178 (1976)).

no constitutional right to provide their children with private school education unfettered by reasonable government regulation.”²²² “[T]he parents’ rights must give way to reasonable state regulation.”²²³

In 1982, only Nevada and Utah “had statutes that specifically provided for home schooling.”²²⁴ Yet, by 1993, thirty-two states provided statutes for homeschooling.²²⁵ Currently every state and province allows some form of homeschooling.²²⁶ However,

[r]equirements vary widely. Some states have no explicit requirements. Some require that parents notify public school officials that they will be homeschooling. In some states, parents must submit curriculum plans; in others, periodic reports. Some states require testing. Some states require several of these.²²⁷

Basically, homeschooling laws can be separated into three categories: private school laws, equivalency laws, and home education laws.²²⁸ Private school laws governing homeschooling are the least intrusive.²²⁹ States with specific home education laws tend to be the most regulated.²³⁰

“Equivalency laws . . . exempt children from compulsory attendance laws if they are receiving ‘equivalent instruction’ elsewhere.”²³¹ Where and how students spend their educational time is not a private matter for public school attendees.²³² Most states’ educational compulsory attendance statutes enable governments to locate children during the daytime hours

²²² *Id.* (quoting *Runyon*, 427 U.S. at 178).

²²³ *Id.*

²²⁴ ALEXANDER & ALEXANDER, *supra* note 73, at 256.

²²⁵ ALEXANDER & ALEXANDER, *supra* note 73, at 256.

²²⁶ LEPPERT & LEPPERT, *supra* note 14, at 37.

²²⁷ DOBSON, *supra* note 112, at 8.

²²⁸ DOBSON, *supra* note 112, at 7. See also Judith G. McMullen, *Behind Closed Doors: Should States Regulate Homeschooling?*, 54 S.C. L. REV. 75, 87 (2002).

²²⁹ DOBSON, *supra* note 112, at 329-42 (Alabama, Alaska, California, Iowa, Illinois, Kentucky, Michigan, Nebraska, Oklahoma and Texas all have such laws. This article provides state-by-state tabulation of home school compulsory education law citations).

²³⁰ DOBSON, *supra* note 112, at 8 (such states include Arizona, Arkansas, Colorado, Florida, Georgia, Hawaii, Louisiana, Maine, Maryland, Michigan, Minnesota, Missouri, Mississippi, Montana, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming).

²³¹ DOBSON, *supra* note 112, at 7. See also *Forstrom v. Byrne*, 775 A.2d 65, 70 (N.J. Super. Ct. App. Div. 2001) (“[O]ur compulsory school attendance law permits home schooling.”); *Crites v. Smith*, 826 S.W.2d 459, 469 (Tenn. Ct. App. 1991); McMullen, *supra* note 228, at 88. Cf. *Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 446 (Tex. 1994) (“District court enjoined defendants from enforcing the compulsory attendance law contrary to the construction . . .”).

²³² DOBSON, *supra* note 112, at 7 (“Intrusive regulations cannot be imposed upon private schools.”).

approximately 180 days a year.²³³

Laws require compulsory school attendance but not compulsory education. Compulsory school attendance laws are enforceable; it is not difficult to check attendance for young people enrolled in public and private schools, including homeschools. However, laws that required compulsory education would give the state control over education.²³⁴

Compulsory attendance is not the same as compulsory education,²³⁵ yet “[e]very state recognizes homeschooling as a legal way to meet state compulsory attendance requirements.”²³⁶

Various state cases have challenged how homeschooling should be defined and what, if any, regulations should apply.²³⁷ Homeschooling litigation typically involves three issues: “(1) statutory interpretation of exemptions,²³⁸ (2) complaints regarding state requirements for home instructors’ qualifications,²³⁹ and (3) state evaluations of the home instruction²⁴⁰ programs.”²⁴¹ In *Yoder*, the Supreme Court stressed, “[t]here is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic

²³³ Typically, public schools have a 180-day school year. See, e.g., MASS. GEN. LAWS ANN. ch. 76, § 1 (West 1996) (school will be open for whatever number of days the school board designates).

²³⁴ DOBSON, *supra* note 112, at 20.

²³⁵ See McMullen, *supra* note 228, at 87.

²³⁶ DOBSON, *supra* note 112, at 12; see, e.g., Care & Protection of Charles, 504 N.E.2d 592, 597 (Mass. 1987) (“[T]he Legislature intended that the approval of a home school proposal fall within the . . . standard for the approval of a private school.”).

²³⁷ E.g., Clark v. Reiss, 831 S.W.2d 622 (Ark. Ct. App. 1992); State v. Buckner, 472 So.2d 1228 (Fla. Dist. Ct. App. 1985).

²³⁸ E.g., Clark, 831 S.W.2d at 623 (“[E]rrred in construing the home schooling statute, Ark.Code Ann. § 6-15-503 (Supp.1991)”); Buckner, 472 So.2d at 1241 (“[A]lthough the legislature authorized one type of at-home schooling, the legislature did not necessarily prohibit other types . . .”).

²³⁹ E.g., State v. Melin, 428 N.W.2d 227, 232 (N.D. 1988) (finding a compelling state interest in securing certified teachers to teach homeschoolers); *In re Marriage of Riess*, 632 N.E.2d 635, 637 (Ill. App. Ct. 1994) (respondent argued that child’s “mother [was] not properly trained to provide home schooling for the child, and that such education was not in the best interest of the child”).

²⁴⁰ See Donald D. Dorman, Note, *Michigan’s Teacher Certification Requirement as Applied to Religiously Motivated Home Schools*, 23 U. MICH. J.L. REFORM 733, 753 (1990) (questions of state involvement arise “[i]f the home school ever falls below required standards”); Lisa M. Lukasik, Comment, *The Latest Home Education Challenge: The Relationship Between Home Schools and Public Schools*, 74 N.C. L. REV. 1913, 1922 (1996) (“[T]he Due Process Clause prohibits laws or regulations that involve impermissible administrative discretion and may provide a due process claim to home educators if they must seek permission from a public school official before they begin home schooling.”) (citing JOHN W. WHITEHEAD & WENDELL R. BIRD, HOME EDUCATION AND CONSTITUTIONAL LIBERTIES 57-58 (1986)).

²⁴¹ ALEXANDER & ALEXANDER, *supra* note 73, at 256.

education.”²⁴²

Denial of home instruction and compulsion to attend school do not violate the religious freedom of the parent. A U.S. district court has held that parents have no fundamental right to maintain home instruction for their children and that parental rights of free exercise of religion are not abridged by the state’s denial of home instruction.

The state may compel all children to attend a school, public or private, and home instruction will not suffice as an exemption from compulsory attendance requirements unless the state statute so specifies.²⁴³

States which once denied homeschooling did so based on the difficulty of supervising homeschools and on rational basis review, stressing states’ interests in fostering students’ socialization skills.²⁴⁴ This, of course, was before the Supreme Court stressed the importance of privacy.²⁴⁵ Although rational basis review remains the current standard, the HSLDA argues, “[a] person’s right to privacy should always receive a higher protection than a government’s right to information, unless the government has a compelling interest in collecting that information.”²⁴⁶

Ironically, considering the oft-stressed importance of socialization, the Tenth Circuit Court of Appeals upheld the right of school boards to deny part-time attendance of otherwise homeschooled students,²⁴⁷ although this is not necessarily the trend.²⁴⁸ Over the last decade, California has been experimenting with public school–home school partnerships, which often incorporate computer-age communication capabilities between homeschooled students and school facilities, teaching personnel, and other students.²⁴⁹ Arguably, such programs better facilitate parental

²⁴² *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972).

²⁴³ ALEXANDER & ALEXANDER, *supra* note 73, at 256.

²⁴⁴ See *Knox v. O’Brien*, 72 A.2d 389, 392 (Cape May County Ct. 1950) (“Cloister and shelter have its [sic] place, but not in the every day give and take of life.”); *State v. Will*, 160 P. 1025, 1026-27 (Kan. 1916) (Kansas statutes neither denied nor allowed homeschooling. However, the court ruled that the exclusion of home instruction from statutes, that established private, denominational and parochial school instruction as valid, indicated legislative intent to disallow homeschooling.).

²⁴⁵ See *supra* Part II. A. 2. Information That School or Government Officials May By Law Require From Some Students.

²⁴⁶ HSLDA, *Privacy Report*, *supra* note 75 (emphasis omitted).

²⁴⁷ *Swanson v. Guthrie Indep. Sch. Dist. No. 1-L*, 135 F.3d 694, 696-700 (10th Cir. 1998).

²⁴⁸ Lukasik, *supra* note 240, at 1973-74 (delineating several California part-time attendance programs).

²⁴⁹ Lukasik, *supra* note 240, at 1973-76.

monitoring of shared information. Some legislatures also allow homeschoolers to participate in interscholastic sports.²⁵⁰

In states that allow homeschooling, the burden usually falls on the state to show that the parent is not providing adequate instruction.²⁵¹ In this way — given the privacy rights afforded the home and the overall success rates of homeschooled children²⁵² — governments may support familial rights of privacy. Nonetheless, parents who homeschooled their children in Indiana were denied damages when they alleged that a school superintendent sought information from parents while attempting to verify compliance with home-instruction law.²⁵³

Some contemporary grass-roots movements question whether public schools truly act in citizens' best interests. Many homeschooling proponents and civil libertarians stress that public schools are more likely to promote rules and teach subjects that preserve *government* not *citizen* interests.²⁵⁴ In the 1970s, educator John Holt created the term "unschooling" to describe the burgeoning "homeschooling" movement whereby students study topics in which the students show individual interests, as opposed to following cookie-cutter curriculums mandated by school systems.²⁵⁵ One of homeschooling's greatest strengths is its flexible instruction because the curriculum, lesson planning and teaching approaches need not be the same as in public schools.²⁵⁶ Although a few states "require that homeschoolers submit their curriculum plans to officials,"²⁵⁷ for the most part,

²⁵⁰ Lukasik, *supra* note 240, at 1975 n.378; *cf.* *Angstadt v. Midd-West Sch. Dist.*, 377 F.3d 338, 342-43 (3d Cir. 2004) (upholding attendance requirement limiting participation in school sports).

²⁵¹ *See, e.g., Sheppard v. State*, 306 P.2d 346, 356 (Okla. Crim. App. 1957); *State v. Massa*, 231 A.2d 252, 255 (Morris County Ct. 1967).

²⁵² *See* CAFI COHEN, AND WHAT ABOUT COLLEGE?: HOW HOMESCHOOLING LEADS TO ADMISSIONS TO THE BEST COLLEGES AND UNIVERSITIES 10 (Revised 2d ed. 2000) ("[H]omeschooled students have won admission to a wide range of colleges and universities. And the list of selective schools that have accepted homeschoolers continues to grow.").

²⁵³ *Mazanec v. N. Judson-San Pierre Sch. Corp.*, 798 F.2d 230, 235-36 (7th Cir. 1986).

²⁵⁴ *See, e.g., CLAIRE WOLFE, DON'T SHOOT THE BASTARDS (YET): 101 MORE WAYS TO SALVAGE FREEDOM 6* (1999) ("It's not 'public schools.' It's *government* schools. The government isn't 'us.' It's *them*. The federals. Washington, D.C."); *see generally* JOHN TAYLOR GATTO, *DUMBING US DOWN: THE HIDDEN CURRICULUM OF COMPULSORY SCHOOLING* 14-16 (1992).

²⁵⁵ PATRICK FARENGA, *THE BEGINNER'S GUIDE TO HOMESCHOOLING* 35-37 (3d ed. 2000). *See also* LEPPERT & LEPPERT, *supra* note 14, at 101-02.

²⁵⁶ DOBSON, *supra* note 112, at 18 ("[E]ven in states in which the code specifies what must be taught and when, homeschoolers have been quite successful in interpreting the law in the broadest possible of terms . . .").

²⁵⁷ DOBSON, *supra* note 112, at 19, 329-42; *see also* McMullen, *supra* note 228, at 88 (in Texas, "[h]ome schools need only have a written curriculum, conduct it in a bona fide manner and teach math, reading, spelling, grammar, and good citizenship. . . [In]

homeschooling families retain private choices when it comes to what and how subjects are being taught.

IV. CONCLUSIONS AND CHALLENGES

Homeschooling and privacy laws are obviously in a state of flux.²⁵⁸ If the rise in homeschooling continues, there may come a time when homeschooling will no longer carry any privacy advantages in any state. Although all states guarantee some form of education,²⁵⁹ government officials could easily argue that they cannot guarantee educational standards without greater regulation of homeschools. Most state departments of education require compulsory attendance in school.²⁶⁰ If school officials do not know why a student is missing from school, they are usually required to investigate; the burden often lies with the state to insure that children are receiving appropriate or equivalent instruction elsewhere.²⁶¹ For instance, the federal Individuals with Disabilities Educational Act (IDEA) requires states to ensure that disabled children receive appropriate educational services.²⁶² In other words, child welfare, curriculum and truancy could all become excuses to supervise homeschooling families.

Currently, homeschooled children have overall impressive success rates.²⁶³ Most homeschooled students have a good chance at getting into U.S. colleges or universities, especially since homeschooling allows students to experience a wide range of unconventional activities that are sometimes not available to students who get their educations in traditional schools.²⁶⁴ At some point, however, homeschoolers' performance rates could become inferior. When or if such a shift occurs, homeschooling families could be privacy *disadvantaged* even in their homes, the

Michigan, . . . parents have the option, but not the requirement, of notifying the state that they are homeschooling") (footnote omitted).

²⁵⁸ See *supra* Part II. EDUCATIONAL INSTITUTIONS AND PRIVACY and Part III. LEGAL FOUNDATIONS AND REGULATIONS OF HOMESCHOOLING.

²⁵⁹ See ALEXANDER & ALEXANDER, *supra* note 73.

²⁶⁰ DOBSON, *supra* note 112, at 20.

²⁶¹ Miller, *supra* note 16, at 186-87 (providing comparison samples of contrary state statutes and court interpretations concerning homeschooling).

²⁶² Individuals with Disabilities Education Act, 20 U.S.C.A. §§ 1400 *et seq.* (West 2000).

²⁶³ See COHEN, *supra* note 252, at 10 ("[H]omeschooled students have won admission to a wide range of colleges and universities. And the list of selective schools that have accepted homeschoolers continues to grow.").

²⁶⁴ COHEN, *supra* note 252, at 13 (Students who are homeschooled often have very impressive accomplishments that are often eye-catching to college admissions departments).

last great refuge of privacy the court currently affords.

The possibility exists, arguably, for the federal government to pre-empt the field of education – or more at issue, homeschooling – and regulate it. Schools that do not comply could lose their federal aid.²⁶⁵ Even though the U.S. Constitution does not mention education, the federal government has increasingly used its grants-in-aid spending power to exert pressure on the states to meet federal standards and requirements or risk losing federal support.²⁶⁶ On the other hand, if a federal government's grants-in-aid program had the impact of violating the First Amendment, the Supreme Court could hold such regulations unconstitutional.²⁶⁷

School systems administrators have long argued that their resources are harshly limited and that their schools are overcrowded.²⁶⁸ Homeschooling reduces the expense and size of public school systems, yet does not detract from the tax-based support. Currently, when parents homeschool their children, governments receive tax funding for students they do not actually have to teach.²⁶⁹ Perhaps governments have not been inclined to prohibit homeschooling because of this. This situation, of course, could change if any significant school voucher program goes into effect.²⁷⁰

One may wonder: If the government is obligated by law or

²⁶⁵ *But see* Sandra L. Macklin, Note, *Students' Rights in Indiana: Wrongful Distribution of Student Records and Potential Remedies*, 74 IND. L.J. 1321, 1337 (1999) (however, as of 1999, the department that enforces FERPA "has never attempted to withdraw federal funds based on FERPA violations").

²⁶⁶ KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 219 (14th ed. 2001) ("[T]he size and range of the [grant-in-aid] programs have increased considerably over the years, and detailed federal conditions have proliferated."); *see, e.g.*, *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (holding that Congress may attach conditions on the receipt of federal funds).

²⁶⁷ *Flast v. Cohen*, 392 U.S. 83, 85-86, 105-06 (1968) (holding that taxpayers have standing to challenge the use of federal money on textbooks and other materials for a parochial school).

²⁶⁸ *See, e.g.*, Tom Ford, *Burnsville Schools Scrimping, Saving to Keep Spending in Line*, STAR TRIBUNE (Minneapolis, Minn.), Nov. 24, 2004, at S4 ("Several of the [New Prague School] district's high schools are overcrowded and lack enough classrooms . . ."); Etan Horowitz, *Leaders Seek to Guide Tavares Growth: A City Council Workshop Will Focus on Managing Exploding Development and Its Effects*, ORLANDO SENTINEL (Fla.), Nov. 28, 2004, at K1 ("[Tavares] middle school [near Orlando] was overcrowded by 247 students, and the high school was overcrowded by 161 students.").

²⁶⁹ School districts are primarily funded via property and other taxes. *E.g.*, *Fla. Dep't of Educ. v. Glasser*, 622 So. 2d 944, 948-49 (Fla. 1993) (specific enabling legislation may authorize school districts to levy taxes).

²⁷⁰ Government moneys may be disbursed to schools that students choose to attend. BLACK'S LAW DICTIONARY 755 (2d pocket ed. 2001) ("[A voucher is a] written or printed authorization to disburse money.").

statute not to distribute personal information,²⁷¹ then why should families be concerned about giving the government such information? Basically, the less information government officials collect, the less opportunity they have to legally or illegally disseminate it. For instance, it is not greatly publicized that the No Child Left Behind Act requires secondary schools to provide military recruiters access to school facilities and contact information for every student upon request.²⁷² Also, private companies are attempting to expand access to government databases.²⁷³ For instance, in 2000, an Ohio school board allegedly sold students' personal data to a local bank, which used the information to solicit new customers.²⁷⁴ Many examples of illegal, questionable, or apathetic collection, treatment and dissemination of private information exist.

Public school students have few true remedies after their rights have been violated. FERPA lays out certain rights that parents and students hold;²⁷⁵ however, government officials' mistakes and apathy towards citizens' personal information is apparent.²⁷⁶ A blatant example of how some school officials indifferently handle students' private information took place in

²⁷¹ *E.g.*, FERPA, 20 U.S.C. § 1232g (2000).

²⁷² No Child Left Behind Act of 2001, PUB. L. NO. 107-110, 115 Stat. 1425 (2002). *See also*, John Seeley, *Operation Opt Out: As Military Recruiters Work the High Schools, Teachers and Students Urge a Reality Check*, L.A. CITY BEAT, Oct. 21, 2004, at 11, available at <http://lacitybeat.com/article.php?id=1321&IssueNum=72> (“[K]nown to activists as the ‘No Cannon Fodder Left Alone’ clause, [the provision] does provide a loophole for parents (or the student, when 18) to opt out of service sales pitches.”); David Goodman, *No Child Unrecruited: Should the Military be Given the Names of Every High School Student in America?*, MOTHER JONES, Nov./Dec. 2002, available at http://www.motherjones.com/news/outfront/2002/11/ma_153_01.html (discussing educators' opinions of the Act's disclosure requirement).

²⁷³ *See* ACLU, ACLU Sues Ohio School Board that Sold Students' Personal Information to a Bank (Aug. 29, 2000), available at <http://aclu.org/Privacy/Privacy.cfm?ID=8095&c=39> [hereinafter ACLU, Ohio School Board]; *accord* ACLU, ACLU Asks Univ. of Nevada to Stop Selling Student Information to Credit Card Company (Jan. 22, 2002), available at <http://www.aclu.org/StudentsRights/StudentsRights.cfm?ID=10201&c=161> [hereinafter ACLU, Univ. of Nevada].

²⁷⁴ *See* ACLU, Ohio School Board, *supra* note 273; *accord* ACLU, Univ. of Nevada, *supra* note 273.

²⁷⁵ *See supra* Part II. A. 1. Congressional Acts.

²⁷⁶ Lucadamo et al., *supra* note 46, at 2; *accord* Associated Press, *Children's Private Records Posted Online in Florida*, Sept. 30, 2004, available at <http://www.informationweek.com/story/showArticle.jhtml?articleID=48800362> (“Florida's child welfare agency . . . acknowledged that confidential records for nearly 4,000 abused and neglected children were available on the Internet [The records] included names of children, as well as details such as birth dates, Social Security numbers, photographs, case histories and directions to foster homes.”); *see also* Alison Gendar et al., *Schools Trashed Over Files: Educators Offer Apology But Furious Parents Want Heads to Roll*, N.Y. DAILY NEWS, Nov. 15, 2004, at 3; Kathleen Lucadamo, *Klein Apologizes, Launches Probe*, N.Y. DAILY NEWS, Nov. 16, 2004, at 7.

November 2004, when New York City educators dumped approximately 300 pounds of confidential records in a sidewalk trash pile.²⁷⁷ Students' medical and psychological reports were in plain sight and passersby rummaged through them.²⁷⁸

Detailed in the documents were names, dates of birth, home addresses, telephone numbers and even Social Security numbers for many of the 1,125 students from across the city who were home-schooled from 1987 to 1998. The boxes also contained confidential information on thousands of other children, including 8,300 grade and attendance sheets, 6,200 computer printouts and an audit file.²⁷⁹ New York City's childrens agencies had been caught five prior times improperly disposing of private records.²⁸⁰

Besides simply being more proactive when discarding old files, several straightforward and inexpensive steps could be taken to increase student privacy in public schools. Government and school officials could more actively proclaim and proliferate students' rights by utilizing such tools as the No Child Left Behind Act's military recruitment solicitation opt-out forms, FERPA's student directory opt-out form, or FERPA's school records access information and correction forms.²⁸¹ Currently, the U.S. Department of Education only distributes pamphlets explaining privacy and educational rights upon specific request.²⁸² Both parents and educators could do more to ensure that students understand their privacy rights.²⁸³ Similarly, school systems and governments should limit information collection and dissemination to only what is truly necessary.²⁸⁴ One particular productive and significant first step would be for all school systems to eliminate the use of Social Security

²⁷⁷ Lucadamo et al., *supra* note 46, at 2; *accord* Associated Press, *supra* note 276; *see also* Gendar et al., *supra* note 276, at 3; Lucadamo, *Klein Apologizes, Launches Probe*, *supra* note 276, at 7.

²⁷⁸ Lucadamo et al., *supra* note 46, at 2.

²⁷⁹ Lucadamo et al., *supra* note 46, at 3.

²⁸⁰ Bob Port, *Foulup is Far From the First Time*, N.Y. DAILY NEWS, Nov. 14, 2004, at 3.

²⁸¹ *See* Seeley, *supra* note 272, at 11; Goodman, *supra* note 272; *see also* 20 U.S.C. § 1232g(e) (2000) (requires that every school notify students of their rights under FERPA); *see, e.g.*, Detroit Public Schools, *Do You Know Your Rights to Privacy and Access of Records?*, available at <http://www.detroitk12.org/resources/parents/privacy.htm> (last visited Nov. 11, 2005); Hot Springs School District, *Family Educational Records Privacy Act*, available at <http://www.hssd.k12.sd.us/ferpa.htm> (last updated Apr. 5, 2005).

²⁸² Press Release, ACLU, NYCLU Hails Victory, *supra* note 153.

²⁸³ Press Release, ACLU, NYCLU Hails Victory, *supra* note 153.

²⁸⁴ *E.g.*, *Krebs v. Rutgers*, 797 F. Supp. 1246, 1259-60 (D.N.J. 1992) (Court issued preliminary injunction against state university enjoining it from disclosing students' Social Security numbers to campus post office personnel; the university characterized such disclosure as a "legitimate educational interest."). *Id.* at 1260.

numbers as student IDs, as some Florida educational systems have done.²⁸⁵

Supreme Court Justice Louis Brandeis emphasized that “the right to be let alone [is] the most comprehensive of rights and the right most valued by civilized men.”²⁸⁶ This paper focuses on this one right as it concerns modern educational standards and is not presented to skew all the good that public school programs accomplish. Of course, government schooling presents many advantages, not the least of which may include: social, psychological and emotional benefits; better parental time-management; best use of family monies;²⁸⁷ choice educational supplies, equipment, facilities and programs; and qualified staffs and certified teachers.

Nonetheless, because the law does not currently or consistently mandate collection of personal information about homeschooled children, privacy is an often overlooked advantage of homeschooling in most states. Concerned parents, particularly those willing and able to choose their state of residence, should “shop” to find which states offer suitable educational and privacy advantages in line with their needs and desires.²⁸⁸ Ultimately, parents who believe in the freedom to make decisions about their children’s private lives without government interference must decide how much personal and familial information is worth divulging in exchange for their children’s education.

²⁸⁵ Komuves, *supra* note 100, at 538 n.33; *see also* Fla. St. Univ. v. Hatton, 672 So. 2d 576, 577 (Fla. Dist. Ct. App. 1996) (court ordered state university to produce only summaries of records without identifying information).

²⁸⁶ *Olmstead v. United States*, 277 U.S. 438, 478 (Brandeis, J., dissenting).

²⁸⁷ *Cf. Forstrom v. Byrne*, 775 A.2d 65, 67 (N.J. Super. Ct. App. Div. 2001) (parents who choose to homeschool their physically disabled children may not receive full IDEA benefits and other funding); Individuals with Disabilities Education Act, 20 U.S.C.A. § 1412(a)(10)(C)(i) (West 2000).

²⁸⁸ *See* DOBSON, *supra* note 112, at 329-42 (provides basic state-by-state tabulation of state regulatory approaches); Miller, *supra* note 16, at 176-84 (provides comparison samples of contrary state statutes and court interpretations concerning homeschooling).

The Illegality of the U.S. Policy of Preemptive Self-Defense Under International Law

Chris Bordelon*

I. INTRODUCTION

In the aftermath of the September 11, 2001 attacks in the United States, domestic and foreign political actors who might otherwise have balked if the world's lone superpower claimed a broad right to use force abroad instead offered the U.S. a strong showing of goodwill and support.¹ Perhaps interpreting this solidarity as willingness to support American uses of force abroad regardless of their permissibility under international law, the Bush administration articulated a provocative interpretation of the right of self-defense recognized in the United Nations Charter. In a formal policy statement, the administration claimed that this right, which is an exception to the general prohibition of the use of force in international relations, justified the use of preemptive force against "enemies" of the United States.²

The Bush administration's assertion of a right of preemptive self-defense, along with its reliance on this purported right to justify its use of force against Iraq, has drawn considerable criticism on international law grounds.³ It is debatable whether

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¹ See George K. Walker, *The Lawfulness of Operation Enduring Freedom's Self-Defense Responses*, 37 VAL. U. L. REV. 489, 494-95, 498-505 (2002-2003) (describing Congressional and foreign reactions to September 11, 2001 terrorist attacks and global support against terrorism); JOHN F. MURPHY, *THE UNITED STATES AND THE RULE OF LAW IN INTERNATIONAL AFFAIRS* 167 (2004) [hereinafter J. MURPHY] ("The international reaction to the attacks was swift and almost universally one of outrage and support for the United States.").

² National Security Council, *The National Security Strategy of the United States of America*, at 15 (September 2002), available at <http://www.whitehouse.gov/nsc/nss.html> [hereinafter *NSS*].

³ See, e.g., Major Joshua E. Kastenberg, *The Use of Conventional International Law in Combating Terrorism: A Maginot Line for Modern Civilization Employing the Principles of Anticipatory Self-Defense & Preemption*, 55 A.F. L. REV. 87, 88 (2004) ("[A] pressing question that has emerged on the world stage is whether and anticipatory self-

anticipatory self-defense is permissible under international law. However, the Bush administration's preemption strategy calls for the use of force beyond the scope of the right of self-defense, even if the right is broadly construed.

The Bush administration released its formal policy statement, "The National Security Strategy of the United States of America" ("NSS"), in September 2002.⁴ This document outlines various considerations that are said to guide the administration's foreign policy decisions.⁵ Of particular interest is the document's treatment of two categories of "enemies:" "terrorists" and "rogue states." The NSS contains no specific definition of the term "terrorists." However, the term includes states that "knowingly harbor or . . . aid" terrorists.⁶ The NSS defines "rogue states" as those states with characteristics that match certain enumerated criteria and explicitly includes Iraq and North Korea in this category.⁷ The document argues that the emergence of these "new deadly challenges" has effected a "profound transformation" in the "security environment,"⁸ and has brought about a "new world" in which "the only path to peace and security is the path of action."⁹ In the context of the NSS, the noun "action," the verb "act," and various derivations of these words were used euphemistically to refer to the use of military force by the U.S. against its "enemies."¹⁰

The "action" contemplated against terrorists and rogue state is not limited to deterrence of and response to the use or threat of force by these groups, but includes action "against such emerging threats before they are fully formed."¹¹ The U.S. will "not hesitate to act alone" to prevent terrorists and rogue states from attacking or threatening to attack, and will "exercise [its] right of self-defense," as the administration understands it, "by acting preemptively."¹² The U.S. will "no longer solely rely on a reactive posture as [it did] in the past," nor will it "let . . . enemies strike first," or "remain idle while dangers gather."¹³ Thus, under the NSS, military force is to be used preemptively to "forestall or

defense and preemption are legitimate international law concepts.").

⁴ NSS, *supra* note 2.

⁵ NSS, *supra* note 2.

⁶ NSS, *supra* note 2, at 5.

⁷ NSS, *supra* note 2, at 13-14.

⁸ NSS, *supra* note 2, at 13.

⁹ George W. Bush, *Introduction to The National Security Strategy of the United States of America*, para. 5 (September 2002), available at <http://www.whitehouse.gov/nsc/nss.html> [hereinafter Bush].

¹⁰ See NSS, *supra* note 2, at 15.

¹¹ Bush, *supra* note 9, at para. 5.

¹² NSS, *supra* note 2, at 6.

¹³ NSS, *supra* note 2, at 15.

prevent . . . hostile acts by our adversaries.”¹⁴ While the administration suggested at least one other justification for using force against Iraq,¹⁵ it relied in part on its asserted right to preemptive self-defense.¹⁶ The commencement of U.S. efforts to put its theory of preemptive self-defense into practice warrants an examination of whether self-defense is a valid justification for using force in these circumstances.

The authors of the NSS believe that the preemptive use of force is compatible with international law.¹⁷ The NSS states that, “[f]or centuries, international law [has] recognized that nations need not suffer an attack” before using force in self-defense “against forces that present an imminent danger of attack.”¹⁸ Preemption, the document asserts, has been regarded as legitimate under international law when undertaken with respect to an “imminent threat—most often a visible mobilization” of military forces.¹⁹ Without further explanation of what “imminent threat” means, the NSS asserts that “[w]e must adapt the concept of imminent threat to the capabilities and objectives of today’s adversaries.”²⁰ “The greater the threat” posed by these adversaries, the “more compelling the case for taking anticipatory action . . . even if uncertainty remains as to

¹⁴ NSS, *supra* note 2, at 15.

¹⁵ The U.S. also justified its use of force against Iraq by citing several Security Council resolutions authorizing force. See CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 192-93 (2000) [hereinafter GRAY, USE OF FORCE] (describing the lack of acceptance by other states of earlier U.S. claims that authorization to use force against Iraq could be implied from past Council Resolutions); see also Amy E. Eckert & Manooher Mofidi, *Doctrine or Doctrinaire—The First Strike Doctrine and Preemptive Self-Defense Under International Law*, 12 TUL. J. INT’L & COMP. L. 117, 125-27 (2004) (noting the failed attempt by the U.S. to obtain a Council resolution explicitly authorizing the use of force in 2003 and describing U.S. efforts to obtain such a resolution); Ian Johnstone, *US-UN Relations After Iraq: The End of the World (Order) as We Know It?*, 15 EUR. J. INT’L L. 813, 831 (2004) (briefly summarizing the arguments for and against the purported Council authorization).

¹⁶ Eckert & Mofidi, *supra* note 15, at 123, 128; Lucy Martinez, *September 11th, Iraq and the Doctrine of Anticipatory Self-Defense*, 72 UMKC L. REV. 123, 123 (2003-2004); see also World Press Review Online, *The United Nations, International Law, and the War in Iraq*, <http://www.worldpress.org/specials/iraq> (describing speeches by President Bush and Secretary of State Colin Powell that suggested self-defense as a justification for the use of force against Iraq) (last visited Nov. 12, 2005).

¹⁷ See NSS, *supra* note 2, at 15; John B. Bellinger III, *Authority for the Use of Force by the United States Against Iraq Under International Law* (Apr. 10, 2003), at <http://www.cfr.org/publication.php?id=5862> (statements by the United Nations Secretary General, phrased similarly to language in the NSS, to the effect that the proliferation of highly destructive weapons justify the conclusion that “states cannot be required to wait for an attack before they can lawfully use force to defend themselves”); see also J. MURPHY, *supra* note 1, at 176 (noting that the NSS asserts a right of preemptive self-defense, and adding that “it is by no means clear . . . that the [2002] attack against Iraq can be justified as an act of self-defense).

¹⁸ NSS, *supra* note 2, at 15.

¹⁹ NSS, *supra* note 2, at 15.

²⁰ NSS, *supra* note 2, at 15.

the time and place of the enemy's attack."²¹

The NSS's brief mention of the legality of the new U.S. strategy provides an incomplete analysis of the relevant norms. The NSS treats the permissible temporal scope of self-defense as a matter of settled law. It thus ignores an ongoing scholarly and international debate concerning when force may first be used.²² The document also fails to fully consider the application of two customary international law principles, necessity and proportionality, to uses of force called for by the preemption strategy.²³ Moreover, the NSS does not indicate the source of the authority of the U.S. to unilaterally "adapt the concept of imminent threat" to suit its present needs.²⁴ Analysis of these gaps in the NSS's consideration of relevant international law suggests that the administration's confidence in the legality of preemptive self-defense is misplaced.

II. THE UNITED NATIONS CHARTER AND A STATE'S RIGHT OF SELF-DEFENSE

Scholars regard the United Nations Charter (Charter) as the "starting point" for analyzing the relevant norms restricting the ability of states to threaten or use force.²⁵ The Charter's text amply demonstrates its drafters' fundamental concern with limiting instances in which the use of force in international relations would be considered legally permissible. The preamble begins with an expression of the signatories' determination "to save succeeding generations from the scourge of war," and describes the "principles and . . . methods" contained in the substantive portion of the Charter as being aimed at "ensur[ing] . . . that armed force shall not be used, save in the common interest."²⁶ The first of the "Purposes of the United Nations" listed in Article 1 is "[t]o maintain international peace and security."²⁷ The second Purpose commits the U.N. to

²¹ NSS, *supra* note 2, at 15.

²² See, e.g., GRAY, USE OF FORCE, *supra* note 15 at 86, 112; Leo Van den hole, *Anticipatory Self-Defence Under International Law*, 19 AM. U. INT'L. L. REV. 69, 80-82 (2003-2004) (noting a division of opinion on when self-defense may first be used).

²³ See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 98 (June 27) (discussing customary rules of international law).

²⁴ See Hugh Thirlway, *The Sources of International Law*, in INTERNATIONAL LAW 117, 125 (Malcolm Evans ed., Oxford University Press 2003) (explaining how customary rules are formed).

²⁵ Christine Gray, *The Use of Force and the International Legal Order*, in INTERNATIONAL LAW 589, 590 (Malcolm Evans ed., Oxford University Press 2003) [hereinafter Gray, in INTERNATIONAL LAW].

²⁶ U.N. Charter pmb.

²⁷ *Id.* at art. 1, para 1.

“take . . . appropriate measures to strengthen universal peace.”²⁸

A. Article 2(4)’s Prohibition on the Use of Force

Article 2(4) sets forth a principle that has been described as “the heart” of the Charter,²⁹ requiring member states to “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”³⁰ Other provisions of the Charter require states that become parties to international disputes to “resolve all their disputes by peaceful means.”³¹ However, Chapter VII of the Charter contains two exceptions to the general prohibition of the use of force.³² The first exception allows for the use of force after the Security Council has “determine[d] the existence of any threat, breach of the peace, or act of aggression”³³ and “decide[d]” that “measures shall be taken in accordance with Article . . . 42.”³⁴ Article 42 empowers the Security Council to “take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.”³⁵ The second and more frequently invoked exception is the reservation to states of a right of self-defense contained within Article 51.³⁶ The second exception establishes that “[n]othing in the . . . Charter . . . impair[s] the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations.”³⁷ When the “Security Council has taken measures necessary to maintain international peace and

²⁸ *Id.* at art. 1, para 2.

²⁹ THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 117 (Bruno Simma ed., 2d ed. 2002) [hereinafter Simma] (quoting Louis Henkin, *The Reports of the Death of Article 2(4) are Greatly Exaggerated*, 65 AM. J. INT’L L. 544 (1971)).

³⁰ U.N. Charter art. 2, para. 4.

³¹ *Id.* at art. 2, para. 3; *see also id.* at art. 33, para. 1 (“The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall . . . seek a solution by . . . resort to . . . peaceful means . . .”); Simma, *supra* note 29, at 584 (describing the relationship between Article 2(3) and Article 33 provisions).

³² The title of Chapter VII of the Charter is “Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression.” U.N. Charter.

³³ *Id.* at art. 39.

³⁴ *Id.*; *see also id.* at art. 41 (The Council may also decide to take measures not involving the use of force.).

³⁵ *Id.* at art. 42; *see also id.* at art. 43, para. 1 (noting that the Security Council may call upon other states to contribute forces to a military action authorized pursuant to Articles 39 and 42, and those states are obliged to make such forces available).

³⁶ *Id.* at art. 51; *see also* Richard N. Gardner, *Commentary on the Law of Self-Defense*, in LAW AND FORCE IN THE NEW INTERNATIONAL ORDER 52 (Lori Fisler Damrosch & David J. Scheffer eds., 1991) [hereinafter Gardner, in LAW AND FORCE]; GRAY, USE OF FORCE, *supra* note 15, at 84.

³⁷ U.N. Charter art. 51.

security,”³⁸ however, the right to self-defense terminates.³⁹ Moreover, a procedural limitation applies: any measure undertaken in self-defense must “be immediately reported to the Security Council.”⁴⁰

The characterization of the Charter’s text as the starting point for analysis of the legality of the use of force is an apt one, in part because the relevant text is fairly brief and the rules it sets forth do not always provide clear answers when applied to particular facts. Throughout the Charter’s history, states that have used force have seized upon potential gaps in the Charter’s prohibition of the use of force in order to justify their actions.⁴¹ For example, states have urged that particular uses of force fell outside the parameters of the prohibition because the force was not used “in the international relations between States.”⁴² States have also argued that their particular use of force was not “against the territorial integrity or political independence” of another state,⁴³ or was not “inconsistent with the Purposes of the United Nations.”⁴⁴ States that have used force have sometimes claimed that these phrases give rise to implied exceptions to the prohibition of the use of force, and therefore provide legal justification for intervention in other states to achieve objectives such as the fulfillment of humanitarian need,⁴⁵ the attainment of self-determination,⁴⁶ the installation of democratic regimes,⁴⁷ or

³⁸ *Id.*

³⁹ *See id.* (“Nothing . . . shall impair the inherent right of . . . self-defence if an armed attack occurs . . . until the Security Council has taken measures necessary to maintain international peace and security.”) (emphasis added); *see also* J.N. SINGH, USE OF FORCE UNDER INTERNATIONAL LAW 31 (1984) (acknowledging that “[u]nder Article 51 . . . the defending state has to stop its defence” when the Security Council has taken the specified “measures”); Gideon A. Moor, Note, *The Republic of Bosnia-Herzegovina and Article 51: Inherent Rights and Unmet Responsibilities*, 18 FORDHAM INT’L L.J. 870, 882 (1995) (same interpretation). Some scholars assert that, for practical reasons, the language italicized above is inoperative to terminate the right of self-defense if the “measures” taken by the Security Council are only “economic” or “legal” in nature. *See* Thomas M. Franck, Comment, *Terrorism and the Right of Self-Defense*, 95 AM. J. INT’L L. 839, 841-42 (2001).

⁴⁰ U.N. Charter art. 51.

⁴¹ *See* Jon E. Fink, *From Peacekeeping to Peace Enforcement: The Blurring of the Mandate for the Use of Force in Maintaining International Peace and Security*, 19 MD. J. INT’L L. & TRADE 1, 7 (1995).

⁴² Simma, *supra* note 29, at 121-22.

⁴³ Simma, *supra* note 29, at 123; *see also* GRAY, USE OF FORCE, *supra* note 15, at 49-50 (China claims the right to use force against Taiwan on the basis of territorial integrity).

⁴⁴ IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 268 (1963) (rejecting such arguments).

⁴⁵ James P. Terry, *Rethinking Humanitarian Intervention After Kosovo: Legal Reality and Political Pragmatism*, 2004 ARMY LAW. 36, 38 (2004) (arguing that humanitarian intervention is permissible under the Charter as one of the Charter’s purposes is protecting human rights; therefore, using force for humanitarian purposes is permissible and not inconsistent with the purposes of the U.N.).

⁴⁶ ANTONIO CASSESE, INTERNATIONAL LAW 322 (2001) (suggesting that the prohibition on force applies only to states in this context and not to “peoples subjected to

the preservation of socialism.⁴⁸

Questions have also arisen regarding what actions constitute “force” for the purposes of Article 2(4).⁴⁹ Some argue that that economic or physical actions not involving military action should be treated as involving the use of force,⁵⁰ as should indirect support for military action by groups other than the armed forces of the supporting state.⁵¹ Moreover, the Security Council’s authorization of enforcement actions pursuant to Chapter VII is accomplished by passing resolutions that may not clearly define the exact scope of the authorization,⁵² providing states with opportunities to justify uses of force that may or may not be authorized depending on how one interprets the resolutions at issue.⁵³ Similarly, it has also been claimed that Security Council resolutions which authorized force in the past have a continuous and cumulative effect, with the result that the use of force may be resumed at concerned states’ discretion without renewed Security Council authorization.⁵⁴

Notwithstanding the ambiguities and possible loopholes found in Article 2(4), its prohibition on the use of force is widely regarded as barring, as a general rule, the nonconsensual use of force by one state against another.⁵⁵ The preemptive measures contemplated by the NSS are not consensual in nature.⁵⁶ Moreover, the Bush administration has not sought to justify U.S. action under the NSS by reference to the questionable exceptions

colonial domination or foreign occupation, as well as racial groups not represented in government, [who] are forcibly denied the right to self-determination”).

⁴⁷ Anthony S. Winer, *The Reagan Doctrine, the 2003 Invasion of Iraq, and the Role of a Sole Superpower*, 22 LAW & INEQ. 169, 181 (2004) (explaining the “Reagan Doctrine” as the use of military force to preserve democracy).

⁴⁸ *Id.* at 181 (explaining that the “Brezhnev Doctrine” was the Soviet leader’s philosophy that “the Soviet Union had the inherent authority to maintain communism in any existing communist state when that system became threatened”).

⁴⁹ Simma, *supra* note 29, at 117-21.

⁵⁰ MALCOLM N. SHAW, INTERNATIONAL LAW 687-88 (3d ed. 1991).

⁵¹ See Military and Paramilitary Activities, (Nicar. v. U.S.) 1986 I.C.J. 14, paras. 191-92, 195 (June 27) (citing favorably resolutions of the United Nations General Assembly and the General Assembly of the Organization of American States suggesting that force can include actions of irregulars, and assuming that states can be responsible for force and armed attacks undertaken by irregulars); Simma, *supra* note 29, at 119.

⁵² See Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime*, 93 AM. J. INT’L L. 124, 126 (1999).

⁵³ See Gray, in INTERNATIONAL LAW, *supra* note 25, at 610 (discussing Security Council resolutions that purportedly justified NATO’s 1998 air campaign against Yugoslavia).

⁵⁴ See, e.g., GRAY, USE OF FORCE, *supra* note 15, at 192-93.

⁵⁵ See, e.g., Simma, *supra* note 29, at 120-21; CASSESE, *supra* note 46, at 281; SHAW, *supra* note 50, at 688.

⁵⁶ See NSS, *supra* note 2, at 15-16 (implying that preemptive actions aim to strike at adversaries and eliminate the threat they pose).

to Article 2(4) just described; rather, the administration argues that the unquestionably valid right of self-defense is expansive enough to permit states invoking it to employ preemptive force.⁵⁷ Although disagreement exists as to whether non-military action can constitute force, it is widely held that non-consensual armed action by one state against the territory of another— such as that called for by the NSS— constitutes a use of force for purposes of the Charter's rules.⁵⁸ The point at which a state's support for proxies fighting another state will be deemed a use of force by the supporting state is not entirely clear.⁵⁹ There can be no doubt, however, that because the use of force called for by the U.S. strategy consists of action by the American military, the U.S. is responsible for using such force.⁶⁰

B. The Right of Self-Defense Under Article 51

As the preceding discussion suggests, when the U.S. undertakes military action under its NSS strategy, it is likely making use of force within the meaning of Article 2(4).⁶¹ In the future, no prior Security Council authorizations to use force are likely to be available to provide justification when the NSS strategy is applied. However, the argument will be advanced, as it has been in the case of the Iraq war,⁶² that the force used by the U.S. is a legitimate exercise of the right of self-defense recognized in Article 51. The text of Article 51, like that of other Charter provisions dealing with the use of force, has given rise to important issues of interpretation. The meaning of the term

⁵⁷ *NSS*, *supra* note 2, at 15.

⁵⁸ *See Simma*, *supra* note 29, at 117-18 (The "correct and prevailing view" is that armed force is prohibited; beyond that, arguments have been advanced that economic or political pressure may constitute force within the meaning of Article 2(4).); *see also* BROWNLEE, *supra* note 44, at 268.

⁵⁹ *See Simma*, *supra* note 29, at 120-21 (noting ambiguities of state responsibility for the actions of irregular forces that were addressed in *Military and Paramilitary Activities, (Nicar. v. U.S.)* 1986 I.C.J. 14 (June 27), and pointing out that "not every act of assistance" given by a state to irregulars "is to be qualified as a use of force"). It is uncontroversial, however, that actions undertaken by irregular forces should at least sometimes be treated as uses of force by states with which the irregulars are in some way connected. *Simma*, *supra* note 29, at 119 n.40 (characterizing this proposition as "virtually undisputed"); *see also* *Military and Paramilitary Activities, (Nicar. v. U.S.)* 1986 I.C.J. 14, paras. 191-92, 195 (June 27) (indicating what force states can be responsible for and when armed attacks undertaken by irregulars are considered force).

⁶⁰ *Simma*, *supra* note 29, at 119 (viewing as uncontroversial the proposition that force under Article 2(4) includes "the open incursion of regular military forces into the territory of another State"); *cf.* *Military and Paramilitary Activities, (Nicar. v. U.S.)* 1986 I.C.J. 14, para. 195 (June 27) (stating that an "armed attack" under Article 51 "includ[es] . . . action by regular armed forces across an international border"); Gray, *in* INTERNATIONAL LAW, *supra* note 25, at 602 (same).

⁶¹ *See NSS*, *supra* note 2, at 15-16.

⁶² *See supra* note 16 and accompanying text (noting that the U.S. has proffered self-defense as one justification for the Iraq invasion).

“armed attack” in Article 51, and the relationship of that term to the “use of force” prohibited by Article 2(4), have been called into question. In particular, controversy exists as to whether or not the two terms are synonymous.⁶³ The International Court of Justice (ICJ) has suggested that the terms have different meanings because some state actions properly characterized as uses of force are not of sufficient “gravity” to qualify as armed attacks.⁶⁴ Thus, according to the ICJ, not every “use of force” is sufficiently serious to be treated as an “armed attack” that would permit a forcible response to be justified as self-defense.⁶⁵ With respect to the Iraq war, however, there has been no showing that Iraq used or threatened any force at all in advance of the 2002 U.S. invasion, much less engaged in an armed attack.⁶⁶

It may be argued that the September 11, 2001 attacks constituted an armed attack which ultimately gave the U.S. a right to exercise self-defense against Iraq. Prior to that date, it was not clear whether a terrorist act could be treated as an armed attack;⁶⁷ however, the Security Council’s response implied that the September 11 attacks gave rise to an affirmative right to use force in self-defense.⁶⁸ While the Security Council did not declare Afghanistan responsible for the attacks, the U.S. justified the war against Afghanistan as an act of self-defense.⁶⁹ Most states were receptive to the notion that Afghanistan was sufficiently responsible for supporting the September 11th attackers to permit responsibility for the attacks to be imputed to Afghanistan.⁷⁰ The attacks appeared to rise to the level of armed attacks within the meaning of Article 51, so U.S. claims of a right to use force in self-defense against Afghanistan were widely

⁶³ Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. CHI. L. REV. 113, 136 (1986) [hereinafter Schachter, *In Defense of International Rules*].

⁶⁴ *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 103-04 (June 27).

⁶⁵ See Sean D. Murphy, *Terrorism and the Concept of ‘Armed Attack’ in Article 51 of the U.N. Charter*, 43 HARV. INT’L L.J. 41, 44 (2002) [hereinafter S. Murphy].

⁶⁶ J. MURPHY, *supra* note 1, at 176 (noting that “[t]here is no evidence that Iraq was part of an armed attack against the United States”); see also Gray, in *INTERNATIONAL LAW*, *supra* note 25, at 605 (concluding that if Iraq were not shown to have been involved in planning or undertaking armed attacks against the U.S., then use of force by the U.S. against Iraq would be “stretching pre-emptive self-defence to an extreme”).

⁶⁷ See Schachter, *In Defense of International Rules*, *supra* note 63, at 139-41 (describing this as a “controversial question”).

⁶⁸ See Johnstone, *supra* note 15, at 828.

⁶⁹ See Johnstone, *supra* note 15, at 828; Jonathan I. Charney, *The Use of Force against Terrorism and International Law*, 95 AM. J. INT’L L. 835, 835-36 (2001) (noting that self-defense was asserted as the justification for the use of force by the U.S. against Afghanistan, and suggesting that the justification may have been valid, but criticizing the failure of the U.S. to provide the international community with adequate information or to obtain the approval of the Security Council before invading Afghanistan).

⁷⁰ See Johnstone, *supra* note 15, at 828; J. MURPHY, *supra* note 1, at 167.

perceived as unobjectionable.⁷¹ While the U.S. made efforts to connect Iraq to the September 11 attacks, the U.S. government could not produce the evidence needed to impute responsibility for those acts to Iraq.⁷² Thus, the distinction between the use of force and more substantial armed attacks is inapposite,⁷³ because Iraq did not use force at all, much less use it in a manner substantial enough to give rise to an armed attack.

Given that Iraq was apparently not responsible for any armed attacks against the U.S., one might think that the U.S. claim that its use of force against Iraq was undertaken in self-defense necessarily fails. The text of Article 51, after all, seems to indicate that the right of self-defense arises only when “an armed attack occurs.”⁷⁴ However, in this instance, the text obscures an interpretive dispute that hinges directly on the U.S. claim. States and scholars disagree as to the time at which the right of self-defense becomes available for exercise.⁷⁵ Determining the legitimacy of the U.S.’s claim of a right to use preemptive force to defend itself depends upon the extent to which self-defense may be exercised in advance of an armed attack.

C. Permissive and Restrictive Interpretations of the Right of Self-Defense

Article 51 must be interpreted in order to determine if the right of self-defense can permit the use of preemptive force. The Vienna Convention on the Law of Treaties, which the U.S. has signed but not ratified, provides a useful guide to the interpretation of the treaty provisions such as Article 51.⁷⁶ The Vienna Convention requires that treaties “be interpreted in good faith in accordance with the ordinary meaning to be given to [their] terms . . . in their context and in the light of [their] object

⁷¹ See Johnstone, *supra* note 15, at 828-29; J. MURPHY, *supra* note 1, at 167.

⁷² Mahmoud Hmoud, *The Use of Force Against Iraq: Occupation and Security Council Resolution 1483*, 36 CORNELL INT’L L.J. 435, 443 (2004); Martinez, *supra* note 16, at 190.

⁷³ See *supra* notes 63-65 and accompanying text (describing this distinction).

⁷⁴ U.N. Charter art. 51.

⁷⁵ See, e.g., GRAY, USE OF FORCE, *supra* note 15, at 86, 112 (noting division of opinion on the interpretation of the Article 51 text); Van den hole, *supra* note 22, at 80-83 (also noting division of opinion).

⁷⁶ United Nations Conference on the Law of Treaties art. 31, May 22, 1969, 1155 U.N.T.S. 331 [hereinafter U.N. Conference]; Charles Lipson, *Why Are Some International Agreements Informal?*, in INTERNATIONAL LAW NORMS, ACTORS, PROCESS, A PROBLEM-ORIENTED APPROACH 39 (Jeffrey L. Dunoff et al. eds., 2002) (The U.S. has indicated that the Convention is “the authoritative guide to current treaty law and practice.”). See United Nations, *Treaty Series*, available at <http://untreaty.un.org/sample/EnglishInternetBible/partI/chapterXXIII/treaty1.htm> (last visited Nov. 1, 2005) (while the U.S. has signed the treaty, it has not ratified it).

and purpose.”⁷⁷ The relevant “context” includes, “in addition to the text, including its preamble and annexes[,]” any agreements or instruments agreed to or accepted by “all the parties in connexion [sic] with the conclusion of the treaty.”⁷⁸ In addition to context, the primary guideposts to interpretation are: (1) “subsequent agreement[s]” regarding the treaty’s “interpretation” or “application;” (2) “subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;” and (3) “any relevant rules of international law.”⁷⁹ The commentary indicates that some dispute exists as to the relative weight to be given to each of the guideposts to interpretation, but concludes that most jurists recognize “the primacy of the text as the basis for the interpretation.”⁸⁰

Scholars endeavoring to interpret Article 51 to determine when the right of self-defense arises have employed methods of interpretation similar to those endorsed by the Vienna Convention, but have drawn different conclusions. The more restrictive position holds that Article 51 forecloses a state’s ability to use force in self-defense before an armed attack occurs. The more permissive position holds that an armed attack need not occur before force may be used in self-defense.⁸¹ Instead, force may be used in anticipation of an attack, in a manner that has been dubbed “anticipatory self-defence.”⁸² Force used in an anticipatory act of self-defense must still meet the necessity and proportionality requirements of customary international law, and in the context of anticipatory self-defense, the former requirement demands a showing that the threat is imminent.⁸³ The Bush administration asserted that this second, permissive viewpoint represents a centuries-old consensus as to the scope of the right.⁸⁴ Furthermore, the administration regards the preemptive strategy enunciated in the NSS as an allowable

⁷⁷ U.N. Conference, *supra* note 76.

⁷⁸ U.N. Conference, *supra* note 76, at art. 31.

⁷⁹ U.N. Conference, *supra* note 76, at art. 31.

⁸⁰ Lipson, *supra* note 76, at 58 (“[S]upplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.”). The preparatory work of the treaty is thus not referenced here.

⁸¹ See Gray, *in* INTERNATIONAL LAW, *supra* note 25, at 600 (summarizing the restrictive and permissive positions).

⁸² See Gray, *in* INTERNATIONAL LAW, *supra* note 25, at 600.

⁸³ See Gray, *in* INTERNATIONAL LAW, *supra* note 25, at 600; Simma, *supra* note 29, at 803 (while rejecting the permissibility of anticipatory self-defense under Article 51, noting that scholars who believe that anticipatory self-defense can be lawful nevertheless require it to be a necessary and proportional response to an imminent threat).

⁸⁴ NSS, *supra* note 2, at 15.

application of the right of self-defense as understood pursuant to the permissive position.⁸⁵

1. Treaty Text

Analysis of Article 51 in light of the Vienna Convention sheds light on the disagreement between the restrictive and permissive schools of thought. The text of Article 51 uses the phrase “if an armed attack occurs” to describe the situation in which the Charter’s operation will not “impair” the right of self-defense.⁸⁶ Those advocating the restrictive view may argue compellingly that this language indicates that an actual—rather than a potential—armed attack is needed to trigger the right to use force in self-defense.⁸⁷ An armed attack is an event capable of being perceived and identified as such, and like any other event, “occurs” when it “come[s] into existence” or “happen[s],” and not before.⁸⁸ Thus, an armed attack must actually happen before it can truly be said that “[n]othing in the . . . Charter” will “impair the inherent right of . . . self-defence.”⁸⁹ Accordingly, only an armed attack that is happening or has happened can satisfy Article 51’s armed attack requirement.⁹⁰

Moreover, the structure of the language used in Article 51 bolsters the restrictive position. Article 51 impliedly recognizes a general rule of impairment of the right of self-defense when it states that nothing in the Charter will “impair” the right “if an armed attack occurs.”⁹¹ The Article would arguably be devoid of meaning if special provisions did not have to be made in order to preserve a right of self-defense.⁹² Thus, the Charter must generally operate to impair the right of self-defense; only in exceptional cases will it be deemed unimpaired. The occurrence of an armed attack gives rise to the only situation in which the Charter states that the right of self-defense is not impaired, however “inherent” it may be.⁹³ A familiar canon of construction holds that the mention of one thing implies the exclusion of other things; as applied to Article 51, this suggests that explicit

⁸⁵ NSS, *supra* note 2, at 15.

⁸⁶ U.N. Charter art. 51.

⁸⁷ Eckert & Mofidi, *supra* note 15, at 137-38.

⁸⁸ WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 817 (1991).

⁸⁹ U.N. Charter art. 51.

⁹⁰ See, e.g., S. Murphy, *supra* note 65, at 44; Quincy Wright, *The Prevention of Aggression*, 50 AM. J. INT’L L. 514, 529 (1956); Simma, *supra* note 29, at 803.

⁹¹ Eckert & Mofidi, *supra* note 15, at 137 (quoting U.N. Charter art. 51).

⁹² See BROWNLEE, *supra* note 44, at 273 (making this point, and stating that “where the Charter has a specific provision relating to a particular legal category, to assert that this does not restrict the wider ambit of the customary law relating to that category or problem is to go beyond the bounds of logic. Why have treaty provisions at all?”).

⁹³ Simma, *supra* note 29, at 790.

exceptions to the general rule of impairment of the right of self-defense should be deemed exclusive.⁹⁴ Thus, the language should be read to mean that the Charter has rendered the right of self-defense unavailable prior to the occurrence of an armed attack.

On the other hand, advocates of a permissive interpretation contend that the text of Article 51 does not purport to grant a right of self-defense to states.⁹⁵ The language of Article 51 assumes that such a right already existed when the Charter was signed; indeed, the right is said to be an “inherent” aspect of the sovereignty of states.⁹⁶ Article 51’s recognition that states’ self-defense rights are “inherent,” which is defined as “involved in [states’] constitution[s] or essential character” and “belonging by nature” to states, suggests that the argument for a restrictive approach should be turned on its head.⁹⁷ The Charter’s drafters described the right of self-defense as “inherent” because they deemed it a fundamental attribute of state sovereignty.⁹⁸ Therefore, Article 51 should not be read as restricting the right of self-defense, but as clarifying the right’s continued existence, because the drafters would have been explicit if they wished to place limitations on a right they considered so important.⁹⁹

Scholars adopting a permissive approach endeavor to interpret the phrase “an armed attack” in a manner consistent with their position.¹⁰⁰ Some view the armed attack requirement as a reference not only to actual interstate violence, but also to actions taken in preparation for the attack.¹⁰¹ Thus, an armed

⁹⁴ See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992) (referencing this canon); BROWNLEE, *supra* note 44, at 273 (applying the canon).

⁹⁵ See, e.g., Abraham D. Sofaer, *The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 92-93 (1989); John Alan Cohan, *The Bush Doctrine and the Emerging Norm of Anticipatory Self-Defense in Customary International Law*, 15 PACE INT’L L. REV. 283, 316 (2003).

⁹⁶ See U.N. Charter art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations.”).

⁹⁷ See WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 622 (1991).

⁹⁸ U.N. Charter art. 51; see JULIUS STONE, *AGGRESSION AND WORLD ORDER: A CRITIQUE OF UNITED NATIONS THEORIES OF AGGRESSION* 43-44, 44 n.13 (1958) (referring to the “continued vigour” of the concept of self-defense and assumption on the part of states that treaty provisions would not and could not eliminate this “natural right”); Sofaer, *supra* note 95, at 94.

⁹⁹ STONE, *supra* note 98, at 43-44; see Sofaer, *supra* note 95, at 94.

¹⁰⁰ U.N. Charter art. 51.

¹⁰¹ See, e.g., Winston P. Nagan & Craig Hammer, *The New Bush National Security Doctrine and the Rule of Law*, 22 BERKELEY J. INT’L L. 375, 425 n.212 (2004) (quoting Sir Humphrey Waldoock); American Soc’y of Int’l Law, *Self-Defense in an Age of Terrorism*, 97 AM. SOC’Y INT’L L. PROC. 141, 148 (2003) (suggesting the permissibility of “nipping an armed attack in the bud”). To the extent that the latter position rejects the concept of preemptive self-defense, it allows a state to exercise self-defense when it is positive an imminent attack will occur. It is reactionary rather than anticipatory self-defense, and is

attack may be said to have occurred when some state of preparation is reached, even before one state actually strikes another.¹⁰² The definition of “armed attack” must encompass more than the ultimate act of interstate violence; otherwise, the right would be deprived of the broad scope seemingly appropriate to a right inherent in statehood.¹⁰³ An alternative explanation is that Article 51 does not require an armed attack, but merely states one instance in which the customary right of self-defense is preserved.¹⁰⁴ This second understanding is difficult to square with the structure of Article 51. However, the recognized inherent and fundamental need for self-defense against imminent attack,¹⁰⁵ in addition to states’ interpretation of the provision,¹⁰⁶ may be viewed as justifications for the second reading of Article 51.

The Vienna Convention’s “General Rule of Interpretation” does not limit the scope of the “text” considered by an interpreter to the specific portion under scrutiny, but instead calls for examination of the whole “text, including its preamble and annexes,” to aid in interpretation.¹⁰⁷ The restrictive school of thought points to numerous aspects of the Charter that suggest that the avenues left open for the legitimate use of force were meant to be narrow. According to the restrictive view, the scope of the right to self-defense recognized in Article 51 is diminished by the temporal limitation in the armed attack requirement and the Article’s command that the exercise of the right by the states is “immediately reported to the Security Council.”¹⁰⁸ Moreover, the text explains that force used in self-defense must cease when the Council “take[s] measures necessary to maintain international peace and security.”¹⁰⁹ If the “inherent” quality of the right of self-defense is as important to interpreting Article 51 as the permissive position posits — supposedly relaxing or eliminating the text’s requirement of an armed attack — it seems unusual that the right of self-defense would be made contingent

included in this part of the discussion because, although it involves reaction, using force in self-defense in instances suggested by this view still precedes the occurrence of any interstate violence.

¹⁰² See Nagan & Hammer, *supra* note 101.

¹⁰³ See BROWNIE, *supra* note 44, at 273 (suggesting the need for a broad interpretation of inherent right); U.N. Charter art. 51 (outlining the inherent right of the states).

¹⁰⁴ See Gray, *in* INTERNATIONAL LAW, *supra* note 25, at 600.

¹⁰⁵ Martinez, *supra* note 16, at 162-63 (making this argument and referencing numerous sources in accord).

¹⁰⁶ THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 50 (2002).

¹⁰⁷ U.N. Conference, *supra* note 76.

¹⁰⁸ U.N. Charter art. 51.

¹⁰⁹ *Id.*

upon notification, and subject to limitation by action of a body beyond the state's control.

With respect to Article 51's interaction with Article 2(4), those urging a restrictive interpretation of the temporal scope of the self-defense right can again invoke the canon that explicit exceptions are deemed exclusive. The general prohibition on the use of force yields only to a limited number of explicit exceptions, including the occurrence of an armed attack.¹¹⁰ If an armed attack "occurs" when interstate violence actually "happen[s]" and not before, the argument that another, different right of self-defense may be relied upon before interstate violence actually occurs runs afoul of sound textual interpretation.¹¹¹

The right of self-defense recognized in Article 51 is merely an exception to the general prohibition on the use of force contained in Article 2(4).¹¹² This suggests that "[t]he use of force in self-defense is limited to situations where the state is truly required to defend itself from serious attack. In such situations, the state must carry the burden of presenting evidence to support its actions, normally before these irreversible and irreparable measures are taken."¹¹³ Thus, the Charter affirmatively requires U.N. members to rely on alternatives to force to resolve their disputes,¹¹⁴ and suggests a number of peaceful means by which this obligation may be discharged.¹¹⁵ An annex to the Charter was included to give concrete form to one vehicle for peaceful dispute resolution, the International Court of Justice, the "function [of which] is to decide in accordance with international law such disputes as are submitted to it."¹¹⁶ Also relevant in this context is the Charter's preamble, which explains a central focus of the Charter: the common interest in keeping forcible

¹¹⁰ See, e.g., S. Murphy, *supra* note 65, at 44.

¹¹¹ See THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH 941 (1995) (defining "occur").

¹¹² See Simma, *supra* note 29, at 117, 128, 789 (referring to the prohibition of the use of force found in Article 2(4) as the "general" rule and self-defense as an "exception" to that rule). Adherents of a restrictive view of the self-defense right may argue that the exceptional status of self-defense warrants a narrow construction of the right. See Gray, USE OF FORCE, *supra* note 15, at 86-87, 600 (reciting this argument).

¹¹³ Charney, *supra* note 69, at 835-36 (criticizing a broad interpretation of the right of self-defense on the ground that it would conflict with "core" objectives specified in the Charter, including the 'prevent[ion of] states from using force in international relations to promote their policy agendas no matter how just,' as well as with the objectives of self-defense itself).

¹¹⁴ U.N. Charter art. 2, para. 3.

¹¹⁵ U.N. Charter art. 2, para. 33 ("[States] shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means.").

¹¹⁶ See Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, 1060.

exchanges between states to a minimum.¹¹⁷ A restrictive interpretation of Article 51 thus suggests that so long as an “armed attack” remains a possibility rather than an actuality, the Charter’s commands to settle disputes peacefully and to avoid the use of force preclude a state from resorting to arms.¹¹⁸

Lastly, the Charter’s other significant exception to the prohibition of the use of force allows for its use pursuant to Security Council decisions.¹¹⁹ Article 1(1) expresses a preference for the use of “collective measures” as a means of “maintain[ing] international peace and security.”¹²⁰ Article 24 reflects the same preference for collective over unilateral action in that it established that United Nations “[m]embers confer on the Security Council primary responsibility for the maintenance of international peace and security.”¹²¹ This preference is further reinforced by the textually subordinate status of self-defense under Article 51, as noted above, in relation to Security Council action.¹²² Arguably, these aspects of the text are incompatible with an interpretation of Article 51 that leaves a state free to use force against another state before the Security Council has an opportunity to consider the situation.¹²³

Those favoring a permissive approach to interpretation of the right of self-defense are likely to view the same portions of the text differently. First, with respect to the provisions for Security Council involvement found in Article 51, they regard the notification requirement as no more than an administrative or procedural matter, imposing no limits on the substantive scope of the right enjoyed by the state acting in self-defense.¹²⁴ As such, the fact that a party exercising the right must give notice to the Security Council should not be read to suggest that the right ought to be narrowly construed.¹²⁵ The Council’s apparent ability

¹¹⁷ See U.N. Charter pmbl. (listing reasons why the United Nations was founded; the first reason listed is “to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind”).

¹¹⁸ Eckert & Mofidi, *supra* note 15, at 137-38.

¹¹⁹ U.N. Charter arts. 39, 42 (permitting the Security Council to authorize force “necessary to maintain or restore international peace and security” if it “determine[s] the existence of any threat to the peace, breach of the peace or act of aggression”).

¹²⁰ U.N. Charter art. 1, para. 1.

¹²¹ U.N. Charter art. 24.

¹²² See U.N. Charter, *supra* notes 114-15 and accompanying text.

¹²³ See Charney, *supra* note 69, at 837 (condemning unilateral uses of force in self-defense in situations where a state could instead resort to the Security Council’s enforcement procedures, on the ground that “the Council, and the United Nations as a whole, should be the primary vehicle to respond to threats and to breaches of the peace”).

¹²⁴ See generally Gray, in INTERNATIONAL LAW, *supra* note 25, at 90-91 (noting, however, that failure to follow the notification procedure will have a deleterious impact on a state’s claim to have acted in self-defense).

¹²⁵ Simma, *supra* note 29, at 804 n.152 (noting that the “reporting duty” is “rarely complied with” and has been “devoid of practical significance” because of the frequent

to terminate a properly-exercised right of self-defense is of little importance to the issue that divides the restrictive and permissive schools of thought — the time when the right may first be asserted.¹²⁶ By the terms of the Charter, the right of self-defense can be limited only when the Council acts, and then only when it takes “measures necessary to maintain international peace and security.”¹²⁷ Moreover, in practice, this limitation has little effectiveness, as states have exercised what amounts to “concurrent power” with the Council in continuing to defend themselves even after taking “measures,” and possess a wide degree of discretion in deciding when the Council’s action has superseded their right to use force in self-defense.¹²⁸ For these reasons, the Council’s ability to terminate the exercise of a state’s right to self-defense should not significantly detract from Article 51’s recognition of self-defense as an inherent right worthy of the liberal interpretation given to it by the permissive school. Additionally, the preference for collective over individual action to “maintain international peace and security” should not be interpreted to imply that the collectivism favored by the Charter is at odds with a broad interpretation of the right of self-defense, because the self-defense right recognized in Article 51 is itself capable of being exercised in a “collective” fashion.¹²⁹

Permissive writers claim that the aforementioned canon of construction should not exclude anticipatory self-defense unless Article 51’s reference to an armed attack intends to foreclose anticipatory action.¹³⁰ In their view, the canon is inapplicable because the language requiring an “armed attack” applies only when “the Security Council is acting” and takes “measures

inefficacy of the Security Council”). *But see* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, para. 235 (June 27) (suggesting that the fact that a state failed to report to the Security Council is significant to analysis of the state’s claim of a right to use force in self-defense under the Charter).

¹²⁶ The issue of whether preemptive self-defense is permissible relates to the availability, not the termination, of the self-defense right. To the extent that it is argued that the Security Council’s ability to terminate a state’s recourse to the right is relevant to interpreting the right as it relates to preemptive force, it should be noted that the ability of the Security Council to terminate the right has had very little practical impact. *See* FRANCK, *supra* note 106, at 50 (noting that while Article 51 as drafted grants the Security Council the ability to terminate a state’s use of force in self-defense, the “coexistence of collective measures with the continued measures in self-defense has become accepted practice”).

¹²⁷ U.N. Charter art. 51.

¹²⁸ *See* FRANCK, *supra* note 106, at 49.

¹²⁹ U.N. Charter art. 51; Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1639 (1984) [hereinafter Schachter, *The Right of States*].

¹³⁰ *See* STONE, *supra* note 98, at 44 n.14. (“Any reference based on *inclusio unius exclusio alterius* is neutralized by the clear reference of what is included to the situation where the Security Council is acting.”).

necessary to maintain international peace and security.”¹³¹ States’ obligation to settle disputes peacefully is inapposite, because it has already been breached by the time a state exercises its right of self-defense.¹³² If the right to use force in self-defense extends to situations preceding the armed attack, a permissive understanding of the right suggests that at some point in a potential attacker’s preparations, the potential defender’s obligation to settle disputes peacefully must yield by reason of the potential attacker’s decision to resort to force.¹³³

2. Context and Subsequent Agreements

The text of a treaty, although perceived by many scholars to be of primary importance to the task of interpretation, is not the only relevant consideration. According to the Vienna Convention, the treaty’s “context” should be considered, and certain other items should be “taken into account.”¹³⁴ Aside from its own text, the Charter lacks a relevant “context” as defined by the Vienna Convention.¹³⁵ The Vienna Convention also calls for consideration of “subsequent agreement[s] between the parties” pertaining to the treaty.¹³⁶ Unlike agreements and instruments entered “in connexion [sic] with the conclusion of the treaty to be interpreted,” which form part of the treaty’s “context” and must receive the backing of all other parties to the treaty, subsequent agreements may be relevant to interpretation of a treaty even if they have not been assented to by “all” the parties to the treaty under scrutiny.¹³⁷ Therefore, agreements postdating the Charter that are not backed by all parties to it may still be relevant to the Charter’s interpretation. As a result, a number of widely supported General Assembly resolutions may provide insight into

¹³¹ See U.N. Charter art. 51; STONE, *supra* note 98, at 44 (asserting that “where the Security Council is not acting, the broader license of self-defence and self-redress under customary international law must surely continue to exist,” and that Article 51 should not be read to eliminate states’ “license” to justify uses of force based on customary rules so long as the “Council is not acting, [and] there is no inconsistency with the purposes of the United Nations”).

¹³² Schachter, *The Right of States*, *supra* note 129, at 1635.

¹³³ See Simma, *supra* note 29, at 108-09 (stating that, in principle, this obligation “presupposes a right to existence for the party concerned and thus a right to respect for its integrity” and adding that “[t]o the extent that the use of force is permissible, an obligation to settle a dispute peacefully cannot exist”).

¹³⁴ U.N. Conference, *supra* note 76.

¹³⁵ U.N. Conference, *supra* note 76 (To the author’s knowledge, there were no formal agreements or understandings made both at the time of and in connection with the conclusion of the Charter to which all the parties to the treaty assented that bore directly on the issue of the legitimate timing of force used in self-defense.)

¹³⁶ U.N. Conference, *supra* note 76, at art. 31; see Simma, *supra* note 29, at 108-09 (stating that this obligation “presupposes a right to existence for the party concerned and thus a right to respect for its integrity[,]” and adding that “[t]o the extent that the use of force is permissible, an obligation to settle a dispute peacefully cannot exist”).

¹³⁷ U.N. Conference, *supra* note 76.

Article 51's interpretation. Although none of these resolutions go directly to the scope of permissible self-defense, what they have to say about the use of force as a general matter may still be relevant to interpreting the scope of permissible self-defense.¹³⁸

The 1965 U.N. Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty (Declaration on the Inadmissibility of Intervention) rejects the use of force in international relations. It declares that "[n]o State may use or encourage the use of . . . measures to coerce another State . . . to secure from it advantages of any kind," and further enjoins States from engaging in "activities directed towards the violent overthrow of the régime of another State."¹³⁹ This language may be understood to condemn acts of self-defense undertaken before, or too far in advance of, the occurrence of an armed attack. However, the Declaration on the Inadmissibility of Intervention goes on to disavow any intention that its language is meant to "affect[] in any manner the relevant provisions of the Charter."¹⁴⁰

The 1970 U.N. Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States In Accordance with the Charter of the United Nations (Declaration on Friendly Relations) demands that states "refrain from the threat or use of force . . . as a means of solving international disputes," and affirms that "[a] war of aggression constitutes a crime against the peace" which gives rise to criminal "responsibility."¹⁴¹ The Declaration on Friendly Relations provides support for the notion that the right of self-defense is limited rather than open-ended by declaring that forcible "acts of reprisal" are impermissible.¹⁴² Additionally, the Declaration on Friendly Relations indicates that the obligation to settle disputes peacefully continues even after initial attempts to do so have failed.¹⁴³ It is hard to reconcile a process in which all parties earnestly endeavor to peacefully settle a dispute with the

¹³⁸ GRAY, USE OF FORCE, *supra* note 15, at 112; Gray, *in* INTERNATIONAL LAW, *supra* note 25, at 601.

¹³⁹ Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, G.A. Res. 2131 (XX), ¶ 1, U.N. Doc. A/2131 (Dec. 21, 1965).

¹⁴⁰ *Id.* at ¶ 8.

¹⁴¹ Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), ¶ 1, U.N. Doc. A/2625 (Oct. 24, 1970) [hereinafter Declaration on Friendly Relations].

¹⁴² *Id.*; *see, e.g.*, CASSESE, *supra* note 46, at 217 (stating that the principles the Declaration on Friendly Relations articulates are often treated as a reflection of customary international law).

¹⁴³ Declaration on Friendly Relations, *supra* note 141. *But see* CASSESE, *supra* note 46, at 217 (noting that states are "not duty bound to settle those disputes at any cost").

use of force in advance — or too far in advance — of an armed attack by another disputant, the occurrence of which remains speculative before violence is brought to bear.¹⁴⁴

An overhasty act of self-defense might well run afoul of a third Assembly resolution, the Definition of Aggression, which states, “[t]he first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression.”¹⁴⁵ The resolution’s definition of “[a]ggression” may be rebutted only pursuant to a Council determination.¹⁴⁶ No justifications for aggression are identified.¹⁴⁷ Like the Declaration on the Inadmissibility of Intervention, however, both the Declaration of Friendly Relations and the Definition of Aggression contain language indicating that they are not intended to change the Charter’s scope or meaning.¹⁴⁸

Those favoring a restrictive interpretation of the self-defense right can argue that the aforementioned resolutions are consistent with their view. Specifically, their view is a narrow reading of the right that limits its assertion to situations in which the Charter clearly recognizes its existence—namely, when one state is then undertaking or has already undertaken an “armed attack” against the defender.¹⁴⁹ Adherents of the permissive position may counter that none of the resolutions cited explicitly purports to construe the right of self-defense.¹⁵⁰ Furthermore, those favoring a permissive interpretation may argue that no inferences about the scope of the rules found in the Charter should be drawn. They can ground this argument on traditional reservations about the ability of General Assembly resolutions to produce binding legal effects, and the caveats expressly included in the resolutions that appear to foreclose treatment of the resolutions as authoritative interpretations of

¹⁴⁴ Martinez, *supra* note 16, at 170.

¹⁴⁵ Definition of Aggression, G.A. Res. 3314 (XXIX), art. 2, U.N. Doc. A/3314 (Dec. 14, 1974) [hereinafter Definition of Aggression] (like the Declaration on Friendly Relations, the Definition of Aggression has been cited as a reflection, at least in part, of customary international law); see *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 103 (June 27).

¹⁴⁶ Definition of Aggression, *supra* note 145, at art. 2.

¹⁴⁷ Definition of Aggression, *supra* note 145, at art. 5.

¹⁴⁸ See Declaration on Friendly Relations, *supra* note 141, at ¶ 1 (“Nothing in the foregoing paragraphs shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful.”); Definition of Aggression, *supra* note 145, at art. 6 (“Nothing in this Definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful.”).

¹⁴⁹ U.N. Charter art. 51; Schachter, *In Defense of International Rules*, *supra* note 63, at 120.

¹⁵⁰ GRAY, USE OF FORCE, *supra* note 15, at 112; GRAY, *in* INTERNATIONAL LAW, *supra* note 25, at 601.

the Charter.¹⁵¹ Those preferring a restrictive approach could respond that the limiting clauses of the resolutions are better understood, not as impediments to the use of the resolutions in construing the Charter, but as indications that the resolutions are intended to restate the Charter's meaning rather than to modify it.¹⁵² Moreover, resolutions such as the Declaration on Friendly Relations, which received overwhelming support in the General Assembly, may be relevant both to interpreting Article 51 and to independently determining the legality of the use of force by contributing to the development of customary international law.¹⁵³

3. State Practice

The Vienna Convention also calls for consideration of “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”¹⁵⁴ On several occasions since the founding of the United Nations, states have used force in a manner seemingly akin to anticipatory self-defense.¹⁵⁵ The U.S. naval blockade of

¹⁵¹ See CASSESE, *supra* note 46, at 160-61 (characterizing General Assembly resolutions as ‘soft law’ capable of indicating new trends and concerns but unable to impose legally binding obligations); Simma, *supra* note 29, at 269 (acknowledging that Assembly resolutions are nonbinding and that it has been “controversial” to ascribe legal effect to them).

¹⁵² The language used in the resolutions seem to express an intention that the resolutions be viewed as efforts to restate rather than to develop the law. See, e.g., Declaration on Friendly Relations, *supra* note 141, at ¶ 1 (declaring only that the resolution shall not “be construed as enlarging or diminishing in any way the scope of the provisions of the Charter”). Arguments that the Assembly included these clauses to express its intent that these resolutions should be regarded as having no legal import even though international law was the subject matter of the resolutions leads to the absurd conclusion that the Assembly acted for no reason.

¹⁵³ CASSESE, *supra* note 46, at 292-93 (noting that significant resolutions may “gradually generate[] the possible crystallization of general binding rules or principles”); Simma, *supra* note 29, at 268-73 (describing different theories of the extent to which General Assembly resolutions can produce legal effects, and adding that “[i]t is widely acknowledged that [Assembly] resolutions may under certain circumstances constitute evidence of existing customary law”); see also *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 101, 103 (June 27) (noting that states’ adoption of the Declaration on Friendly Relations was an indication of their *opinio juris* as to customary international law, and that the Definition of Aggression could be “taken to reflect customary international law”).

¹⁵⁴ U.N. Conference, *supra* note 76.

¹⁵⁵ Other examples have also been cited as instances of the assertion of a right of anticipatory self-defense, but are not discussed here at length because the force used in each – whether lawful or not – is better described as responsive. See Martinez, *supra* note 16, at 140-43 (citing U.S. air strikes against Libya in 1986 after the bombing of a German nightclub frequented by Americans, U.S. missile strikes against Iraq in 1993 after its attempts to assassinate former President Bush, and U.S. missile strikes against Sudan and Afghanistan in 1998 after bombings of American embassies). To the extent that these instances were ones in which states argued for anticipatory self-defense, none can be said to have resulted in the unequivocal acceptance or rejection of the doctrine. See GRAY, *USE OF FORCE*, *supra* note 15, at 116-18.

Cuba during the Cuban missile crisis has been cited as an example of a case in which preemptive or anticipatory self-defense was used with international approval.¹⁵⁶ The blockade should properly be regarded as a use of force¹⁵⁷ and was apparently undertaken to forestall the installation and possible future use of Soviet nuclear-armed missiles in Cuba.¹⁵⁸ However, while commentators debated the applicability of the right of self-defense, the official U.S. position did not attempt to justify the blockade on that ground.¹⁵⁹ Instead, it sought to justify it as a measure taken by a regional organization, the Organization of American States, pursuant to Article 52.¹⁶⁰ The American unwillingness to rely on the right of self-defense, especially in view of the strong tendency of states to advance self-defense to legitimize their uses of force,¹⁶¹ suggests that the U.S. believed that self-defense would have been heavily contested as a justification.¹⁶² Even to the extent that self-defense was raised in discussions in the Council, it cannot be said that the Council recognized the Cuban blockade as legitimate, as opinion was sharply divided, and it is uncertain whether supporters of the U.S. position were motivated by Cold War alliance considerations or by the U.S.'s proffered justifications.¹⁶³ Thus, the Cuban blockade provides no real support for a permissive interpretation of the Charter.

A second oft-cited example is the Israeli air-strike against Egypt at the start of the Six-Day War in 1967. Prior to the air strike, the objective of was to destroy Egypt's Air Force. Egypt had taken a number of provocative actions in short succession that made the onset of hostilities appear imminent, including closing the Straits of Tiran to Israeli traffic.¹⁶⁴ The Israeli strike

¹⁵⁶ See Van den hole, *supra* note 22, at 101.

¹⁵⁷ BROWNLIE, *supra* note 44, at 365-66.

¹⁵⁸ WILLIAM R. KEYLOR, *THE TWENTIETH-CENTURY WORLD: AN INTERNATIONAL HISTORY* 315 (4th ed. 2001).

¹⁵⁹ Quincy Wright, *The Cuban Quarantine*, 57 AM. J. INT'L L. 546, 554, 560 (1963) [hereinafter Wright, *The Cuban Quarantine*] (noting that the U.S.'s "main argument" was that the quarantine was justified by "Articles 6 and 8 of the Rio Treaty of 1947," implemented by a branch of the Organization of American States).

¹⁶⁰ *Id.* at 557-59 (setting out the U.S. argument). The claim that the Cuban blockade could be justified as an enforcement action by a regional organization is belied by Article 52. See U.N. Charter, art. 52, para. 1 ("[N]o enforcement action shall be taken under regional arrangements . . . without the authorization of the Security Council . . .").

¹⁶¹ Gardner, in *LAW AND FORCE*, *supra* note 36, at 52.

¹⁶² GRAY, *USE OF FORCE*, *supra* note 15, at 112.

¹⁶³ See Sean M. Condon, *Justification for Unilateral Action in Response to the Iraqi Threat: A Critical Analysis of Operation Desert Fox*, 161 MIL. L. REV. 115, 136 (1999) (noting the split of opinion, which reflected Cold War divisions, but erroneously suggesting that the split reflected no ideological divide).

¹⁶⁴ KEYLOR, *supra* note 158, at 341-42.

preceded any interstate violence undertaken by Egypt.¹⁶⁵ Israel sought to justify its action on grounds of self-defense, arguing that the actions taken by Egypt amounted to an armed attack.¹⁶⁶ The Council again split along ideological lines, with the Western bloc supporting the Israeli action and the Soviet bloc opposed to it.¹⁶⁷ However, unlike the example of the Cuban blockade, Israel justified its 1967 air raid on the basis of self-defense.¹⁶⁸ However, Israel's justification was one of ordinary rather than anticipatory self-defense: it argued that the closing of the Straits was not merely preparation for war, but was tantamount to an armed attack.¹⁶⁹ In any event, the U.N. institutions did not explicitly accept or reject the Israeli claim.¹⁷⁰

A third historical example appears to have received more attention from commentators than the two previously discussed, probably because it presented facts most implicative of the debate over anticipatory self-defense. In 1981, Israel launched another air-raid, this time against an Iraqi nuclear facility under construction near Baghdad.¹⁷¹ While the facility was not yet operable, and speculative arguments could have been made as to its potential future use as a means of producing nuclear weapons, it was clear that at the time of the strike, the unfinished and inoperative reactor posed no threat to other states.¹⁷² Reliance on a right of preemptive self-defense was unavoidable: Israel aimed to justify its use of force by claiming that force was used to defend against a threat that would become imminent only in the

¹⁶⁵ KEYLOR, *supra* note 158, at 341-42.

¹⁶⁶ Quincy Wright, *Legal Aspects of the Middle East Situation*, 33 L. & CONTEMP. PROBLEMS 5, 26-27 (1968) [hereinafter Wright, *Middle East Situation*] (noting the Israeli justification was accompanied by an admission that its air raid was preceded by any Egyptian attack); Martinez, *supra* note 16, at 138-39.

¹⁶⁷ See Condrón, *supra* note 163, at 137.

¹⁶⁸ Beth M. Polebaum, Note, *National Self-Defense in International Law: An Emerging Standard for a Nuclear Age*, 59 N.Y.U. L. REV. 187, 191 (1984).

¹⁶⁹ Wright, *Middle East Situation*, *supra* note 166, at 26 (noting that Israel claimed that Egypt's closing of the Straits of Tiran was an "armed attack"); see also Condrón, *supra* note 163, at 136 (discussing the United Arab Republic's closing of the Straits of Tiran and Israel's previously issued statement that such closing "would constitute an act of war"); Martinez, *supra* note 16, at 138-39 (stating that Israel claimed the "totality of the actions of Egypt, Jordan and Syria in fact amounted to a prior armed attack." Therefore, Israel, as such, relied in part on "traditional self-defense.").

¹⁷⁰ Wright, *Middle East Situation*, *supra* note 166, at 9-11, 27 (describing U.N. discussions and resolutions that were inconclusive as to the Israel's claim to have acted in self defense, and noting in the context of a discussion of responsibility for aggression that substantial arguments existed to support viewing either side as having acted aggressively rather than defensively); Shabtai Rosenne, *Directions for a Middle East Settlement—Some Underlying Legal Problems*, 33 L. & CONTEMP. PROBS. 44, 55 (1968) (noting that efforts in the U.N. bodies to "attribute responsibility for the breakdown of peace to one side or another" had been unsuccessful).

¹⁷¹ Martinez, *supra* note 16, at 139.

¹⁷² Martinez, *supra* note 16, at 139; SINGH, *supra* note 39, at 46.

future.¹⁷³ The action was met with widespread disapproval, but for different reasons. Some states took a position consistent with the restrictive view and argued that no action of the kind taken could ever be consistent with the Charter.¹⁷⁴ Specifically, Article 51 had limited the scope of the right, making it exercisable only “if an armed attack occurs.”¹⁷⁵ Conversely, other states based their objection to the Israeli action on customary law grounds, arguing that the Israeli strike did not comport with the requirements of necessity and proportionality.¹⁷⁶ The U.S. condemned Israel only for its failure to exhaust peaceful means of resolving the dispute.¹⁷⁷ The U.N. political organs thus condemned the attack without reaching a consensus as to the scope of the right of self-defense.¹⁷⁸

The historical practice of U.N. members in dealing with claims of anticipatory self-defense suggests that states are not in agreement as to the propriety under Article 51 of actions taken in self-defense prior to the onset of an armed attack. While some states agree that the right of self-defense includes the right of states to deploy force before military force is deployed against them, this is not the majority viewpoint.¹⁷⁹ States rely infrequently on anticipatory self-defense to justify the use of force; instead, they attempt when possible to characterize their actions as supported by the less controversial right of states to use force defensively in response to an armed attack that has occurred or is occurring.¹⁸⁰

4. Relevant Rules of International Law: Customary Principles of Necessity and Proportionality

Customary international law has an important role to play in an analysis of the legality of the use of force in self-defense. First, according to the interpretive framework set forth in the Vienna Convention, “relevant rules of international law applicable in the relations between the parties” to the Charter must be considered as an aspect of the Charter’s “context” to arrive at a proper understanding of the scope of the right of self-defense recognized therein.¹⁸¹ General rules of customary

¹⁷³ See Gray, *in* INTERNATIONAL LAW, *supra* note 25, at 601.

¹⁷⁴ Martinez, *supra* note 16, at 133-34.

¹⁷⁵ U.N. Charter art. 51.

¹⁷⁶ See Martinez, *supra* note 16, at 139-40.

¹⁷⁷ See Martinez, *supra* note 16, at 139-40 (stating that the U.N. Security Council and the United States condemned Israel’s actions and the U.S. specifically admonished Israel for its failure to exhaust peaceful means of dispute resolution).

¹⁷⁸ Gray, *in* INTERNATIONAL LAW, *supra* note 25, at 601.

¹⁷⁹ GRAY, USE OF FORCE, *supra* note 15, at 111-12, 115.

¹⁸⁰ *Id.* at 115; see also S. Murphy, *supra* note 65, at 44.

¹⁸¹ U.N. Conference, *supra* note 76.

international law are as valid and applicable in relations between the parties to the Charter as are the provisions of the Charter itself.¹⁸² The obligations imposed by customary rules exist independently of any treaty provision.¹⁸³

The customary rules factor significantly in the analysis of the availability, timing, and permissible scope of the use of force in self-defense. Many writers cite the early formulation of these rules found in a diplomatic note from U.S. Secretary of State Daniel Webster to the British ambassador in 1842.¹⁸⁴ The note concerned the sinking of an American ship, the *Caroline*, by the British, which was done in order to prevent the ship from being used to support rebels opposed to the British colonial government.¹⁸⁵ The U.S. demanded that the British justify their action by showing that the “necessity of that self-defense [wa]s instant and overwhelming, and leaving no choice of means, and no moment for deliberation.”¹⁸⁶ The American note also demanded a showing that the force used involved nothing “unreasonable or excessive.”¹⁸⁷ Although this note long predated the Charter, and was thus the product of a time when resorting to force was not unlawful in the sense of the prohibition in Article 2(4),¹⁸⁸ it contains a useful elaboration of the customary constraints on self-defense.¹⁸⁹ As the letter indicates, use of force in lawful self-defense must always be both necessary and proportionate.¹⁹⁰

The concept of necessity limits the use of force to situations in which forcible “measures . . . are . . . necessary to respond to” the armed attack¹⁹¹ or to otherwise repel aggression.¹⁹² Peaceful

¹⁸² See Statute of the International Court of Justice, *supra* note 118, at art. 38(1)(a)-(d) (identifying sources of international law). The United States has argued in the past that the doctrines of necessity and proportionality have been “supervene[d] and subsume[d]” by the prohibition on force in the Charter, and the International Court has rejected this argument. See *Military and Paramilitary Activities, (Nicar. v. U.S.)* 1986 I.C.J. 14, at 93 (June 27) (“Principles such as those of the non-use of force . . . continue to be binding as part of customary international law, despite the operation of provisions of conventional law in which they have been incorporated”) (citation and internal quotations omitted).

¹⁸³ See Thirlway, *supra* note 24, at 124-25.

¹⁸⁴ Schachter, *The Right of States*, *supra* note 129, at 1634.

¹⁸⁵ Schachter, *The Right of States*, *supra* note 129, at 1634-35; Eckert & Mofidi, *supra* note 15, at 129.

¹⁸⁶ Eckert & Mofidi, *supra* note 15, at 130 (quoting BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 1222 (1991)).

¹⁸⁷ Eckert & Mofidi, *supra* note 15, at 130 (quoting BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 1222 (1991)).

¹⁸⁸ SHAW, *supra* note 50, at 682-85 (providing a brief summary of law governing the use of force in international relations).

¹⁸⁹ Eckert & Mofidi, *supra* note 15, at 129-30.

¹⁹⁰ *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 103 (June 27).

¹⁹¹ See *id.* (explaining that Article 51 does not itself require acts taken in self-defense to be “proportional” and “necessary;” Article 51 does not purport to supersede these

alternatives must not have been readily available to the state invoking self-defense.¹⁹³ The law recognizes that the use of force in self-defense may be necessary for a variety of reasons, such as “to hold the aggressor in check and prevent him from continuing the aggression,” “to recover territory” recently lost to the attacker, or to “repel an attack.”¹⁹⁴ The aim of force used in self-defense cannot be “retaliatory or punitive.”¹⁹⁵ When states rely upon anticipatory self-defense, scholars who accept that doctrine as a valid justification for the use of force generally accept that the requirement of necessity demands a showing that the threat was imminent.¹⁹⁶

The proportionality requirement, on the other hand, limits the amount and scope of the force that may be used to fulfill the need to defend.¹⁹⁷ The concept that forcible “measures . . . [must be] proportional to the armed attack”¹⁹⁸ does not demand that the defending state limit the size or sophistication of its forces;¹⁹⁹ nor does it categorically compel a state fighting off an invasion to stop its use of force as soon as the invaders are pushed back beyond the border.²⁰⁰ However, the force used in self-defense must be “proportional to the offense in its extent, manner, and goal.”²⁰¹ The proportionality requirement’s prohibition of “unreasonable or excessive” conduct is, in a sense, similar to the necessity requirement’s prohibition of “forbidden” conduct because in both instances, the conduct that is not permitted will vary with the circumstances.²⁰² Sufficient force may be used to respond to armed attacks to ensure decisive results, even if to achieve them would require modest increases in the force used or spatial expansions of the conflict.²⁰³ In general, to be

requirements of customary international law).

¹⁹² Gray, *in* INTERNATIONAL LAW, *supra* note 25, at 600; *see also* CASSESE, *supra* note 46, at 305 (arguing that the use of self-defense must be limited to “rejecting the armed attack”).

¹⁹³ Schachter, *The Right of States*, *supra* note 129, at 1635 (agreeing with this proposition but recognizing its limits).

¹⁹⁴ CASSESE, *supra* note 46, at 305; Gray, *in* INTERNATIONAL LAW, *supra* note 25, at 600.

¹⁹⁵ *See* Declaration on Friendly Relations, *supra* note 141 (“States have a duty to refrain from acts of reprisal involving the use of force.”).

¹⁹⁶ *See, e.g.*, SINGH, *supra* note 39, at 16 (accepting anticipatory self-defense doctrine, but acknowledging that the state invoking it must be able to show that the threat against it was imminent or that there was a “strong probability of armed attack”); *see also* Condron, *supra* note 163, at 130-31.

¹⁹⁷ Schachter, *The Right of States*, *supra* note 129, at 1637.

¹⁹⁸ Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 94 (June 27).

¹⁹⁹ *See, e.g.*, Van den hole, *supra* note 22, at 103-04.

²⁰⁰ Schachter, *The Right of States*, *supra* note 129, at 1637-38.

²⁰¹ Schachter, *In Defense of International Rules*, *supra* note 63, at 120.

²⁰² GRAY, USE OF FORCE, *supra* note 15, at 107.

²⁰³ *See, e.g.*, Schachter, *The Right of States*, *supra* note 129, at 1637-38; Van den hole, *supra* note 22, at 103-04.

proportional to the attack, “the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it.”²⁰⁴

Those favoring a restrictive approach to anticipatory self-defense may argue that these customary doctrines, although understood by some writers to permit anticipatory self-defense, cannot properly be applied when anticipatory force is used.²⁰⁵ Determinations of necessity and proportionality, after all, “are dependent on the facts of the particular case.”²⁰⁶ The facts of a case cannot be meaningfully analyzed before they actually exist; analysis before that time is merely speculation. Thus, one who engages in anticipatory self-defense may thwart the application of these rules because the need for force and the necessary amount cannot be ascertained.²⁰⁷ Before the commencement of an armed attack, the use of force in self-defense can only be based on a guess as to the hostile intentions of the potential attacker. If the guess is incorrect and the attack never would have occurred or could have been peacefully prevented, then there was no need for the use of defensive force in any proportion.²⁰⁸ Indeed, according to some supporters of the restrictive position, force used in anticipatory self-defense cannot comply with the rules imposed by customary doctrines.²⁰⁹

Supporters of the permissive view contend that many writers consider the customary rules to permit the use of anticipatory self-defense.²¹⁰ They seek to dispel fears about the potential for anticipatory self-defense to encourage reckless uses of force by reading the requirement of necessity as incorporating a requirement of imminence.²¹¹ The requirement of imminence is theoretically measurable even in the absence of an armed attack; from an objective standpoint, the legality of the anticipatory action can be assessed by considering the relevant facts at the time defensive force was used.²¹² The burden of being subject to the use of force initially falls upon the potential attacker, but in

²⁰⁴ See John Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 740 (2004) (footnote omitted).

²⁰⁵ See BROWNLIE, *supra* note 44, at 257 (noting that many writers believe that customary law permits anticipatory self-defense as a general matter, although apparently disagreeing on the ground that anticipatory self-defense in fact subverts the application of these rules).

²⁰⁶ GRAY, *USE OF FORCE*, *supra* note 15, at 107.

²⁰⁷ See BROWNLIE, *supra* note 44, at 259.

²⁰⁸ See MARY ELLEN O'CONNELL, THE AMERICAN SOCIETY OF INTERNATIONAL LAW TASK FORCE ON TERRORISM, *The Myth of Preemptive Self-Defense* 19 (2002), <http://www.asil.org/taskforce/oconnell.pdf>.

²⁰⁹ See, e.g., BROWNLIE, *supra* note 44, at 259, 261-62 (arguing that anticipatory force cannot be used consistently with the proportionality requirement).

²¹⁰ See, e.g., Van den hole, *supra* note 22, at 97.

²¹¹ See, e.g., SINGH, *supra* note 39, at 16.

²¹² Martinez, *supra* note 16, at 166, 191.

light of the rule permitting those subject to attack to take defensive measures, this allocation of risk might be entirely appropriate.²¹³

5. Object and Purpose of the Treaty

Under the interpretive approach of the Vienna Convention, a treaty should be considered “in the light of its object of purpose.”²¹⁴ The purpose to be examined is not merely the purpose of the individual rule under consideration, but that of the treaty as a whole.²¹⁵ Here, both sides of the debate over the permissibility of anticipatory self-defense can marshal compelling arguments. Those favoring a restrictive approach are aided by the Charter’s manifest focus on keeping interstate violence to a minimum.²¹⁶ An interpretation of the right of self-defense that unnecessarily increases the likelihood that force will be used, such as the interpretation articulated by the permissive school, is inconsistent with this overriding goal.²¹⁷ Their interpretation allows the self-defense exception to override the prohibition on using force.²¹⁸ The permissive interpretation gives rise to circumstances in which creative argument might justify any use of force by connecting its use to speculation about some future threat that might reasonably—whether rightly or wrongly—be perceived as imminent.²¹⁹ In an era where deadly weapons are capable of widespread and serious harm, the dangers of resorting to force are compounded.²²⁰

Similarly, the Charter is designed to ensure the operation of mechanisms guided toward the peaceful settlement of international disputes.²²¹ Achievement of this purpose may be thwarted if the right of self-defense is construed too broadly. If states can anticipate potential attacks and respond with force before they occur, the underlying disputes that engendered hostility between the states may give rise to interstate violence before mechanisms that promote peaceful settlements of

²¹³ Sofaer, *supra* note 95, at 97-98.

²¹⁴ U.N. Conference, *supra* note 76, at art. 31, para. 1.

²¹⁵ U.N. Conference, *supra* note 76, at art. 31, para. 1 (stating that “[a] treaty shall be interpreted . . . in the light of its object and purpose”) (emphasis added).

²¹⁶ See Charney, *supra* note 69, at 836 (calling this focus “the primary goal of the United Nations Charter”).

²¹⁷ See, e.g., BROWNLIE, *supra* note 44, at 259 (noting situations in which the use of anticipatory self-defense may be open to objections).

²¹⁸ See O’CONNELL, *supra* note 208, at 5, 16.

²¹⁹ O’CONNELL, *supra* note 208, at 16; see also Jorge Alberto Ramirez, *Iraq War: Anticipatory Self-Defense or Unlawful Unilateralism?* 34 CAL. W. INT’L L.J. 1, 23-24 (2003) (discussing the dangers of broadening the use of anticipatory self-defense).

²²⁰ See Schachter, *The Right of States*, *supra* note 129, at 1634.

²²¹ U.N. Charter art. 2, para. 3; Simma, *supra* note 29, at 105-07.

international disputes have a chance to work.²²² The time available for peaceful dispute resolution to function is reduced, possibly by a significant amount, depending upon the accuracy of the estimation as to the imminence of the attack by the state exercising its right of self-defense.

Additionally, the Charter's language was meant to be functional in nature and capable of practical application.²²³ The restrictionist school of thought believes that Article 51 imposes such a rule in the context of self-defense: the use of force is justified if an armed attack occurs, and is not if an armed attack has yet to occur.²²⁴ Those advancing a permissive interpretation of the right of self-defense favor a considerably less certain analysis based only upon the customary standard rather than the objectively determinable criteria of the occurrence of an armed attack.²²⁵ The rule as permissively interpreted is more difficult to apply, and the risk of error is increased.²²⁶ The benefits of a clear rule are lost. Requiring an armed attack before using force in self-defense clearly informs states of the activity they must avoid in order to prevent force being used against them. The permissive approach also leaves states less certain as to what preventive measures they can take to avoid the permissible use of force against them.

Those favoring the permissive approach can agree that the Charter was meant to produce a soundly-functioning international system, but need not accept the restrictive approach's viewpoint of what such a system entails. Under this view, the Charter established a framework within which international peace and security can be maintained with the states themselves as primary beneficiaries. States, and their sovereignty and integrity, were to be preserved by the U.N. rather than subsumed into a world government.²²⁷ Diminution of the scope of the "inherent" right of self-defense would amount to an unwarranted intrusion into a fundamental aspect of

²²² See CASSESE, *supra* note 46, at 217 (noting scope of obligation to peacefully settle disputes).

²²³ See FRANCK, *supra* note 106, at 6-7.

²²⁴ See O'CONNELL, *supra* note 208, at 19 ("An attack must be underway or must have already occurred in order to trigger the right of unilateral self-defense.").

²²⁵ Eckert & Mofidi, *supra* note 15, at 149; see also CASSESE, *supra* note 46, at 309 (discussing historical examples of customary standards).

²²⁶ CASSESE, *supra* note 46, at 309; BROWNLIE, *supra* note 44, at 259; O'CONNELL, *supra* note 208, at 19.

²²⁷ See U.N. Charter art. 2 (distinguishing between "[t]he Organization and its Members," acknowledging by implication that its Members are "sovereign," and clarifying that "[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state").

sovereignty.²²⁸ Self-defense is too fundamental to this sovereignty to have artificial time limits placed upon it by the Charter or customary law.

In addition, the Council has been only modestly successful in performing its primary function of achieving sustained peace.²²⁹ The Charter was intended to be a holistic scheme for ensuring international peace, safeguarding states from aggression and preserving the right of self-defense as a supplement to the collective mechanism embodied in the Council.²³⁰ The Council's limited success thus far suggests that the purpose of maintaining international peace and security may not be fulfilled unless force in self-defense may be exercised in more than the narrowest of circumstances.²³¹

Furthermore, as a practical matter, the permissive school can argue that the Charter should not be interpreted as a suicide pact that illegalizes defensive actions necessary for a state to preserve itself.²³² Since the Charter was signed in June 1945, the weapons available to states have become even more destructive. Such weapons may enable an attacker to strike a decisive blow against its victim in one stroke. By the time an attack is underway, it may simply be too late to take measures in self-defense.²³³ If the law guarantees that the attacker may strike first, it has effectively rewarded that state's violence with military advantage.²³⁴ The purpose of the Charter was certainly not to encourage violence or to deprive states of the ability to take reasonable steps to defend themselves. The restrictive view impedes resort to the right of self-defense, potentially making resort to violence acceptable and advantageous to states in a position to take advantage of others that scrupulously follow the law.²³⁵

²²⁸ U.N. Charter art. 51.

²²⁹ See, e.g., Patrick McLain, *Settling the Score with Saddam: Resolution 1441 and Parallel Justifications for the Use of Force against Iraq*, 13 DUKE J. COMP. & INT'L L. 233, 258 (2003); see also Gray, in INTERNATIONAL LAW, *supra* note 25, at 590 (indicating that Chapter VII enforcement by the Security Council did not proceed as originally planned).

²³⁰ See FRANCK, *supra* note 106, at 3.

²³¹ See McLain, *supra* note 229, at 258-59 (suggesting this notion, but ultimately rejecting the argument that current law allows for unilateral action based on the Security Council's ineffectiveness).

²³² See Martinez, *supra* note 16, at 162-63.

²³³ See Martinez, *supra* note 16, at 162-63.

²³⁴ See BROWNLIE, *supra* note 44, at 276 (suggesting but disagreeing with this argument).

²³⁵ See FRANCK, *supra* note 106, at 178 (noting that "[l]aw . . . does not thrive . . . when it grossly offends most persons' common moral sense of what is right").

III. EVALUATION OF THE ASSERTED RIGHT TO USE PREEMPTIVE FORCE IN SELF-DEFENSE

The divide between the interpretive approaches to the right of self-defense runs deep, and the state of the law with respect to the availability of anticipatory self-defense is likely to remain unclear. However, fairly widespread agreement exists as to the substance of the customary rules limiting the exercise of self-defense.²³⁶ Even those who assert the validity of anticipatory self-defense generally agree that customary rules limit its exercise.²³⁷ Regardless of one's position on the interpretation of Article 51, using force in self-defense in contravention of this minimal customary standard will assuredly violate international law.

The preemptive use of force in self-defense, which was enunciated as the U.S. strategy in the NSS and was suggested as a possible justification for the Iraq war, must be evaluated in light of these standards. Initially, the NSS's suggestion that agreement on the permissibility of anticipatory self-defense has existed "[f]or centuries" must be a reference to the period before recourse to force was prohibited as a general matter by the Charter, subject to a carefully-worded recognition of the right to self-defense.²³⁸ Since the Charter's adoption, two schools of thought on anticipatory self-defense have existed. The restrictive position, far from viewing such action as capable of being taken "lawfully" or with "legitimacy," categorically bars using force in self-defense before an armed attack occurs.²³⁹ The NSS's preemptive strategy does not comport with this position because the U.S. plans to use defensive force long before potential attackers are prepared to act.²⁴⁰

Moreover, even if the NSS is considered in light of the permissive approach to the right of self-defense, the preemptive strategy does not pass muster. First, even a permissive interpretation of Article 51 cannot completely do away with the

²³⁶ GRAY, *USE OF FORCE*, *supra* note 15, at 105 ("As part of the basic core of self-defence all states agree that self-defence must be necessary and proportionate.")

²³⁷ See, e.g., Louis Rene Beres, *Preserving the Third Temple: Israel's Right of Anticipatory Self-Defense Under International Law*, 26 VAND. J. TRANSNAT'L L. 111, 147-48 (1993); see also SINGH, *supra* note 39, at 16 (discussing limits on the use of anticipatory self-defense).

²³⁸ See NSS, *supra* note 2, at 15 (explaining the evolving concept of "imminent threat" since the Cold War); Simma, *supra* note 29, at 114-15 (discussing that before the twentieth century, the use of force was not prohibited under international law); BROWNLEE, *supra* note 44, at 40-41 (presumably, the NSS refers to these old justifications).

²³⁹ See, e.g., American Soc'y of Int'l Law, *Self-Defense in an age of Terrorism*, *supra* note 101, at 147-48.

²⁴⁰ See NSS, *supra* note 2, at 15.

requirement of an armed attack.²⁴¹ To the extent that preemptive self-defense is asserted to justify the use of force against speculative threats that bear no relation to any armed attack, the Charter will bar the claim.²⁴² Second, customary rules are likely to foreclose the permissibility of preemptive self-defense if circumstances arise in which Article 51 does not. Unjustifiable preemptive self-defense differs from potentially permissible anticipatory self-defense in that it allows states to unleash force against one another with much greater ease.²⁴³ Anticipatory self-defense, as advocated by most adherents to the permissive interpretation of self-defense, is impermissible if a state cannot demonstrate that a threat actually exists and is imminent.²⁴⁴ In contrast, preemptive self-defense, such as that called for by the NSS, permits the use of force by states that merely feel threatened, without requiring a showing of objectively verifiable indications that the asserted threat warrants the use of force in reply.²⁴⁵ Proportionality becomes virtually impossible to measure as to preemptive force, because no attack has occurred, is occurring, or is planned as to which the use of force must be proportionate.²⁴⁶ A legal regime that would permit the preemptive use of force in self-defense would be far too careless in its handling of the use of interstate force, a fearsome villain who the parties to the Charter knew from personal experience²⁴⁷ had to be kept in shackles of law.²⁴⁸

Second, those advocating a permissive approach agree with their restrictive-minded counterparts that the use of force in self-defense must be restrained by the customary law concepts of

²⁴¹ See U.N. Charter, art. 2, para. 4 (suggesting that although member states must refrain from threatening or using force where inconsistent with the Charter, they may threaten or use force when it is *not* inconsistent with the purposes of the United Nations).

²⁴² See, e.g., O'CONNELL, *supra* note 208, at 6 (“[W]here a state is threatened by force not amounting to an armed attack, it must resort to measures less than armed self-defense . . .”).

²⁴³ See CASSESE, *supra* note 46, at 310 (suggesting that “risks of abuse” might arise in a legal regime that permitted pre-emptive strikes) (emphasis omitted).

²⁴⁴ E.g., SINGH, *supra* note 39, at 16; Simma, *supra* note 29, at 803 (noting that many advocates of anticipatory self-defense view it as incorporating a requirement of imminence).

²⁴⁵ O'CONNELL, *supra* note 208, at 21 (identifying concerns with the subjective nature of the determination of when a sufficient threat has arisen, and characterizing the U.S. justification for preemptive war as based on “speculative concerns about [a] state’s possible future actions”); CASSESE, *supra* note 46, at 310 (“[P]re-emptive strikes . . . may be[] based on subjective and arbitrary appraisals by individual States.”).

²⁴⁶ O'CONNELL, *supra* note 208, at 19.

²⁴⁷ See U.N. Charter pmb. (prominently evincing the widely shared desire “to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind”).

²⁴⁸ See U.N. Charter art. 2, paras. 3-4; see also SHAW, *supra* note 50, at 681 (remarking that “the law must seek to provide mechanisms to restrain and punish the resort to violence”).

necessity and proportionality.²⁴⁹ However, one cannot assess the facts and circumstances that give rise to the necessity of the use of force, and confine its proportions, before the attack actually occurs.²⁵⁰ For adherents of the restrictive view, this is one reason why an armed attack must actually have occurred before force is used in self-defense. For adherents of the permissive view, the requirement that the armed attack be imminent assuages concerns about the availability of facts sufficient to draw conclusions about whether a given use of force is justified.

The NSS, however, does not require a showing of an imminent threat before authorizing preemptive uses of force. The administration explains that, “as a matter of common sense and self-defense, America will act against such emerging threats before they are fully formed.”²⁵¹ Indeed, the U.S. strategy expressly seeks to “adapt the concept of imminent threat,” apparently allowing for force to be used “preemptively,” “even if uncertainty remains as to the time and place of the enemy’s attack,” and even before “dangers gather.”²⁵² U.S. action against Iraq demonstrates that the NSS’s notion of imminence does not require an immediate or tremendous threat by a potential attacker.²⁵³ Indeed, if the Iraq situation is any guide, a threat may be sufficient to trigger NSS authorization to use force in purported self-defense if it is little more than plausible or even a hypothetical threat.

If the rules regulating the use of force are relaxed to reflect U.S. policy, conflicts may arise that could be prevented if the rules governing self-defense continue to require a truly imminent threat.²⁵⁴ The U.S. position may also produce interstate violence by creating an increased incidence of improper uses of force by states that feel less reluctant to use force purportedly in self-defense than in the past.²⁵⁵ Moreover, a standard that relies on a considerably less imminent threat is more likely to give rise to mistakes by the defenders as to whether they faced a threat at

²⁴⁹ See Van den hole, *supra* note 22, at 97 (one of many articles asserting the permissibility of anticipatory self-defense while agreeing that the customary rules apply to its exercise); see also GRAY, USE OF FORCE, *supra* note 15, at 105 (discussing the agreement of states as to the necessity and proportionality requirements of self-defense).

²⁵⁰ See BROWNIE, *supra* note 44, at 259.

²⁵¹ NSS, *supra* note 2, at Introduction.

²⁵² NSS, *supra* note 2, at 15.

²⁵³ See Eckert & Mofidi, *supra* note 15, at 126 (noting the wide discrepancies between the U.S. assertions of the existence of a threat stemming from weapons of mass destruction that were used to justify the action against Iraq, and Iraq’s apparent lack of such weapons).

²⁵⁴ Ramirez, *supra* note 219, at 23-24; BROWNIE, *supra* note 44, at 259.

²⁵⁵ BROWNIE, *supra* note 44, at 259.

all.²⁵⁶ As the evidentiary problems with the case for self-defense in Iraq demonstrate, the U.S. government will experience mistakes with its current understanding of the self-defense rule.²⁵⁷ The abandonment of the requirement of an imminent threat leaves no principled means by which the law can distinguish force used in self-defense from aggression.²⁵⁸ The Bush administration's understanding of the constraints of customary law on self-defense is at variance with that law in its present form.

Thus, the U.S. position in the NSS may be best described as an argument for a change in the law. Some writers have argued, on the assumption that the use of force in self-defense can be permitted before an armed attack occurs, that the war in Iraq is state practice that provides evidence of a change in the customary law loosening the constraints of necessity and proportionality.²⁵⁹ Some scholars have gone further, arguing that the prohibition on the use of force has come to lack vitality, and that the use of force for purposes such as preemptive self-defense is no longer forbidden.²⁶⁰ These arguments are misplaced. The creation of a new customary rule traditionally requires "an established, widespread, and consistent practice"²⁶¹ combined with "evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."²⁶² The practice of justifying the use of force on grounds of preemptive or anticipatory self-defense is not consistent or widespread.²⁶³ Furthermore, the psychological element of *opinio juris* is not present: the U.S. has conceded that "[it] must adapt the concept of imminent threat" as currently understood,²⁶⁴ and many other states apparently view the U.S. justification of self-defense for the preemptive use of force in Iraq as inappropriate.²⁶⁵ This refusal to treat divergent state practice as an emerging customary rule suggests the continued vitality of existing

²⁵⁶ The U.S. requires less information about the purported attacker's disposition to justify the use of force as compared to the current permissive view of anticipatory self-defense. See *NSS*, *supra* note 2, at Introduction, 15.

²⁵⁷ Eckert & Mofidi, *supra* note 15, at 127-28.

²⁵⁸ See, e.g., American Soc'y of Int'l Law, *supra* note 101, at 151-52.

²⁵⁹ See, e.g., Cohan, *supra* note 95, at 292, 356.

²⁶⁰ Martinez, *supra* note 16, at 164. *Contra* Michael Byers, *Terrorism, the Use of Force and International Law after 11 September*, 51 INT'L & COMP. L.Q. 401, 410-11 (2002).

²⁶¹ Thirlway, *supra* note 24, at 125.

²⁶² Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 3, 90 (July 25).

²⁶³ GRAY, USE OF FORCE, *supra* note 15, at 112.

²⁶⁴ *NSS*, *supra* note 2, at 15.

²⁶⁵ David P. Fidler, *International Law and Weapons of Mass Destruction: End of the Arms Control?*, 14 DUKE J. COMP. & INT'L L. 39, 72-73 (2004); Eckert & Mofidi, *supra* note 15, at 127.

rules.²⁶⁶ Finally, from a policy standpoint, it cannot be denied that the elimination or substantial weakening of the rules restricting the use of force would have a deleterious effect on international order, potentially unleashing anarchy as states other than the U.S. come to view the use of force as a permissible means of resolving their disputes.²⁶⁷

Perhaps to avoid the negative impact of other states' assertions of a right to use preemptive force, the NSS appears to have taken an extreme approach. The NSS can be read to argue that different rules should apply to constrain the use of force by the U.S., and that these rules should be relatively permissive.²⁶⁸ This approach, however, is difficult to square with the U.N.'s fundamental "principle of the sovereign equality of all its Members."²⁶⁹ While states are not equal in other respects, each should be treated as a formal equal of the others for purposes of applying the rules of international law.²⁷⁰ Exceptional approaches subvert this important principle. They place international law in the unsatisfying position of serving as an ongoing and evolving apologia for the actions of powerful states.²⁷¹ They are also inconsistent with basic notions of

²⁶⁶ Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J 14, 98 (June 27).

²⁶⁷ See Martinez, *supra* note 16, at 164-65 (discussing these concerns in the context of the debate over the permissibility of anticipatory self-defense); see also Eckert & Mofidi, *supra* note 15, at 150 (warning of the danger of leaving states with "a loose, unsubstantiated notion of 'preemptive self-defense'"); O'CONNELL, *supra* note 208, at 19 (discussing possible effects of America's precedent).

²⁶⁸ See NSS, *supra* note 2, at 15 (the NSS briefly refers to international law, but then asserts that "[w]e must adapt" it. The document then indicates that "[t]he United States has long maintained the option of preemptive actions." Implicit in these remarks is the suggestion that the U.S. can unilaterally change international law, and that it possesses rights under that law that may differ from those of other states); see also Michael Byers & Simon Chesterman, *Changing the Rules About Rules? Unilateral Humanitarian Intervention and the Future of International Law*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 177, 195 (J. L. Holzgrefe & Robert O. Keohane eds., 2003) (suggesting that the creation of exceptional rights characterizes the current administration's approach to international relations generally); Detlev F. Vagts, *Hegemonic International Law*, 95 AM. J. INT'L L. 843, 843-48 (2001) (suggesting the applicability of special international rules to hegemons).

²⁶⁹ U.N. Charter art. 2, para. 1 ("The Organization is based on the principle of the sovereign equality of all its Members.").

²⁷⁰ U.N. Charter, art. 2, para 1; see CASSESE, *supra* note 46, at 88, 90; Simma, *supra* note 29, at 85; see also Declaration on Friendly Relations, *supra* note 141 (explaining that "[a]ll states . . . have equal rights and duties and are equal members of the international community").

²⁷¹ See Anne-Marie Slaughter, *Liberal International Relations Theory and International Economic Law*, 10 AM. U. J. INT'L L. & POL'Y 717, 724 (1995) (summarizing the argument that international law can be aimed either at meaningfully constraining state behavior or as merely justifying it at every turn); see also THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR 402 (Rex Warner trans., Penguin Books 1972) (1954) ("[W]hen these matters are discussed by practical people, the standard of justice depends on the equality of power to compel and that in fact the strong do what they have the power to do and the weak accept what they have to accept.").

fairness in an international system that has long been governed by rules that are the product of states' mutual consent.²⁷²

IV. CONCLUSION

The strategy of preemptive self-defense articulated by the U.S. in the NSS, and apparently applied against Iraq, is at odds with current norms governing the use of force in self-defense. In order for the preemptive use of force to be lawful notwithstanding the Charter's prohibition of the use of force, U.S. strategy would have to comport with the Charter and customary law relevant to the right of self-defense. Application of either of the prevailing interpretations of the right of self-defense leads to the conclusion that the U.S. strategy does not comply with international law. The U.S. strategy calls for resorting to force at an earlier stage than the Charter and customary law permit. Consequently, unless and until changes to the law are made that render the U.S. position regarding preemptive force compatible with the law governing self-defense, the U.S.'s "threat or use of force" in the circumstances identified in its strategy will remain inconsistent with international law.²⁷³

²⁷² See Dinah Shelton, *International Law and 'Relative Normativity,'* in INTERNATIONAL LAW 145, 151 (Malcolm Evans ed., Oxford University Press 2003); CASSESE, *supra* note 46, at 123; see also *Matthew* 7:12 (New American Bible) ("Do to others whatever you would have them do to you.").

²⁷³ U.N. Charter art. 2, para. 4.

The Declaration of Independence, Annotated¹

By Thomas Jefferson² and Timothy Sandefur³

IN CONGRESS, JULY 4, 1776.

The unanimous Declaration of the thirteen united States of America⁴

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the Powers of the earth, the separate and equal station to which the Laws of Nature⁵ and of Nature's God entitle them,⁶ a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all⁷ men are

¹ THE DECLARATION OF INDEPENDENCE (U.S. 1776), *reprinted in* UNITED STATES CODE ANNOTATED, ARTICLE 1, § 1 TO § 8, CLAUSE 3, at 1 (West 2004). *The Declaration of Independence, Annotated* is a follow-up to a previous article by Timothy Sandefur, *Liberal Originalism: A Past for the Future*, 27 HARV. J.L. & PUB. POL'Y 489 (2004), which surveyed the theory of constitutional interpretation known as liberal originalism. This theory holds that the Constitution should be interpreted consistently with the Declaration of Independence.

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⁴ *But see* *Troxel v. Granville*, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting) ("The Declaration of Independence, however, is not a legal prescription conferring powers upon the courts.").

⁵ *But see* Carlton F.W. Larson, *The Declaration of Independence: A 225th Anniversary Re-Interpretation*, 76 WASH. L. REV. 701, 711 (2001) ("Invoking 'natural rights' in a modern law school is about as persuasive as citing Cotton Mather's treatise on witchcraft.").

⁶ *But see* *Sup. Ct. of N.H. v. Piper*, 470 U.S. 274, 281 n.10 (1985) ("The 'natural rights' theory . . . was discarded long ago.").

⁷ *Accord* *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 388 (1978) (Marshall, J., separate opinion) ("The self-evident truths and the unalienable rights were intended, however, to apply only to white men."). *But see* *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857) ("[A]t the time of the Declaration of Independence . . . [blacks were] regarded as beings of an inferior order; . . . and so far inferior, that they had no rights

created equal,⁸ that they are endowed by their Creator with certain unalienable Rights,⁹ that among these are Life,¹⁰ Liberty¹¹ and the pursuit of Happiness.¹² That to secure these rights,¹³ Governments are instituted among Men, deriving their just powers from the consent of the governed,¹⁴ That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter¹⁵ or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable,¹⁶ than to right themselves by abolishing the

which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.”).

⁸ *But see* Grutter v. Bollinger, 539 U.S. 306, 325(2003) (“[S]tudent body diversity is a compelling state interest that can justify the use of race in university admissions.”).

⁹ *But see* Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (“The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same . . . has been a shibboleth for some well-known writers.”); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 121-22 (1990) (“[N]o husband or wife, no father or mother, should act on the principle that a ‘person belongs to himself and not others.’ No citizen should take the view that no part of him belongs to ‘society as a whole.’”).

¹⁰ *But see* Arver v. United States, 245 U.S. 366, 376-77 (1918) (finding military conscription constitutional); Oliver Wendell Holmes, Jr., *Natural Law*, 32 HARV. L. REV. 40, 42 (1919) (“[T]he right to life—is sacrificed without a scruple not only in war, but whenever the interest of society, that is, of the predominant power in the community, is thought to demand it [I]n any event . . . it is only an interest, [so its] sanctity disappears.”).

¹¹ *But see* Herndon by Herndon v. Chapel Hill-Carrboro City Bd. of Educ., 89 F.3d 174, 176-77 (4th Cir. 1996) (holding that compulsory community service by schools does not violate Due Process under the Fourteenth Amendment); Steirer v. Bethlehem Area Sch. Dist., 987 F.2d 989, 997-1000 (3d Cir. 1993) (explaining that mandatory community service is not involuntary servitude).

¹² *But see* Jones v. Bd. of Comm’rs of the Ala. State Bar, 737 F.2d 996, 1000 (11th Cir. 1984) (“The Court, however, has never held that the right to pursue a particular occupation is a fundamental right, and it has not applied strict scrutiny review to classifications affecting an individual’s pursuit of his or her occupation.”).

¹³ *But see* Nollan v. Cal. Coastal Comm’n, 483 U.S. 825, 834 (1987) (“Our cases have not elaborated on the standards for determining what constitutes a ‘legitimate state interest’”); Egan v. City and County of San Francisco, 133 P. 294, 296 (Cal. 1913) (“Generally speaking, anything calculated to promote the education, the recreation, or the pleasure of the public is to be included within the legitimate domain of public purposes.”).

¹⁴ *But see* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72 (1996) (holding that Congress cannot abrogate state sovereign immunity); Stump v. Sparkman, 435 U.S. 349, 359-60 (1978) (upholding judicial immunity for judge who issued *ex parte* order that minor be sterilized).

¹⁵ *But see* City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (giving Congress no power under the Fourteenth Amendment to revise Supreme Court’s constitutional interpretation).

¹⁶ *See, e.g.,* Friedman v. Berger, 409 F. Supp. 1225, 1225-26 (S.D.N.Y. 1976), *aff’d*, 547 F.2d 724 (2d Cir. 1976) (“The Medicaid statute (as is true of other parts of the Social Security Act) is an aggravated assault on the English language, resistant to attempts to

forms to which they are accustomed.¹⁷ But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government,¹⁸ and to provide new Guards for their future security. Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.

He has refused his Assent to Laws, the most wholesome and necessary for the public good.¹⁹

He has forbidden his Governors to pass Laws of immediate and pressing importance,²⁰ unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.²¹

He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only.²²

understand it. The statute is complicated and murky, not only difficult to administer and to interpret but a poor example to those who would like to use plain and simple expressions. The present motion must be decided, however, and what follows is the result of best efforts to find the meaning of the Medicaid statute and other relevant statutes and regulations.”)

¹⁷ See, e.g., *City of Indianapolis v. Edmond*, 531 U.S. 32, 56 (2000) (Thomas, J., dissenting) (“[O]ur decisions . . . stand for the proposition that suspicionless roadblock seizures are constitutionally permissible I am not convinced that [these Fourth Amendment roadblock seizure cases] were correctly decided. Indeed, I rather doubt that the Framers of the Fourth Amendment would have considered ‘reasonable’ a program of indiscriminate stops of individuals not suspected of wrongdoing. Respondents did not, however, advocate . . . overruling . . . and I am reluctant to consider such a step without the benefit of briefing and argument.”) (citations omitted); *United States v. Lopez*, 514 U.S. 549, 601 n.8 (1995) (Thomas, J., concurring) (“Although I might be willing to return to the original understanding [of the Commerce Clause], I recognize that many believe that it is too late in the day to undertake a fundamental reexamination of the past 60 years.”).

¹⁸ *But see* *Dennis v. United States*, 341 U.S. 494, 549 (1951) (Frankfurter, J., concurring) (“Of course no government can recognize a ‘right’ of revolution . . .”).

¹⁹ Cf. Jeff Canfield, Note, *What A Sham(e): The Broken Beck Rights System in The Real World Workplace*, 47 WAYNE L. REV. 1049 *passim* (2001); Brian J. Woldow, Comment, *The NLRB’s (Slowly) Developing Beck Jurisprudence: Defending A Right In A Politicized Agency*, 52 ADMIN. L. REV. 1075 *passim* (2000) (noting government refusal to meaningfully implement Supreme Court’s decision in *Comm’n Workers of America v. Beck*, 487 U.S. 735 (1988)).

²⁰ *But see* *Saenz v. Roe*, 526 U.S. 489, 505-07 (1999) (providing that state may not reduce welfare amounts for non-residents).

²¹ *But see* Catherine Fisk & Erwin Chemerinsky, *In Defense of Filibustering Judicial Nominations*, 26 CARDOZO L. REV. 331 *passim* (2005).

²² *But see* *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004) (holding that political

He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their Public Records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people.²³

He has refused for a long time, after such dissolutions, to cause others to be elected; whereby the Legislative Powers, incapable of Annihilation, have returned to the People at large for their exercise; the State remaining in the mean time exposed to all the dangers of invasion from without, and convulsions within.

He has endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands.²⁴

He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers.²⁵

He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.²⁶

He has erected a multitude of New Offices, and sent hither swarms of Officers to harass our People, and eat out their substance.²⁷

He has kept among us, in times of peace, Standing Armies²⁸

gerrymandering is a problem “entrusted to one of the political branches or involves no judicially enforceable rights.”).

²³ *But see* Guinn v. Leg. of the State of Nev., 71 P.3d 1269, 1272 (Nev. 2003) (granting governor’s petition for a writ of mandamus and instructing legislature to disregard 2/3 majority requirement for tax increases).

²⁴ *But see* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency, 535 U.S. 302, 341-43 (2002) (deciding that a “temporary” 32 months total moratorium on construction is not a *per se* taking of property); *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 708 (1995) (including “significant habitat modification or degradation that actually kills or injures wildlife” as “harm”[ful] under the Endangered Species Act).

²⁵ *See also* John C. Eastman & Timothy Sandefur, *The Senate Is Supposed to Advise and Consent, Not Obstruct and Delay*, 7 NEXUS 11 *passim* (2002) (describing Senate’s refusal to hold hearings on judicial nominees).

²⁶ *But see* Humphrey’s Ex’r v. United States, 295 U.S. 602, 631-32 (1935) (holding that the President’s removal power over independent administrative agencies is constitutional).

²⁷ *But see* 26 U.S.C. § 1 *et seq.* (2000); 16 U.S.C. § 1 *et seq.* (2000).

²⁸ *But see* Bd. of Educ. v. Earls, 536 U.S. 822, 825 (2002) (permitting random drug testing of school children to advance War on Drugs).

without the Consent of our Legislature.²⁹

He has affected to render the Military independent of and superior to the Civil Power.³⁰

He has combined with others to subject us to a jurisdiction foreign to our constitution,³¹ and unacknowledged by our laws;³² giving his Assent to their Acts of pretended Legislation:³³

For quartering large bodies of armed troops among us:³⁴

For protecting them, by a mock Trial, from Punishment for any Murders which they should commit on the Inhabitants of these States:³⁵

For cutting off our Trade with all parts of the world:³⁶

²⁹ *But see* United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 497-99 (2001) (upholding federal prohibition on marijuana as trumping state law authorizing medical use).

³⁰ *But see* Campbell v. Clinton, 203 F.3d 19, 20-21 (D.C. Cir. 2000) (finding that the congressmen lacked standing to enjoin the President from sending troops to Yugoslavia without congressional approval); Berk v. Laird, 429 F.2d 302, 304-06 (2d Cir. 1970) (questioning the U.S.'s authority to engage in Vietnam war without Declaration of War is political question beyond court's power to determine).

³¹ *But see* Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 754 n.8 (2002) (upholding sovereign immunity for "an independent agency that itself lacks any textual basis in the Constitution").

³² *See, e.g.,* Nat'l Cable Television Ass'n Inc. v. United States, 415 U.S. 336, 352-53 (1974) (Marshall, J., concurring in part and dissenting in part) ("The notion that the Constitution narrowly confines the power of Congress to delegate authority to administrative agencies, which was briefly in vogue in the 1930's, has been virtually abandoned by the Court for all practical purposes . . ."); *see also* Tara L. Branum, *President or King? The Use and Abuse of Executive Orders In Modern-Day America*, 28 J. LEGIS. 1, 5-6, 9-10 (2002) (arguing that the executive branch is wrongly embracing qualities of the lawmaking branch, and Congress should "assert its authority to restore the separation of powers intended by the Framers of our Constitution").

³³ *But see* Robert Schlesinger, *Campaign-Finance Law Signed without Ceremony*, BOSTON GLOBE, Mar. 28, 2002, at A3 (noting that President Bush signed a bill despite acknowledging its unconstitutionality).

³⁴ *But see* United States v. Lewis, 728 F. Supp. 784, 789 (D.D.C. 1990), *rev'd*, 921 F.2d 1294 (D.C. Cir. 1990) ("In this 'anything goes' war on drugs, random knocks on the doors of our citizens' homes seeking 'consent' to search for drugs cannot be far away. This is not America. In my opinion, the Fifth Amendment to the Constitution is transgressed when police officers engage in a concerted planned program that involves random indiscriminate stopping, questioning, and searching individuals with the clear purpose to obtain from their lips and their bodies information and evidence that would incriminate them."); United States v. Cothran, 729 F. Supp. 153, 157 (D.D.C. 1990), *rev'd*, 921 F.2d 1294 (D.C. Cir. 1990) ("[P]resent police practices in furtherance of the 'war on drugs' represent, in modern sophisticated dress, the same type of government behavior that led to this nation's war of independence.").

³⁵ *But see* Idaho v. Horiuchi, 215 F.3d 986, 988 (9th Cir. 2000), *vacated as moot*, 266 F.3d 979 (9th Cir. 2001) (ruling that immunity prevented prosecution of federal law enforcement officials for murders that took place while employed); Andrade v. Chojnacki, 65 F. Supp. 2d 431, 452 (W.D. Tex. 1999) (holding that public officials are entitled to qualified immunity so long as his/her conduct does not violate any clearly established statutory or constitutional law); Andrade v. United States, 116 F. Supp. 2d 778, 788 (W.D. Tex. 2000) (holding that the discretionary function exception bars suit for excessive force in attack on Waco compound which resulted in numerous deaths).

³⁶ *But see* Regan v. Wald, 468 U.S. 222, 243-44 (1984) (holding that federal

For imposing Taxes on us without our Consent:³⁷

For depriving us in many cases, of the benefits of Trial by Jury:³⁸

For transporting us beyond Seas to be tried for pretended offenses:³⁹

For abolishing the free System of English Laws in a neighboring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies:⁴⁰

For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Government:⁴¹

For suspending our own Legislature, and declaring themselves invested with Power to legislate for us in all cases whatsoever.⁴²

He has abdicated Government here, by declaring us out of his Protection and waging War against us.⁴³

He has plundered our seas, ravaged our Coasts, burnt our

regulation amendment prohibiting travel to and from Cuba is constitutional).

³⁷ *But see* Missouri v. Jenkins, 495 U.S. 33, 51-58 (1990) (ruling that local government institutions, rather than district courts, have the authority to order tax increase).

³⁸ *But see* Harris v. United States, 536 U.S. 545, 568 (2002) (holding that judge may impose an additional punishment as a sentencing factor without jury finding).

³⁹ *But see* Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005) (upholding constitutionality of special military tribunals to try incarcerated alleged terrorists).

⁴⁰ *But see* Al Odah v. United States, 321 F.3d 1134, 1141 (D.C. Cir. 2003) (finding that the court has no jurisdiction "to test the constitutionality or the legality of restraints" on the liberties of detainees in Guantanamo Bay, Cuba), *rev'd*, Rasul v. Bush, 542 U.S. 466 (2004).

⁴¹ *But see* Guinn v. Leg. of the State of Nev., 71 P.3d 1269, 1275 (Nev. 2003) (nullifying state constitutional clause because "[w]hen a procedural requirement that is general in nature prevents funding for a basic, substantive right, the procedure must yield.").

⁴² *But see* Gonzales v. Raich, 125 S. Ct. 2195 (2005) (upholding virtually limitless Congressional power under the Commerce Clause).

⁴³ *But see* Erik Grant Luna, *Our Vietnam: The Prohibition Apocalypse*, 46 DEPAUL L. REV. 483, 546-47 (1996) ("The Court during the past decade let police obtain search warrants on the strength of anonymous tips (Fourth and Sixth Amendments). It did away with the need for warrants when police want to search luggage, trash cans, car interiors, bus passengers, fenced private property and barns (Fourth). It let prosecutors hold drug offenders without bail (Eighth). It permitted the confiscation of property before a suspect is charged, let alone convicted (Fifth). It let prosecutors imprison people twice—at the state and federal levels—for the same crime (Fifth). It let police fly as low as 400 feet over houses in their search for marijuana plants (Fourth). It allowed the seizure of defense attorneys' legal fees in drug cases (Sixth). It allowed mandatory urine testing for federal employees (Fourth). And [it] let stand a sentence of mandatory life without parole for simple drug possession (Eighth).") (quoting Dan Baum, *The Drug War on Civil Liberties*, THE NATION, June 29, 1992, at 886, 888).

towns,⁴⁴ and destroyed the lives of our people.⁴⁵

He is at this time transporting large armies of foreign mercenaries to compleat the works of death, desolation and tyranny, already begun with circumstances of Cruelty & perfidy scarcely paralleled in the most barbarous ages,⁴⁶ and totally unworthy the Head of a civilized nation.⁴⁷

He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country, to become the executioners of their friends and Brethren, or to fall themselves by their Hands.⁴⁸

He has excited domestic insurrections amongst us,⁴⁹ and has

⁴⁴ *But see* Kelo v. City of New London, 125 S. Ct. 2655, 2668 (2005), No. 04-108, slip. op. at 19-20 (U.S. Jun. 23, 2005) (permitting government condemnation of private homes to transfer to private developers for private use).

⁴⁵ *But see* Bennis v. Michigan, 516 U.S. 442, 443 (1996) (upholding forfeiture of petitioner's car, despite her lack of knowledge or participation in activities leading to the forfeiture); David Benjamin Ross, Comment, *Civil Forfeiture: A Fiction That Offends Due Process*, 13 REGENT U. L. REV. 259, 265 (2000) (“[O]fficials today can seize a person's property, real or chattel, without notice or hearing, upon an *ex parte* showing of mere probable cause that the property has somehow been ‘involved’ in a crime.”).

⁴⁶ *See, e.g.*, People v. Love, 610 N.Y.S.2d 958, 961 (N.Y. App. Div. 1994) (Carro, J., dissenting) (“In the instant case Jerry Love was awakened after midnight by two police officers pointing their guns at him and ordering him to show his hands, immediately after his female companion was thrown to the floor and handcuffed. Love did not literally die of fright upon having his peace so violently interrupted by the police, as did the Rev. Williams, but he could have, and hardly a soul would know or care. Under the holding of this case, every woman and man may now legally be subjected to a violent intrusion into home or hotel room in the middle of the night merely by dint of an anonymous ‘911’ call, either genuine or fabricated.”); *see also* James Bovard, *No-Knock Entries by Police Take Their Toll on Innocent*, CHRISTIAN SCIENCE MONITOR, May 24, 1994, at 18 (“On March 25, [1994,] 13 heavily armed Boston police smashed into the apartment of Rev. Accelynne Williams, a retired Methodist minister. Reverend Williams apparently ran into his bedroom when the raid began; police smashed down the bedroom door, struggled with him, and handcuffed him. Minutes later, Williams was dead of a heart attack. No drugs were found in his apartment. Boston police carried out the raid on a tip from an anonymous informant who did not even give a specific apartment number. At 2 a.m. on Jan. 25, 1993, police broke down the door and rushed into the home of Manuel Ramirez of Stockton, Calif. Mr. Ramirez awoke, grabbed a pistol, and shot and killed one policeman by his bedroom door before the other police killed him.”).

⁴⁷ *But see* United States v. Rapanos, 235 F.3d 256, 260 (6th Cir. 2000) (“So here we have a person who comes to the United States and commits crimes of selling dope and the government asks me to put him in prison for ten months. And then we have an American citizen who buys land, pays for it with his own money, and he moves some sand from one end to the other and government wants me to give him sixty-three months in prison. Now, if that isn't our system gone crazy, I don't know what is. And I am not going to do it.”).

⁴⁸ *Cf.* Timothy Lynch, *An Eerie Efficiency*, 2002 CATO SUP. CT. REV. 171 (noting the immense pressure brought to bear on charged defendants to plead guilty to cooperate with authorities in exchange for lighter sentences).

⁴⁹ *See also* Low v. Lan, 118 Cal. Rptr. 2d 60, 63 n.2 (Cal. Ct. App. 2002) (“At oral argument counsel for the Commissioner requested that we use the politically-charged euphemism ‘uprising’ to describe what happened, alluding that our word choice might have some significance in related litigation. No way. We are not about to dignify the rioting and looting that occurred in Los Angeles in May 1992 as an ‘uprising.’”).

endeavored to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions.

In every stage of these Oppressions We have Petitioned for Redress in the most humble terms:⁵⁰ Our repeated Petitions have been answered only by repeated injury.⁵¹ A Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free People.

Nor have We been wanting in attention to our British brethren. We have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations, which, would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity, which denounces our Separation, and hold them, as we hold the rest of mankind, Enemies in War, in Peace Friends.

We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved;⁵² and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right⁵³ do. And for the support of this

⁵⁰ *But see* Stacy A. Teicher, *In Washington, The Majority May Not Always Rule*, CHRISTIAN SCIENCE MONITOR, Sept. 27, 1999, at 2 (detailing how Rep. Bob Barr prevented appropriation necessary to count votes in Washington, D.C. referendum on marijuana legalization).

⁵¹ *See* *Government of Guam v. Moylan*, 407 F.2d 567, 568-69 (9th Cir. 1969) (“On urban renewal condemnations . . . the whole scheme is for a public agency to take one man’s property away from him and sell it to another. The founding fathers may have never thought of this . . . [B]ut under all modern federal decisions our hands are tied.”).

⁵² *But see* *People v. Liebowitz*, 531 N.Y.S.2d 719, 721 (Co.Ct. 1988) (“Even in the absence of a treaty, it is a court’s obligation to enforce recognized principles of international law where questions of right depending on such principles are presented for the court’s determination.”).

⁵³ *But see* William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 704 (1976) (“If such a society adopts a constitution and incorporates in that

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Declaration, with a firm reliance on the Protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.

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constitution safeguards for individual liberty, these safeguards indeed do take on a generalized moral rightness or goodness. . . . [N]either because of any intrinsic worth nor because of any unique origins in someone's idea of natural justice but instead simply because they have been incorporated in a constitution by the people.”).

What Does “Assessment” Mean? The Supreme Court’s Misinterpretation of the Tax Injunction Act and its Disregard for Principles of Comity in *Hibbs v. Winn* Leads to the Adjudication of State Tax Credit Issues in Federal Court

*Sean M. Stegmaier**

I. INTRODUCTION

In our federalist society, constitutional jurisprudence and respect for the federalist principles on which our Constitution is based demand that state governments be granted deference to administer their own tax systems without unwarranted and unprovoked federal intrusion.¹ Therefore, if a State has a legitimate interest in increasing attendance at its private and secondary schools, and chooses to offer to its taxpayers a tax credit in order to achieve this legitimate interest, the federal government should stay its hand and allow the State to arrange its fiscal affairs in whatever manner it deems necessary and appropriate. Congress recognized the imperative need for the states to arrange their tax systems without unnecessary federal court interference when it enacted the Tax Injunction Act in 1937 (TIA), which provides in its entirety as follows: “[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.”²

The statutory language of the TIA clearly indicates the

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¹ See ERWIN CHERMERINSKY, FEDERAL JURISDICTION 710 (3d ed. 1999).

² 28 U.S.C. § 1341 (2003).

intent of Congress: as long as the respective State is able to provide an adequate State court remedy for any challenge to an aspect of the State's tax system, federal district courts lack subject matter jurisdiction over so delicate an area as a State's tax administration. Furthermore, because the TIA "has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations," federal courts, through congressional decree and longstanding principles of comity, are obligated to defer to and respect a State's administration of its tax system.³ By allowing federal district courts to adjudicate challenges to state tax credits, despite the clear statutory bar imposed by the TIA, the Supreme Court in *Hibbs v. Winn* has effectively shown complete disregard for Congress' intent in enacting the federalism-based statute, and has furthermore abandoned venerable principles of comity, which require federal courts to defer to the states in administering their respective tax systems.⁴

Part II of this Note discusses the Arizona State tax credit offered in Arizona Revised Statute § 1089,⁵ and how the Arizona statute was first challenged in the Arizona Supreme Court by a group of Arizona taxpayers. Part II goes on to discuss *Hibbs v. Winn* and the opinions of both the majority and the dissent. Part III of this Note begins by addressing the inherent difficulties in accepting the Supreme Court's holding and heavily relies on the arguments and reasoning set forth by the dissent. Part III goes on to discuss the potentially hazardous consequences to state sovereignty stemming from the Supreme Court's holding in *Hibbs v. Winn*, and how the *Winn* Court ignored the broad federalism underpinnings of the TIA.

II. *HIBBS V. WINN*—A STATEMENT OF THE CASE

A. The Arizona Tax Credit Goes to the Arizona Supreme Court

In 1997, the Arizona Legislature enacted Arizona Revised Statute § 43-1089 (A.R.S. § 1089), which permits State tax credits for contributions made to "[s]chool tuition organization[s]"⁶ (STO) by Arizona taxpayers.⁷ The A.R.S. § 1089

³ *Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976).

⁴ *Hibbs v. Winn*, 124 S. Ct. 2276 (2004).

⁵ ARIZ. REV. STAT. ANN. § 43-1089 (2004).

⁶ ARIZ. REV. STAT. ANN. § 43-1089(F)(3) provides the following: "[s]chool tuition organization' means a charitable organization in this state that is exempt from federal taxation under § 501(c)(3) of the Internal Revenue Code and that allocates at least ninety per cent of its annual revenue for educational scholarships or tuition grants to children to allow them to attend any qualified school of their parents' choice. In addition, to qualify as a school tuition organization the charitable organization shall provide educational

tax credit allows an Arizona taxpayer a dollar-for-dollar tax credit for up to \$500 per year for contributions made to STOs during the taxable year; married couples who file a joint return are permitted a tax credit of up to \$625.⁸ The tax credit offered under A.R.S. § 1089 differs from tax deductions for contributions to nonprofit schools in that A.R.S. § 1089 offers a credit against *total* taxes owed, and does not merely reduce a taxpayer's income that is subject to taxation.⁹ Furthermore, the tax credit can only be used to reduce a taxpayer's total amount of taxes owed by the allowable amount (i.e., \$500 maximum credit for a single individual or \$625 for a married couple filing a joint return), and the taxpayer is not entitled to any type of tax refund based on the taxpayer's contribution.¹⁰

A.R.S. § 1089 imposes certain limitations and requirements on the manner in which STOs are to facilitate taxpayer contributions. First, the tax credit is not allowed if the taxpayer designates the donation to the STO for the direct benefit of any dependent of the taxpayer.¹¹ Second, the STOs are required to spend at least ninety percent of the contributions on educational scholarships and grants for children so that those children can attend private or secondary schools.¹² Third, beneficiaries of the STO's funds must be from at least two different schools.¹³ Finally, an STO cannot distribute funds to students who attend schools that discriminate on the basis of race, color, handicap, familial status or national origin.¹⁴

Approximately two years after the Arizona Legislature enacted A.R.S. § 1089, several Arizona taxpayers challenged the statute in the Arizona Supreme Court, arguing that the Arizona statute violates the Establishment Clause of the United States Constitution,¹⁵ as well as three provisions of the Arizona Constitution, since the statute authorizes the use of funds raised through the State tax system to directly support religious

scholarships or tuition grants to students without limiting availability to only students of one school."

⁷ *Winn v. Killian*, 307 F.3d 1011, 1013 (9th Cir. 2002).

⁸ ARIZ. REV. STAT. ANN. § 43-1089(A)(1)-(2).

⁹ *Id.* § 43-1089(A).

¹⁰ *Id.* § 43-1089(B).

¹¹ *Id.* § 43-1089(D).

¹² *Id.* § 43-1089(F)(3).

¹³ *Id.*

¹⁴ *Id.* § 43-1089(F)(2).

¹⁵ U.S. CONST. amend. I (the Establishment Clause, made applicable to the states by the Fourteenth Amendment, provides in relevant part that, "Congress shall make no law respecting an establishment of religion . . ."). See also *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947) (Justices unanimously agreed that the Establishment Clause applies to the States through the Fourteenth Amendment).

education.¹⁶ Ultimately, the Arizona Supreme Court held that A.R.S. § 1089 did not violate either the United States or the Arizona Constitution, and that the STO tax credit was therefore a valid exercise of the Arizona Legislature's prerogative.¹⁷

B. The Arizona Tax Credit Finds its Way into Federal Court

In February 2000, another group of Arizona taxpayers (Taxpayers) brought suit in the United States District Court for the District of Arizona (federal district court) against Mark W. Killian (Director of Revenue),¹⁸ in his official capacity as the Director of the Arizona Department of Revenue, alleging that the A.R.S. § 1089 STO tax credit program violates both the United States and Arizona Constitutions.¹⁹ The Taxpayers sought to enjoin any future operation of the STO program and an injunction requiring the return of funds already distributed to but not yet spent by the STOs to the State's general fund.²⁰

The Director of Revenue moved to dismiss the suit on two theories: (1) immunity from suit pursuant to the Eleventh Amendment;²¹ and (2) the federal district court lacked subject matter jurisdiction due to the TIA²² and principles of comity.²³ Without ruling on the Eleventh Amendment argument, the federal district court granted the Director of Revenue's motion to dismiss the suit on grounds that the TIA and principles of comity preclude the Taxpayers' suit in federal district court.²⁴

The TIA provides in its entirety as follows: "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."²⁵ In arguing that the TIA barred the Taxpayers' suit in district court, the Director of Revenue urged that the relief sought by the

¹⁶ *Kotterman v. Killian*, 972 P.2d 606, 610 (Ariz. 1999), *cert denied*, 528 U.S. 921 (1999).

¹⁷ *Id.* at 625.

¹⁸ J. Elliott Hibbs replaced Mark W. Killian as the Director of the Arizona Department of Revenue on January 6, 2003, and was therefore substituted as the Defendant in this action when it reached the United States Supreme Court by writ of certiorari. Petitioner's Brief on the Merits at 4 n.1, *Hibbs v. Winn*, 124 S. Ct. 2276 (2004) (No. 02-1809) [hereinafter Brief for Petitioners].

¹⁹ *Winn*, 307 F.3d at 1014.

²⁰ *Id.*

²¹ *Id.* at 1014-15; U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

²² 28 U.S.C. § 1341 (2003).

²³ *Winn*, 307 F.3d at 1014-15.

²⁴ *Id.* at 1015.

²⁵ 28 U.S.C. § 1341 (2003).

Taxpayers—enjoinment of the STO program—would interfere with Arizona’s system of tax “assessment” as that term is used in the TIA.²⁶ Essentially, the Director of Revenue adopted a broad reading of the term “assessment,” arguing that it refers to the overall system by which the State determines a respective taxpayer’s overall tax liability to the state.²⁷ The federal district court agreed with the Director of Revenue’s argument that the STO tax credit fell within the purview of Arizona’s tax “assessment,” and accordingly dismissed the Taxpayers’ suit.²⁸

The federal district court further held, as an alternative ground for dismissal of the suit, that principles of comity required dismissal of the Taxpayers’ suit.²⁹ According to the federal district court, any federal court action that disrupts the tax administration of a state is barred by principles of comity, regardless of whether the action relates to tax collection, tax deductions, or tax credits.³⁰ Therefore, even if invalidation of the contested tax policy results in an *increase* in state revenues (as would be the case with the invalidation of the STO tax credit program), this nevertheless constitutes federal interference with a state’s tax administration, and therefore violates principles of comity.

The Taxpayers appealed the federal district court decision to the United States Court of Appeals for the Ninth Circuit (Ninth Circuit), which reversed the federal district court’s decision, holding that neither the TIA nor principles of comity barred the Taxpayers’ federal challenge to the A.R.S. § 1089 tax credit.³¹ In *Winn v. Killian*, the Ninth Circuit’s decision turned on the applicable meaning of the term “assessment” as used in the TIA, and concluded that both the Director of Revenue’s and the federal district court’s reading of the term was overly broad, and that the TIA does not cover the STO tax credit.³² The Ninth Circuit referred to common dictionary definitions in determining the meaning of “assessment” as used in the TIA. The Ninth Circuit claimed two definitions as relevant: “(1) ‘to estimate officially the value of (property, income, etc.) as a basis for taxation,’ and (2) ‘to impose a tax or other charge on.’”³³ Regarding the first definition

²⁶ *Winn*, 307 F.3d at 1015. Unless otherwise indicated by the context, when the term “assessment” appears in quotation marks within the text of this Note, the term is to be understood in its general usage.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 1018.

³⁰ *Id.*

³¹ *Winn*, 307 F.3d at 1020.

³² *Id.* at 1015.

³³ *Id.* (citing RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 90 (1979)).

of “assessment” offered by the Ninth Circuit, the court found it persuasive that “the STO [tax] credit available to a taxpayer is a uniform amount that is applied to the calculation of taxes *after* a taxpayer’s gross income has been determined and therefore plays no part in the ‘assessment’ of property or income as a basis for the imposition of taxes”³⁴ The Ninth Circuit found the second definition inapplicable to the STO tax credit because A.R.S. § 1089 did not impose a tax; rather, it benefits taxpayers by excusing them from paying an already assessed tax.³⁵ Essentially, in establishing a taxpayer’s ultimate tax liability, the Ninth Circuit narrowly defined “assessment” to cover only those tax calculations made in the course of determining a taxpayer’s gross income, and not those made after gross income has been determined.³⁶

The Ninth Circuit referred to the two purposes of the TIA in concluding that the relief sought by the Taxpayers, if granted, would not result in a violation of the purposes or policies behind the TIA as desired by Congress in enacting the statute in 1937.³⁷ The first purpose, which the Ninth Circuit did not view as relevant, involved the ability of foreign parties to bypass state courts for the more favorable federal district court forum in tax cases.³⁸ According to the Ninth Circuit, the second purpose of the TIA was to prevent the disruption of a state’s ability to collect tax revenues.³⁹ While admitting that the Ninth Circuit had not previously ruled on the TIA’s application to state tax credits, the court ultimately held that the TIA does not bar a suit challenging a state tax credit in a federal district court, since the invalidation of a tax credit does not affect a state’s ability to raise revenue and therefore does not violate the second purpose of the TIA.⁴⁰ On the contrary, if the courts invalidated the STO tax credit, Arizona’s ability to raise tax revenues would actually be enhanced, since the contributions that were otherwise going to the STOs would be redirected into the state fund.⁴¹

In the latter part of its opinion, the Ninth Circuit addressed

³⁴ *Id.* at 1015 (footnote omitted).

³⁵ *Id.*

³⁶ Brief for Petitioners, *supra* note 18, at 6.

³⁷ *Winn*, 307 F.3d at 1016.

³⁸ Prior to passage of the TIA, foreign parties could sue a state for injunctive relief in federal court on the basis of diversity jurisdiction and avoid paying the disputed tax in state court until the case was resolved. State residents, on the other hand, could not obtain diversity jurisdiction and were forced to litigate the matter in state courts, which required the resident taxpayer to pay the tax deficiency prior to litigation. *Id.* at 1016 n.6.

³⁹ *Id.* at 1016.

⁴⁰ *Id.* at 1017.

⁴¹ *Id.*

the federal district court's alternative ground for dismissal of the action: principles of comity preclude suits that involve federal court interference with state tax systems.⁴² The Ninth Circuit concluded that Arizona's tax administration would not be substantially affected if A.R.S. § 1089 were invalidated, since A.R.S. § 1089 represents such a small portion of Arizona's tax system.⁴³ Furthermore, because principles of comity apply to federal court injunctive relief that affect a state's ability to *collect* tax revenue, and because invalidation of A.R.S. § 1089 would increase Arizona's tax collection, principles of comity do not bar the Taxpayers' suit.⁴⁴

Subsequent to the Ninth Circuit's reversal of the federal district court decision, the Ninth Circuit declined to rehear the case en banc.⁴⁵ In his dissenting opinion, Judge Kleinfeld criticized the Ninth Circuit's adopted definition of "assessment," and instead used a broader definition of "assessment" as "the process of calculating a person's final tax bill after all deductions and credits are accounted for."⁴⁶ In support of this broad definition of "assessment," Judge Kleinfeld referred to definitions of the term found in another lay dictionary,⁴⁷ a law dictionary,⁴⁸ and the Internal Revenue Code.⁴⁹ According to Judge Kleinfeld's broad definition of "assessment," the TIA plainly "deprives the federal courts of jurisdiction to enjoin states from granting tax credits as part of the calculation of taxes due."⁵⁰ Furthermore, Judge Kleinfeld stated that even if the TIA does not bar the Taxpayers' suit, principles of comity would act as a bar to the suit, since "long before Congress passed the [TIA], federal courts ordinarily declined jurisdiction over challenges to state taxes."⁵¹ Judge Kleinfeld stressed the importance of not assuming that federal judges are in the exclusive position of interpreting the Constitution and the people's federal rights, since "[s]tate judges

⁴² *Winn*, 307 F.3d at 1018.

⁴³ *Id.* at 1020.

⁴⁴ *Id.*

⁴⁵ *Winn v. Killian*, 321 F.3d 911 (9th Cir. 2003) (Kleinfeld, J., dissenting from denial of rehearing en banc).

⁴⁶ *Id.* at 912 (emphasis added).

⁴⁷ *Id.* at 912 n.9 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 131 (1981) (an "assessment" is "the entire plan or scheme fixed upon for charging or taxing")).

⁴⁸ *Id.* at 912 n.10 (quoting BLACK'S LAW DICTIONARY 116-17 (6th ed. 1990) ("assessment" refers to "determining the share of a tax to be paid by each of many persons").

⁴⁹ *Id.* at 912 n.12 (quoting 26 U.S.C. § 6203 (2002) ("assessment shall be made by recording the liability of the taxpayer")). Unless the context indicates otherwise, all references to a "Section," "§," the "Code," or "IRC" are to the Internal Revenue Code of 1986 as in effect on June 1, 2004.

⁵⁰ *Winn*, 321 F.3d 911, 913.

⁵¹ *Id.*

take the same oath to uphold the federal Constitution that [federal judges] do, and like [federal judges] are subject to federal Supreme Court review.”⁵²

C. The Supreme Court’s Holding and its Reasoning

In *Hibbs v. Winn*, the United States Supreme Court granted certiorari to decide whether the TIA bars constitutional challenges to state tax credits.⁵³ The Court, in a 5 to 4 decision delivered by Justice Ginsburg, affirmed the Ninth Circuit, thus allowing the Taxpayers’ suit challenging the A.R.S. § 1089 tax credit to proceed in federal district court without impediment from the TIA or principles of comity.⁵⁴

Justice Ginsburg noted that federal courts, including the United States Supreme Court, have previously adjudicated challenges to state tax credits and have never before viewed the TIA as precluding federal court jurisdiction.⁵⁵ Justice Ginsburg noted the line of post-*Brown v. Board of Education*⁵⁶ cases in which states used tuition grants and tax credits in an effort to promote racial segregation in public and private schools, and how the Court upheld the Constitution’s equal protection requirement under these challenges without impediment from the TIA.⁵⁷ Justice Ginsburg therefore rejected the Director of Revenue’s argument that the TIA prohibits *all* lower federal court interference with state tax systems.⁵⁸

Justice Ginsburg first determined that the Taxpayers sought the following forms of prospective relief: injunctive relief prohibiting A.R.S. § 1089 tax credits for payments made to STOs that make religion-based grants; a declaration that A.R.S. § 1089, on its face and as applied, violates the Establishment Clause of the United States Constitution; and an order that the Director of Revenue notify all participating STOs that all funds within their possession are to be returned to the state general fund.⁵⁹ With this in mind, Justice Ginsburg asked whether this prospective relief, in terms of the TIA, “seek[s] to ‘enjoin, suspend

⁵² *Id.* at 914.

⁵³ *Hibbs v. Winn*, 124 S. Ct. 2276 (2004). The Court first dealt with the issue of whether Director of Revenue’s petition for certiorari was timely under 28 U.S.C. § 2101(c), and ultimately concluded that the petition was timely, thus giving the Court jurisdiction to decide whether the TIA bars Taxpayers’ suit. *See id.* at 2284. This issue is not relevant for purposes of this Note, and thus merits no further discussion.

⁵⁴ *Winn*, 124 S. Ct. at 2281-82.

⁵⁵ *Id.* at 2281.

⁵⁶ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

⁵⁷ *Winn*, 124 S. Ct. at 2281 (citing *Griffin v. County Sch. Bd. of Prince Edward County*, 377 U.S. 218, 233 (1964)).

⁵⁸ *Id.*

⁵⁹ *Id.* at 2284-85.

or restrain the assessment, levy or collection of any tax under State law.”⁶⁰ The answer to this question turned on the meaning of “assessment,” as used in the TIA, to determine if a challenge to a state tax credit falls within the prohibition of the TIA.⁶¹

In determining the correct meaning of “assessment,” Justice Ginsburg ruled that it is imperative to read the term in its context and not in isolation.⁶² According to Justice Ginsburg, if the term “assessment,” as the Director of Revenue asserts, were in isolation to mean “the entire plan or scheme fixed upon for charging or taxing,” the TIA would have no need for the words “levy” or “collection” that follow “assessment” in the language of the statute.⁶³ Essentially, the term “assessment” would be all that is necessary for purposes of the TIA, since this expansive reading of “assessment” would necessarily include the functions of “levy” and “collection.”⁶⁴ Because the Court follows the “rule against superfluities” in a statute, Justice Ginsburg refused to accept the Director of Revenue’s definition of “assessment” as encompassing the entire taxing scheme, since this would render the terms “levy” and “collection” superfluous.⁶⁵

Justice Ginsburg criticized Justice Kennedy’s dissenting opinion (discussed *infra*) for adopting a conflicting position on the proper definition of “assessment.”⁶⁶ According to Justice Ginsburg, Justice Kennedy’s dissent twice adopts the Director of Revenue’s definition of “assessment” as “the entire plan or scheme fixed upon for charging or taxing,” but later defines “assessment” in a manner that “would disconnect the word from the enforcement process (levy or collection) that ‘assessment’ sets in motion.”⁶⁷

Based on the TIA’s legislative history, Justice Ginsburg ruled that the TIA was modeled on earlier federal statutes that paralleled state provisions prohibiting “actions in State courts to enjoin the collection of State and county taxes.”⁶⁸ Of particular influence was the Anti-Injunction Act (AIA),⁶⁹ which bars “any court” from adjudicating a suit brought “for the purpose of restraining the assessment or collection of any [federal] tax.”⁷⁰

⁶⁰ *Id.* at 2285 (quoting 28 U.S.C. § 1341 (1994)).

⁶¹ *Id.* at 2285.

⁶² *Winn*, 124 S. Ct. at 2285.

⁶³ *Id.* at 2286 (internal quotation marks omitted).

⁶⁴ *Id.* (internal quotation marks omitted).

⁶⁵ *Id.* (internal quotation marks omitted) (citing 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.06 (rev. 6th ed. 2000)).

⁶⁶ *Winn*, 124 S. Ct. at 2286 n.4.

⁶⁷ *Id.*

⁶⁸ *Id.* at 2286 (citing S. REP. NO. 75-1035, at 1 (1937)).

⁶⁹ 26 U.S.C. § 7421(a) (2005).

⁷⁰ *Winn*, 124 S. Ct. at 2286 (citing 26 U.S.C. § 7421(a) (2005)).

According to Justice Ginsburg, the AIA was meant to serve two main purposes: (1) to reflect the Government's desire to assess and collect taxes as quickly as possible without judicial impediment; and (2) to require that the legal right to any disputed sums be a suit for refund.⁷¹ Therefore, just as the AIA prevents federal court injunctions over federal tax collections, the TIA prevents federal court restraints over state tax collections.⁷²

In discussing the legislative history of the TIA, Justice Ginsburg held that the Senate Report identified two state-revenue-protective objectives of the TIA:

(1) to eliminate disparities between taxpayers who could seek injunctive relief in federal court—usually out-of-state corporations asserting diversity jurisdiction—and taxpayers with recourse only to state courts, which generally required taxpayers to pay first and litigate later; and (2) to stop taxpayers, with the aid of a federal injunction, from withholding large sums, thereby disrupting state government finances.⁷³

Based on this legislative history, Justice Ginsburg concluded that in enacting the TIA, Congress focused on taxpayers who sought to avoid paying their taxes by resorting to a federal court forum, which is not the procedure specified by the Internal Revenue Service.⁷⁴ Justice Ginsburg therefore read the TIA's legislative history as not indicating a congressional purpose to prevent *all* federal court interference with state tax systems.⁷⁵

In discussing the legislative history of the TIA, the Director of Revenue argued that Congress, in enacting the TIA, relied on the congressional purpose underlying the Johnson Act of 1934.⁷⁶ The Johnson Act provides, in relevant part, that “[t]he district courts shall not enjoin, suspend or restrain the operation of, or compliance with, [public-utility rate orders made by state regulatory bodies].”⁷⁷ In juxtaposing the TIA with the Johnson Act, Justice Ginsburg concluded that the two Acts were significantly different in their respective underlying congressional intents, since “[t]he TIA does not prohibit interference with ‘the operation of, or compliance with’ state tax laws,” but instead prohibits interference only with the areas of state tax systems that are used to generate revenue, such as

⁷¹ *Id.*

⁷² *Id.* at 2287.

⁷³ *Id.* (citing S. REP. NO. 75-1035, at 1-2 (1937)).

⁷⁴ *Id.* at 2288.

⁷⁵ *Id.*

⁷⁶ Brief for Petitioners, *supra* note 18, at 20 (citing *California v. Grace Brethren Church*, 457 U.S. 393, 409 n.22 (1982)).

⁷⁷ 28 U.S.C. § 1342 (2003).

assessment, levy, and collection.⁷⁸

Justice Ginsburg held that the TIA, consistent with the will of Congress, has been interpreted by the Court to only apply to cases in which the state taxpayer attempts to avoid paying state taxes by seeking the aid of the federal courts.⁷⁹ In furthering this position, Justice Ginsburg cited *California v. Grace Brethren Church*,⁸⁰ in which the Court “recognized that the principal purpose of the TIA was to ‘limit drastically’ federal-court-interference with ‘the collection of [state] taxes.’”⁸¹ *Grace Brethren Church*, according to Justice Ginsburg, dealt with taxpayers who attempted to institute federal actions in order to bypass available state remedies, precisely what the TIA is meant to prohibit.⁸² Justice Ginsburg announced that *Grace Brethren Church* stands for the proposition that the TIA does not prevent federal court review of *all* aspects of state tax systems, but instead prevents federal court review only of issues pertaining to the *collection of revenue* in state tax systems, which is contrary to the positions taken by both the Director of Revenue and the dissent.⁸³

Justice Ginsburg next addressed the issue of what constitutes “a plain, speedy and efficient remedy” in a state court as required by the TIA.⁸⁴ Justice Ginsburg noted that the Court had previously addressed the issue of what constitutes “a plain, speedy and efficient remedy” per the TIA, and concluded that the remedy is not the same for all plaintiffs who sue the State, but is instead custom fit for taxpayers who sue the State.⁸⁵

In the final part of the majority opinion, Justice Ginsburg

⁷⁸ *Winn*, 124 S. Ct at 2288 n.7.

⁷⁹ *Id.* at 2289.

⁸⁰ *California v. Grace Brethren Church*, 457 U.S. 393, 408 (1982).

⁸¹ *Winn*, 124 S. Ct. at 2288 (citing *Grace Brethren Church*, 457 U.S. at 408-09) (citation omitted).

⁸² *Id.* at 2288.

⁸³ *Winn*, 124 S. Ct. at 2288-89. See also *Fair Assessment in Real Estate Ass’n. v. McNary*, 454 U.S. 100, 105-06 (1981) (taxpayers sought damages determined by alleged tax overassessments based on taxation of real property); *Rosewell v. LaSalle Nat’l Bank*, 450 U.S. 503, 510 (1981) (taxpayer refused to pay state taxes because she deemed them unfair); *Ark. v. Farm Credit Servs. of Cent. Ark.*, 520 U.S. 821, 824 (1997) (corporations claimed they were exempt from state taxes and refused to pay); *Nat’l Private Truck Council, Inc. v. Okla. Tax Comm’n*, 515 U.S. 582, 584 (1995) (action sought to prevent State from collecting taxes).

⁸⁴ *Winn*, 124 S. Ct. at 2289.

⁸⁵ *Id.* (citing *Rosewell*, 450 U.S. at 528 (holding that “Illinois’ legal remedy that provides property owners paying property taxes under protest a refund without interest in two years is a plain, speedy and efficient remedy under the [TIA]”) (internal quotation marks omitted); *Grace Brethren Church*, 457 U.S. at 411 (holding that “a state-court remedy is plain, speedy and efficient only if it provides the taxpayer with a full hearing and judicial determination at which she may raise any and all constitutional objections to the tax”) (internal quotation marks omitted) (citation omitted)).

discussed how there have been many federal court decisions, including decisions of the Court that “have reached the merits of third-party constitutional challenges to tax benefits without mentioning the TIA.”⁸⁶ Justice Ginsburg held that, “[c]onsistent with the decades-long understanding prevailing on this issue,” the challenge to the A.R.S. § 1089 tax credit brought by the Taxpayers may be adjudicated in federal district court without any TIA opposition, thereby affirming the Ninth Circuit’s decision.⁸⁷

D. The Dissent

Justice Kennedy, writing for the dissent,⁸⁸ criticized the majority for “show[ing] great skepticism for the state courts’ ability to vindicate constitutional wrongs” and for treating state courts as “second rate constitutional arbiters.”⁸⁹ Justice Kennedy offered two points as evidence of the majority’s stance: (1) the majority’s interpretation of the TIA conflicts with the plain language and a literal reading of the statute’s terms, and (2) the majority’s assertion that Congress, in enacting the TIA, did not intend to include third-party suits that do not seek to stop the collection of a tax imposed on plaintiffs is not supported by the legislative history of the TIA.⁹⁰ Justice Kennedy disapproves of the “[d]ismissive treatment” afforded by the majority to the state courts as constitutional arbiters, since the TIA expressly provides for a “federal safeguard:” federal court intervention if the State court fails to provide “a plain, speedy, and efficient remedy.”⁹¹ Therefore, according to Justice Kennedy, the majority disregards “the balance the [TIA] strikes between federal and state court adjudication.”⁹²

Justice Kennedy notes that while “unexamined custom” may have allowed some cases in the past to proceed as though the TIA

⁸⁶ *Winn*, 124 S. Ct. at 2291. See, e.g., *Byrne v. Pub. Funds for Pub. Sch. of N.J.*, 590 F.2d 514 (3d Cir. 1979) (holding a state tax deduction for parents with children who attend private schools is a violation of the Establishment Clause), *aff’d*, 442 U.S. 907 (1979); *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (state tax benefit for parents of children who attend private schools is a violation of the Establishment Clause); *Mueller v. Allen*, 463 U.S. 388 (1983) (state tax deduction for parents of children who attend parochial schools is not a violation of the Establishment Clause); *Finlator v. Powers*, 902 F.2d 1158 (4th Cir. 1990) (holding a state statute that exempts certain religious books from a state tax is a violation of the Establishment Clause).

⁸⁷ *Winn*, 124 S. Ct. at 2292.

⁸⁸ Chief Justice Rehnquist, Justice Scalia and Justice Thomas joined Justice Kennedy’s dissenting opinion.

⁸⁹ *Winn*, 124 S. Ct. at 2292-93 (Kennedy, J., dissenting).

⁹⁰ *Id.*

⁹¹ *Id.* at 2293.

⁹² *Id.*

does not apply to challenges to state tax credits, this "unexamined custom" is not conclusive, and the terms and purpose of the TIA alone are conclusive and controlling in determining the scope of the TIA.⁹³ To determine whether the TIA bars the federal district court from granting injunctive relief against the STO tax credit, Justice Kennedy presented two necessary inquiries: (1) define "assessment," as used in the TIA, and (2) decide whether an injunction preventing the Director of Revenue from permitting the STO tax credit "would enjoin, suspend, or restrain an assessment" for purposes of the TIA.⁹⁴

Like the majority opinion, Justice Kennedy noted that the term "assessment" is not to be understood in isolation, and must instead be read in light of the surrounding terms in the TIA.⁹⁵ Similar to the majority, Justice Kennedy explained that the TIA was modeled on the AIA,⁹⁶ which provides "that federal courts may not restrain or enjoin an 'assessment or collection of any [federal] tax.'"⁹⁷ In order to determine the meaning of the term "assessment" as used in the AIA, Justice Kennedy referred to other provisions of the Code.⁹⁸ Justice Kennedy concluded that, when read together, the provisions of the Code indicate that an assessment, for purposes of the AIA, "must at the least encompass the recording of a taxpayer's ultimate tax liability," and "[t]he recording of the [taxpayer's] liability on the Government's tax rolls is itself an assessment."⁹⁹ Therefore, because the TIA was modeled on the AIA, it follows that the term "assessment," as used in the TIA, should be interpreted according to the Code's use of the term, indicating that an "assessment" pertains to "a taxpayer's ultimate tax liability."¹⁰⁰

According to Justice Kennedy, the Ninth Circuit should not have principally relied on a dictionary definition in determining the meaning of "assessment," since it is imperative that the definition be considered in light of the prior statute on which the TIA was based.¹⁰¹ Another problem with the Ninth Circuit's reliance on a lay dictionary definition of "assessment" is that the Ninth Circuit used a dictionary that was not available in the year

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Winn*, 124 S. Ct. at 2293 (Kennedy, J., dissenting).

⁹⁶ 26 U.S.C. § 7421(a)(2005).

⁹⁷ *Winn*, 124 S. Ct. at 2293 (Kennedy, J., dissenting).

⁹⁸ *Id.* (citing 26 U.S.C. § 1 *et seq.*).

⁹⁹ *Id.* at 2294.

¹⁰⁰ *Id.* (citing *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) ("[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress can normally be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.")).

¹⁰¹ *Id.*

the TIA was enacted.¹⁰² Justice Kennedy further noted that the Ninth Circuit omitted a relevant definition of “assessment” from the dictionary it used: “(2) to fix or determine the amount of (damages, a tax, a fine, etc.)”¹⁰³ Justice Kennedy found comfort in Judge Kleinfeld’s dissenting opinion from denial of rehearing en banc, which noted that the Ninth Circuit would have discovered relevant, broader definitions of “assessment” had it looked in different lay dictionaries and the Code.¹⁰⁴

Justice Kennedy addressed the Taxpayers’ argument alleging that the TIA does not prohibit the injunction against the STO tax credits, since the Director of Revenue, even after the STO tax credit is enjoined, will be able to enforce taxpayer liabilities, and the elimination of the STO tax credit will actually increase tax revenue.¹⁰⁵ Justice Kennedy dismissed this argument, since it ignores some highly relevant wording in the TIA: “under State law.”¹⁰⁶ According to Justice Kennedy, the TIA prohibits federal district courts “from enjoining, suspending, or restraining a State from recording the taxpayer liability that state law mandates.”¹⁰⁷ A.R.S. § 1089 is an Arizona State law, and is necessary in determining an Arizona taxpayer’s tax liability to the State.¹⁰⁸ Therefore, according to Justice Kennedy, a federal court order directing the Director of Revenue to refrain from recording on the State’s tax rolls taxpayer liability in absence of the STO tax credit would effectively prevent the Director of Revenue from accurately recording taxpayer liability under State law.¹⁰⁹ This sort of directive order, according to Justice Kennedy, is precisely what the plain language of the TIA forbids.¹¹⁰

Justice Kennedy next distinguished prior cases used by the majority to support the majority’s position that the Court and other federal courts have adjudicated non-taxpayer challenges to tax credits without impediment from the AIA.¹¹¹ These cases are distinguishable on the grounds that if the plaintiffs in these suits

¹⁰² *Id.*

¹⁰³ *Winn*, 124 S. Ct. at 2294 (Kennedy, J., dissenting) (emphasis added).

¹⁰⁴ *Id.* (citing *Winn v. Killian*, 321 F.3d 911, 912 (9th Cir. 2003) (Kleinfeld, J., dissenting from denial of rehearing en banc)).

¹⁰⁵ *Id.* at 2295 (Kennedy, J., dissenting).

¹⁰⁶ *Id.* (quoting 28 U.S.C. § 1341 (2003)).

¹⁰⁷ *Id.* at 2296.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* See, e.g., *McGlotten v. Connally*, 338 F. Supp. 448, 453-54 (D.D.C. 1972) (“The preferred course of raising [such tax exemption and deduction] objections in a suit for refund is not available. In this situation we cannot read the statute to bar the present suit.”).

had been barred by the AIA they would have had no other forum in which to adjudicate their claims.¹¹² According to Justice Kennedy, the TIA, unlike the AIA, by its own explicit terms ensures that an acceptable forum exists for those suits that it bars.¹¹³ Where a State court is unable to provide “a plain, speedy, and efficient remedy,” federal district courts are the next available forum, and ultimately, the litigant may resort to the United States Supreme Court, whether the case was originally heard in a federal district court or a State court.¹¹⁴ Justice Kennedy noted that the majority mistakenly failed to address this exception in the TIA, and that this exception “represents a congressional judgment about the balance that should exist between the respect due to the States (for both their administration of tax schemes and their courts’ interpretation of tax laws) and the need for constitutional vindication.”¹¹⁵ Based on this codified exception in the TIA, Justice Kennedy concluded that this exception does not apply to the instant case, since a similar action was already heard in Arizona State court,¹¹⁶ in which the State court was able to provide “a plain, speedy, and efficient remedy.”¹¹⁷ Therefore, according to Justice Kennedy’s reading of the TIA, the Taxpayers’ suit does not fall within this exception to the TIA, and the federal district court accordingly lacked proper subject matter jurisdiction, since the Taxpayers were already afforded an adequate remedy in State court.¹¹⁸

Justice Kennedy criticized the majority for its interpretation of the TIA’s legislative history, arguing that the majority’s reading is inconsistent with earlier Court interpretations of the TIA.¹¹⁹ Citing *California v. Grace Brethren Church*¹²⁰ as a prime example, Justice Kennedy argued that the Court has previously understood the purpose of the TIA as “not only to protect the [State] fisc but also to protect the State’s tax system administration and tax policy implementation.”¹²¹ In *Grace Brethren Church*, the Court held that “[i]f federal declaratory relief were available to test state tax assessments, state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by

¹¹² *Winn*, 124 S. Ct. at 2296 (Kennedy, J., dissenting).

¹¹³ *Id.* at 2297.

¹¹⁴ *Id.* (quoting 28 U.S.C. § 1341 (2003)).

¹¹⁵ *Id.*

¹¹⁶ See *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999).

¹¹⁷ *Winn*, 124 S. Ct. at 2297 (Kennedy, J., dissenting).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 2298.

¹²⁰ *California v. Grace Brethren Church*, 457 U.S. 393 (1982).

¹²¹ *Winn*, 124 S. Ct. at 2298 (Kennedy, J., dissenting).

state law.”¹²² This quote from *Grace Brethren Church*, according to Justice Kennedy, clearly demonstrates that the TIA’s primary concern is to prevent federal court interference with a State’s *entire* tax collection system, and not merely the revenue collecting aspect of it.¹²³ Based on this reading of the TIA, Justice Kennedy disagrees with the majority’s decision, since the majority assumed that the primary purpose of the TIA is to prohibit federal district courts from issuing orders that would *decrease* tax revenues in state funds.¹²⁴ Justice Kennedy argued that the TIA’s purpose is not limited to preventing federal court orders that would decrease tax revenues, but is instead meant to prevent federal court orders that would lead to a disruption in a State’s *entire* tax collection efforts in *any* manner, which includes invalidating state tax credits.¹²⁵

In the final part of his dissent, Justice Kennedy addressed the majority’s argument that federal courts, through “years of unexamined habit,” have adjudicated suits challenging state tax credits.¹²⁶ Justice Kennedy dismissed this argument by stating that “[t]he exercise of federal jurisdiction does not and cannot establish jurisdiction,” and that “[w]hile [the Court] should not reverse the course of our unexamined practice lightly, our obligation is to give a correct interpretation of the statute.”¹²⁷ Justice Kennedy argued that simply because the Court has never before considered the jurisdictional issue in the case at bar, the Court should not resort to following the unexamined habit of the Court to hear challenges to state tax credits, and should instead follow the clear statutory mandate of the TIA.¹²⁸

¹²² *Grace Brethren Church*, 457 U.S. at 410 (quoting *Perez v. Ledesma*, 401 U.S. 82, 127 n.17 (1971) (Brennan, J., concurring in part and dissenting in part)).

¹²³ *Winn*, 124 S. Ct. at 2298-99 (Kennedy, J., dissenting).

¹²⁴ *Id.* at 2297-98.

¹²⁵ *Id.* at 2298-99.

¹²⁶ *Id.* at 2300.

¹²⁷ *Id.* (citing *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (holding that the “Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed *sub silentio*.”)).

¹²⁸ *Id.* at 2301.

III. OPENING THE DOOR FOR FEDERAL COURT INTRUSION INTO
STATE TAX SYSTEMS—DIFFICULTIES WITH THE *WINN* HOLDING
AND ITS REASONING

A. The Majority Misinterpreted the Plain Language and Intent
of the TIA

1. The Majority Misinterpreted the Term “Assessment” as
Used in the TIA

Prior to the majority’s decision in *Winn*, the statutory language of the TIA was seemingly clear, concise, and unambiguous. The TIA prohibits federal district courts from “enjoin[ing], suspend[ing] or restrain[ing] the *assessment*, levy or collection” of any state tax as long as there is a “plain, speedy and efficient remedy” in the state court.¹²⁹ The issue presented before the *Winn* Court was whether enjoining a state tax credit qualifies as an interference with an “assessment” as that term is used in the TIA.¹³⁰ The plain language of the TIA is the correct starting point for the Court’s determination, since plain and unambiguous statutory language is the clearest indicator of congressional intent, and therefore ends the inquiry.¹³¹

Understood in its most ordinary and sensible usage, in relation to state taxes, “assessment . . . must at the least encompass the recording of a taxpayer’s *ultimate* tax liability. This is what the taxpayer owes the Government.”¹³² Instead of referring to the ordinary meaning of “assessment” as used in the context of both the TIA and federal and state precedent, the Ninth Circuit relied on a lay dictionary definition of “assessment,” and concluded that an “assessment” was the official estimate of the value of income or property used to calculate a tax or the imposition of a tax on someone.¹³³ The most troubling part of the Ninth Circuit’s reliance on the lay dictionary definition is that the court ignored a more relevant definition found in the same dictionary: “(2) to fix or determine

¹²⁹ 28 U.S.C. § 1341 (2003) (emphasis added).

¹³⁰ *Winn*, 124 S. Ct. at 2281.

¹³¹ See, e.g., *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (holding that the Court begins with the statutory language in its inquiry); *Rosewell v. LaSalle Nat’l Bank*, 450 U.S. 503, 512 (1981) (“The starting point of our inquiry is the plain language of the statute itself.”).

¹³² *Winn*, 124 S. Ct. at 2294 (Kennedy, J., dissenting) (emphasis added); see also *United States v. Galletti*, 124 S. Ct. 1548, 1553-54 (2004) (“In its numerous uses throughout the Code, it is clear that the term ‘assessment’ refers to little more than the calculation or recording of a tax liability. . . . The Federal tax system is basically one of self-assessment, whereby each taxpayer computes the tax due and then files the appropriate form”) (internal quotations omitted).

¹³³ *Winn v. Killian*, 307 F.3d 1011, 1015 (9th Cir. 2002).

the amount of (damages, a tax, a fine, etc.).”¹³⁴ This additional definition is in accordance with the broad meaning ascribed to the term “assessment” by both the Director of Revenue¹³⁵ and the dissent,¹³⁶ and suggests that “assessment” refers to a taxpayer’s overall tax liability to the government.¹³⁷ A tax credit is used in determining a taxpayer’s overall tax liability, since the amount of the credit is deducted from the “below-the-line” amount of taxes a taxpayer owes to the government.¹³⁸

Definitions of “assessment” found in other dictionaries, including lay dictionaries available in 1937 when the TIA was enacted, also support this broad definition of “assessment.” For example, a lay dictionary available in 1937 provides the following relevant definitions of “assessment”: “act of apportioning or determining an amount to be paid;” “the entire plan or scheme fixed upon for charging or taxing.”¹³⁹ In *Black’s Law Dictionary*, “‘assessment’ is defined as ‘determining the share of a tax to be paid by each of many persons’ . . . [and] ‘the process of ascertaining and adjusting the shares respectively to be contributed by several persons’ such as an individual’s *final* tax bill.”¹⁴⁰

What is perhaps the most relevant definition of the term “assessment” is found in the Code, as it provides that “assessment shall be made by recording the liability of the taxpayer.”¹⁴¹ As Judge Kleinfeld correctly noted in his dissent, “under the congressional understanding in the tax code, ‘assessment’ refers to the bottom line, how much money the

¹³⁴ *Winn*, 124 S. Ct. at 2294 (Kennedy, J., dissenting) (emphasis added).

¹³⁵ Brief for Petitioners, *supra* note 18, at 12 (“[A] ‘tax assessment’ is a tax *bill*: the final amount owed to the government. Under that ordinary and sensible understanding of the word ‘assessment,’ a federal court challenge to a state tax credit—a component of a taxpayer’s ultimate liability—is barred by the plain terms of the [TIA].”).

¹³⁶ *Winn*, 124 S. Ct. at 2294 (Kennedy, J., dissenting) (“[A]n assessment . . . must at the least encompass the recording of a taxpayer’s *ultimate* tax liability.”) (emphasis added).

¹³⁷ Further evidence of the broad meaning of “assessment” is found by looking at Arizona’s tax system. On the 2000 Arizona Resident Personal Income Tax Return (Form 140), Arizona taxpayers determine their ultimate tax liability by accounting for all deductions and credits. See also Brief for Petitioners, *supra* note 18, at 16 n.4 (citing 85 C.J.S. *Taxation* § 1758 (2003) (“In making an assessment [of taxes], the assessing officer should take into account *all deductions and credits* to which the taxpayer is lawfully entitled, and compute them in the manner required by the statute.”) (emphasis added).

¹³⁸ See BLACK’S LAW DICTIONARY 1501 (8th ed. 2004) ([A “tax credit” is] “[a]n amount subtracted directly from one’s total tax liability, dollar for dollar, as opposed to a deduction from gross income.”).

¹³⁹ WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 131 (2d ed. 1934).

¹⁴⁰ *Winn v. Killian*, 321 F.3d 911, 912 (9th Cir. 2003) (Kleinfeld, J., dissenting from denial of rehearing en banc) (citing BLACK’S LAW DICTIONARY 116-17 (6th ed. 1990)) (emphasis added) (footnotes omitted).

¹⁴¹ 26 U.S.C. § 6203 (2005).

taxpayer owes to the government in taxes, after consideration of *any credits* as well as deductions.”¹⁴² This broad understanding of the term “assessment” is the most common sense understanding of the term, and is consistent with the broad purpose intended by Congress in enacting the TIA. Because the term “assessment” is followed by the terms “levy” and “collection,”¹⁴³ the TIA indicates a congressional intent to encompass the entire taxing process, beginning with the determination of the taxpayer’s ultimate tax liability (i.e., the “assessment”) and concluding with the collection of that liability.¹⁴⁴

The *Winn* Court, in construing the meaning of the term “assessment” to counter-intuitive limits, has effectively legislated from the bench by disregarding the clear intent of Congress in enacting the TIA, thereby allowing federal courts with already overburdened dockets to hear cases that Congress specifically legislated to exclude. By accepting an irrelevant lay dictionary definition as conclusive authority, the *Winn* Court has effectively undermined the Legislature in its capacity as the government branch entrusted with the duty of creating and determining laws, and has shown complete disregard for congressional purpose.

2. The TIA Should not be Limited to Instances of Tax Collection

The majority erred in finding that the TIA pertains only to those situations in which the State’s revenue *collecting* function has been hindered. The Court has previously made clear that the purpose of the TIA is to protect a State’s *entire* tax system and not merely the revenue collecting aspect of it.¹⁴⁵ Nowhere in the language of the TIA is there mention of the TIA being limited to situations in which a challenge to a State tax would hinder the State’s ability to collect revenue.¹⁴⁶ Quite the contrary, the language of the TIA clearly demonstrates that “[t]he district

¹⁴² *Winn*, 321 F.3d at 912-13 (Kleinfeld, J., dissenting from denial of rehearing en banc) (emphasis added). See also *American Civil Liberties Union Found. of La. v. Bridges*, 334 F.3d 416, 421 (5th Cir. 2003) (defining “assessment” as “the entire plan or scheme fixed upon for charging or taxing”).

¹⁴³ 28 U.S.C. § 1341 (2003).

¹⁴⁴ *Hibbs v. Winn*, 124 S. Ct. 2276, 2298-99 (2004) (Kennedy, J., dissenting) (The terms “assessment,” “levy,” and “collection” represent the three main stages of a State tax system: (1) the determination of the taxpayer’s overall tax liability (“assessment”); (2) the imposition of the tax (“levy”); and (3) collecting the tax owed (“collection”).

¹⁴⁵ *Id.* (Kennedy, J., dissenting); see also *California v. Grace Brethren Church*, 457 U.S. 393, 409 n.22 (1982) (“[T]he legislative history of the [TIA] demonstrates that Congress worried not so much about the form of relief available in the federal courts, as about divesting the federal courts of jurisdiction to interfere with state tax administration.”).

¹⁴⁶ See 28 U.S.C. § 1341 (2003).

courts shall not enjoin, suspend or restrain the assessment, levy or collection of *any tax* under State law where a plain, speedy and efficient remedy may be had in the courts of such State.”¹⁴⁷ Because the TIA refers to “any tax,” it seems clear that even an aspect of a State tax system that does not add to revenue collection, such as a tax credit, is nevertheless meant to fall under the purview of the TIA, since a tax credit is fundamentally related to a State’s entire tax system.¹⁴⁸

A federal court order that interferes with a state tax credit is just as intrusive into a State’s tax system as is a federal court order that interferes with a State’s ability to raise and collect taxes.¹⁴⁹ Accordingly, a tax credit should not be deemed to be outside the purview of the TIA simply because a tax credit does not lead to an increase in a State’s tax revenues.¹⁵⁰ Tax scholars agree that a tax credit is an imperative determination in the assessment of a tax, and taking account for a tax credit is the final step in determining a taxpayer’s overall tax liability.¹⁵¹ In the case at bar, the majority should not have limited the term “assessment” to the revenue collecting aspect of a State’s tax system and should have instead interpreted the term to encompass the taxpayer’s overall tax liability, tax credits included.¹⁵²

¹⁴⁷ *Id.* (emphasis added).

¹⁴⁸ *See id.* It is interesting to note that in a Ninth Circuit decision following *Hibbs v. Winn*, the court discussed the legislative history and congressional intent behind the TIA, stating that “[a]side from its general concern with protecting state revenues, Congress viewed the [TIA] as a mechanism for steering challenges to state tax laws into state courts.” *May Trucking Co. v. Or. Dep’t of Transp.*, 388 F.3d 1261, 1268 (9th Cir. 2004).

¹⁴⁹ *See, e.g., United Brewers Ass’n v. Perez*, 592 F.2d 1212, 1214 (1st Cir. 1979) (holding that litigation that would increase the amount of taxes collected would nevertheless “disrupt the orderly collection and administration of state taxes”); *In re Gillis*, 836 F.2d 1001, 1008 (6th Cir. 1988) (holding that “the interference by the federal courts into the state tax system is the same in degree and kind as a suit seeking to enjoin a state tax”).

¹⁵⁰ *See Davis v. Mich. Dep’t of Treasury*, 489 U.S. 803 (1989) (holding that the ultimate effect of invalidating a state tax exemption cannot be predicted with complete accuracy).

¹⁵¹ *See* JAMES J. FREELAND ET AL., *FUNDAMENTALS OF FEDERAL INCOME TAXATION* 929 (13th ed. 2004) (“The final step in computing a taxpayer’s regular tax liability is to reduce the taxpayer’s tax liability . . . by the amount of any tax credits allowed to the taxpayer. The amount of tax that must be paid by the taxpayer when filing an income tax return is generally less than the computed tax liability for the year, because the potential payment is reduced by tax credits.”).

¹⁵² In a recent Fifth Circuit decision interpreting *Hibbs v. Winn*, the court was confronted with the issue of whether the federal district courts could exercise proper subject matter jurisdiction over a claim that the State of Louisiana’s prestige license plate program facially discriminates against pro-choice views, thus violating the First Amendment. *Henderson v. Stalder*, 407 F.3d 351 (5th Cir. 2005). The *Henderson* court held that the costs associated with the prestige license plates were in fact “taxes,” and in light of *Hibbs v. Winn*, the federal district court was barred from hearing the case as a result of the TIA. *Id.* at 358-59. The *Henderson* court noted that, “*Hibbs* opened the federal courthouse doors slightly *notwithstanding the limits of the TIA.*” *Id.* at 359.

3. The Majority Ignored That There Existed a “Plain, Speedy and Efficient Remedy” in Arizona State Court

The language of the TIA itself provides for the appropriate time at which a federal court may intervene in the State tax system: “where a plain, speedy and efficient remedy may [*not*] be had in the courts of such State.”¹⁵³ As Justice Kennedy noted in his dissenting opinion, the TIA has a “codified exception” to the prohibition against federal court intervention, which allows federal court interference in state tax systems only where the taxpayer is unable to receive “a plain, speedy and efficient remedy” in her State court.¹⁵⁴ Justice Ginsburg and the majority overlooked this crucial language in the TIA, which represents the fact that Congress has already made the determination as to what sort of balance should exist among the federal and state courts in regards to a State’s ability to administer its own tax system.¹⁵⁵

In the years following the enactment of the TIA, the Court took a broad stance as to what constitutes a “plain, speedy and efficient remedy in State court,” often finding judicial remedies in state courts to be inadequate.¹⁵⁶ However, in more recent decisions, the Court has narrowly construed the statutory language of the TIA and seems to presume that state court remedies are “plain, speedy and efficient” for purposes of the TIA, thus prohibiting federal court intervention.¹⁵⁷ As a result of

(emphasis added). In reaching its decision, the Fifth Circuit interpreted the *Hibbs* decision as allowing federal district court intervention into a state tax matter in spite of the TIA, only if “the suit’s success will *enrich, not deplete*, the government entity’s coffers.” *Id.* (emphasis added).

¹⁵³ 28 U.S.C. § 1341 (2003) (emphasis added).

¹⁵⁴ *Hibbs v. Winn*, 124 S. Ct. 2276, 2297 (2004) (Kennedy, J., dissenting).

¹⁵⁵ *Id.*

¹⁵⁶ CHEMERINSKY, *supra* note 1, at 710; *see, e.g.*, *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105-06 (1944) (holding that the federal district court was not barred by the TIA because there was an absence of state court interpretations of the contested tax law, and this created uncertainty sufficient to justify federal court intervention); *Hillsborough Twp. v. Cromwell*, 326 U.S. 620, 626 (1946) (holding that a “plain, speedy and efficient remedy” did not exist in the State court, thus permitting the federal district court to bypass the TIA, since there existed uncertainty as to the adequacy of the state remedy); *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299, 306 (1952) (holding that because the taxpayer would have been required to file over 300 separate claims in fourteen different counties under state law, the remedy was not “plain, speedy and efficient,” and the federal district court was permitted to take jurisdiction as an exception to the TIA).

¹⁵⁷ CHEMERINSKY, *supra* note 1, at 711; *see, e.g.*, *Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976) (holding that a State requirement that a taxpayer post a bond for the amount of the tax in controversy in order to be heard in State court is a “plain, speedy and efficient remedy,” even though situations may exist in which the taxpayer is unable to post the bond); *Rosewell v. LaSalle Nat’l Bank*, 450 U.S. 503, 528 (1981) (holding that the State remedy was adequate, despite the fact that the taxpayer was required to pay the taxes owed first and then sue for a refund, the taxpayer was not entitled to interest on the refund if successful in court, and it usually took two years for the suit to be heard in State

these recent cases, the *Winn* Court erred in allowing the Taxpayers' suit to proceed in federal district court, since there existed a "plain, speedy and efficient remedy" in Arizona State court, thus divesting the federal district court of subject matter jurisdiction.¹⁵⁸ This is evidenced by the 1999 Arizona Supreme Court case *Kotterman v. Killian*, in which a group of Arizona taxpayers, similarly situated to the Taxpayers in *Winn*, challenged the A.R.S. § 1089 tax credit on Establishment Clause grounds.¹⁵⁹ The Arizona Supreme Court ultimately held the A.R.S. § 1089 tax credit to be a valid law, thus ruling against the *Killian* taxpayers.¹⁶⁰ It is notable that the United States Supreme Court denied review of the *Kotterman* decision.¹⁶¹

Based on the current line of Supreme Court cases broadly interpreting the "plain, speedy and efficient remedy" requirement in the TIA, the *Winn* Court should have ruled against the Taxpayers, finding that they had an adequate remedy available in State court, thus divesting the federal district courts of subject matter jurisdiction over the case. As Justice Kennedy noted in his dissenting opinion, the taxpayer who resorts to the State court is not exclusively confined to the State court forum; the United States Supreme Court is always an available federal forum that will review any state court decision.¹⁶²

B. The Majority's Holding is Contrary to the Broad Federalism Purpose of the TIA

1. The TIA was Enacted in the Broad Interest of State Sovereignty

The TIA embodies principles of federalism: state governments are given deference to administer their own tax

court); *California v. Grace Brethren Church*, 457 U.S. 393, 417 (1982) (holding that "because the appellees could seek a refund of their state unemployment insurance taxes . . . their remedy under state law was 'plain, speedy and efficient' within the meaning of the [TIA], and consequently, that the District Court had no jurisdiction to issue injunctive or declaratory relief.").

¹⁵⁸ Following *Hibbs v. Winn*, the Ninth Circuit discussed what constitutes "plain, speedy and efficient" for purposes of the TIA. *May Trucking Co. v. Oregon Dep't of Transportation*, 388 F.3d 1261, 1270-71 (9th Cir. 2004). According to the *May Trucking Co.* court, "[f]or state-court remedies to be 'plain,' the procedures available in state court must be *certain*." *Id.* at 1270 (emphasis added). Furthermore, "[t]he 'efficiency' of a state-court remedy generally turns on whether it imposes an 'unusual hardship . . . requiring ineffectual activity or an unnecessary expenditure of time or energy.'" *Id.* at 1271 (quoting *Rosewell*, 450 U.S. at 518).

¹⁵⁹ *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999).

¹⁶⁰ *Id.* at 625.

¹⁶¹ *Kotterman v. Killian*, 972 P.2d 606, 625 (Ariz. 1999), *cert. denied*, 528 U.S. 921 (1999).

¹⁶² *Hibbs v. Winn*, 124 S. Ct. 2276, 2297 (2004) (Kennedy, J., dissenting).

systems without undue federal impediment since Congress enacted the TIA in the interest of limiting federal interference with the crucial principal of state sovereignty.¹⁶³ States may have a legitimate interest in promoting secondary school education for parents and their children because secondary schools are not state-funded, and the respective State may have an interest in decreasing the amount of children attending the public schools for state-revenue purposes. In enacting A.R.S. § 1089, the Arizona Legislature may have been attempting to persuade more Arizona taxpayers to send their children to secondary schools in order to lighten the burden on the State fisc since fewer funds would need to be directed to public schools if more children were attending secondary schools.¹⁶⁴ As an incentive to send their children to secondary schools, Arizona taxpayers would receive the STO tax credit embodied in A.R.S. § 1089.¹⁶⁵ The Arizona Legislature made the determination that a tax credit, as opposed to a tax deduction, was the most persuasive means of motivating taxpayer's to send their children to secondary schools, since a tax credit represents a greater overall deduction in tax liability.¹⁶⁶ Regardless of the Arizona legislature's intent in enacting A.R.S. § 1089, the contested STO tax credit is clearly a matter of Arizona State law, and the *Winn* majority erred in allowing federal courts to take jurisdiction over the matter in spite of the TIA's bar on federal intrusion in state

¹⁶³ See CHEMERINSKY, *supra* note 1, at 710. After the Court's decision in *Winn*, the Ninth Circuit noted, in *May Trucking Co. v. Oregon Dep't of Transp.*, the two comity concerns furthered by the TIA: "[f]irst, '[t]he Act is a gesture of comity toward states; recognizing the centrality of tax collection to the operation of government, the Act prevents taxpayers from running to federal court to stymie the collection of state taxes'. . . . Second, recognizing that challenges to state tax laws are 'more properly heard in the state courts,' the Act ensures that state courts are able to entertain challenges to their own tax laws in the first instance." *May Trucking Co. v. Or. Dep't of Transp.*, 388 F.3d 1261, 1269 (9th Cir. 2004) (citations omitted).

¹⁶⁴ See Warren Richey, *Case Could Boost Funding for Private Schools*, CHRISTIAN SCIENCE MONITOR, Jan. 20, 2004, at 2, available at <http://news.findlaw.com/csmonitor/s/20040120/20jan2004091835.html> ("[A] ruling [in favor of Arizona in this case] would also provide a green light to those seeking increased government funding of religious schools, provided they have the state legislature's support and the state judiciary's approval.").

¹⁶⁵ See ARIZ. REV. STAT. ANN. § 43-1089(A)-(B) (2004).

¹⁶⁶ See FREELAND ET AL., *supra* note 151, at 929-30 ("A credit of a certain dollar amount is more advantageous to the taxpayer than a deduction of the same dollar amount, because it reduces tax liability dollar-for-dollar, whereas a deduction reduces only taxable income with a corresponding but smaller reduction in tax liability. Deductions effect greater tax savings as the taxpayer's tax rate increases; in contrast, credits have the same dollar saving for all taxpayers who otherwise would pay tax, regardless of their tax brackets. Tax legislation at one time reflected some movement away from deductions toward credits, possibly because of a policy decision that credits are more equitable. With the adoption of modified flat tax rates, the movement from deductions to credits stalled although it has picked up some momentum in recent legislation.") (emphasis added) (footnotes omitted).

tax matters. As noted by Justice Kennedy, “[t]he TIA protects the responsibility of the States and their courts to administer their own tax systems and to be accountable to the citizens of the State for their policies and decisions.”¹⁶⁷

A further problem potentially spawned out of the *Winn* decision is that multi-state corporations are now able to engage in federal court forum shopping, which is one of the primary actions Congress intended to prevent in enacting the TIA.¹⁶⁸ Multi-state or out-of-state corporations are now given the opportunity to move directly into federal court through diversity jurisdiction in order to avoid a possibly prejudicial state forum.¹⁶⁹ An out-of-state corporation may wish to avoid a state court forum in order to avoid local biases and local favoritism towards local corporations. Additionally, a foreign corporation challenging a state tax law may feel as though a state court would not be as quick to strike down the state tax law as would a federal court.¹⁷⁰

As a result of the majority’s decision in *Winn*, an out-of-state corporation that is troubled by the tax breaks afforded to local corporations, whether it be in the form of a tax credit, deduction, or exemption, is now able to challenge the State tax law in federal court, despite the fact that the State may have a legitimate interest in promoting the welfare of its local corporations.¹⁷¹ According to *Winn*, as long as the foreign corporation’s challenge would not have the effect of *decreasing* state revenues, the TIA will not act as a bar to the challenge, and the States will no longer be guaranteed the ability to afford benefits to their local corporations and businesses, which is a serious infringement on principles of state sovereignty. This result is especially unfortunate in light of the fact that in discussing the legislative history of the TIA, Justice Ginsburg recognized that one of the twin objectives of the TIA was “to eliminate disparities between taxpayers who could seek injunctive relief in federal court—*usually out-of-state corporations asserting diversity jurisdiction.*”¹⁷² This

¹⁶⁷ *Winn*, 124 S. Ct. at 2299 (Kennedy, J., dissenting).

¹⁶⁸ See *Leading Case: F. Tax Injunction Act*, 118 HARV. L. REV. 486, 491 (2004); see also 72 AM. JUR. 2D *State and Local Taxation* § 986 (2005) (“The two purposes of the TIA are: (1) to eliminate discrimination between state citizens who are required to pursue relief regarding illegal tax assessments in state court and foreign corporations operating in the state which could sue under diversity jurisdiction of federal courts; and (2) to prevent such foreign corporations from paralyzing state fiscal operations with dilatory and expensive legal actions in federal court.”) (footnote omitted).

¹⁶⁹ See 28 U.S.C. § 1332 (2003).

¹⁷⁰ See *High Court’s Decision Means New Alternative for Corporations*, STATE INCOME TAX ALERT (CCH, Chicago, Ill.), July 15, 2004, at 2-3.

¹⁷¹ See *id.*

¹⁷² *Winn*, 124 S. Ct. at 2287 (majority opinion) (emphasis added).

demonstrates that the Court was at the very least reckless in failing to account for the fact that foreign corporations are now able, as a result of *Winn*, to side-step state courts and to instead enjoy a more favorable federal forum.

2. The Majority Treats State Court Judges as Inferior Constitutional Arbiters

As noted by Justice Kennedy in his dissenting opinion, the *Winn* majority's decision seems to rest on a presumption that state courts are incapable of properly adjudicating federal constitutional issues, and that these issues are better left to the federal courts.¹⁷³ In the majority opinion, Justice Ginsburg noted that when some of the states were using state tax credits as a means of circumventing *Brown v. Board of Education*,¹⁷⁴ it was "[t]he federal courts, [the Supreme] Court among them, [that] adjudicated the ensuing challenges . . . and upheld the Constitution's equal protection requirement."¹⁷⁵ This presumptuous treatment of state courts is unfounded and dangerous to the fundamental principles of federalism on which our Constitution is based.¹⁷⁶

Treating state courts as "second rate constitutional arbiters," according to Justice Kennedy, is completely unjustified in light of the fact that the TIA itself has a "federal safeguard:" the TIA allows for federal courts to take jurisdiction when the State court is unable "to provide 'a plain, speedy, and efficient remedy.'"¹⁷⁷ Furthermore, a litigant in a State court always has resort to the ultimate federal forum for review of the State court decision: the United States Supreme Court.¹⁷⁸ Apparent from the majority's decision is the majority's fear that state courts are unable to correct violations of the federal Constitution, and that these violations can only be corrected when reviewed by a federal court. This fear, however, is unfounded and completely ignores constitutional jurisprudence established by Court precedent. Prior Court decisions have clearly established that state courts are not to be treated as inferior interpreters of the Constitution, and in the case a State court incorrectly interprets federal law, the Court is always available to correct any misinterpretations of

¹⁷³ *Id.* at 2293 (Kennedy, J., dissenting).

¹⁷⁴ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

¹⁷⁵ *Winn*, 124 S. Ct. at 2281 (majority opinion).

¹⁷⁶ *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 275 (1997) ("A doctrine based on the inherent inadequacy of state forums would run counter to basic principles of federalism.")

¹⁷⁷ *Winn*, 124 S. Ct. at 2293 (Kennedy, J., dissenting).

¹⁷⁸ *Id.* at 2297; *see also Winn v. Killian*, 321 F.3d 911, 914 (9th Cir. 2003) (arguing that "[s]tate judges take the same oath to uphold the federal Constitution that [federal judges] do, and like [federal judges] are subject to federal Supreme Court review").

the federal law.¹⁷⁹ Furthermore, by treating state courts as inferior constitutional interpreters, the majority has effectively disregarded Congress' determination that federal courts are not the only available forums in which a litigant may present constitutional issues.¹⁸⁰ The majority therefore erred in assuming that state courts are inadequate interpreters of the federal Constitution in relation to their federal court counterparts, since the majority ignored the fact that the state court litigant always has resort to the Court to review the State court decision.

Finally, by treating state courts as inferior constitutional interpreters, the *Winn* majority ignored the fact that state court judges are required by the federal Constitution to uphold federal law. In Arizona, State judges are required to take an oath before assuming office that requires them to "support the Constitution of the United States."¹⁸¹ The Court itself has previously held that state courts are obliged to uphold the federal Constitution, and that state judges are entirely competent to adjudicate constitutional issues.¹⁸² When coupled with the fact that the *Winn* majority disregarded the availability of the Court as a federal forum for a state court litigant, the fact that the majority pays no credence to the constitutional requirement that state judges uphold the Constitution in performing their duties leaves us with the "unfortunate result [that state courts are deprived] of

¹⁷⁹ See *Marbury v. Madison*, 5 U.S. 137, 178 (1803) (establishing the authority for the judiciary to review the constitutionality of executive and legislative acts); *Martin v. Hunter's Lessee*, 14 U.S. 304, 342 (1816) (holding that the Constitution presumes that the Supreme Court has the authority to review state court decisions in order to ensure uniformity in the interpretation of federal laws); *Cohens v. Virginia*, 19 U.S. 264, 414 (1821) (holding that criminal defendants could seek Supreme Court review of their State court conviction when they claimed that their conviction violated the Constitution); *Cooper v. Aaron*, 358 U.S. 1, 18-19 (1958) (holding that the Supreme Court has the authority to review state actions).

¹⁸⁰ See *California v. Grace Brethren Church*, 457 U.S. 393, 416-17 (1982) ("Carving out a special exception for taxpayers raising First Amendment claims would undermine significantly Congress' primary purpose to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes.") (internal quotations omitted); *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 515 n.19 (1981) ("The [TIA] embodied Congress' decision to transfer jurisdiction over a class of substantive federal claims from the federal district courts to the state courts, as long as state-court procedures were 'plain, speedy and efficient' and final review of the substantive federal claim could be obtained in [the] Court.>").

¹⁸¹ A.Z. CONST. art. 6, § 26 provides the following in regards to the oath an Arizona State judge must take prior to assuming office: "Each justice, judge and justice of the peace shall . . . take and subscribe an oath that he will *support the Constitution of the United States* and the Constitution of the State of Arizona, and that he will faithfully and impartially discharge the duties of his office to the best of his ability." (emphasis added).

¹⁸² See, e.g., *Alden v. Maine*, 527 U.S. 706, 755 (1999) ("The States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design. [The Court is] unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States.>").

the first opportunity to hear [state tax] cases and to grant the relief the Constitution requires.”¹⁸³

3. Principles of Comity Preclude Federal Interference with State Tax Systems

Although the *Winn* majority found it proper to look past the seemingly clear and unambiguous statutory language of the TIA in holding that the TIA does not apply to a federal challenge to a state tax credit, federal courts are still bound by the comity doctrine,¹⁸⁴ which requires federal courts to defer to state courts when a fundamental state interest is being challenged.¹⁸⁵ As noted by Justice Kennedy in his dissenting opinion, a federal court order affecting a state tax credit in any manner “will thwart and replace the State’s chosen tax policy,” which is precisely what the judicial principle of comity is meant to prohibit.¹⁸⁶

A federal court order declaring the Arizona STO tax credit unconstitutional and therefore invalid is inherently disruptive to a State’s tax system, since it will prevent the State from making a final determination of its taxpayer’s tax bills.¹⁸⁷ Arizona’s decision to offer the A.R.S. § 1089 tax credit to its taxpayers is purely an Arizona State interest, and as such, it should be afforded the respect and deference mandated by the judicial comity doctrine, since “[i]t is a troubling proposition for [the] Court to proceed on the assumption that the State’s interest in limiting the tax burden on its citizens to that for which its law provides is a secondary policy, deserving of little respect from [the Court].”¹⁸⁸ In *California v. Grace Brethren Church*, the Court noted that states have a legitimate interest in administering their respective tax systems, and “if federal declaratory relief were available to test state tax assessments,

¹⁸³ *Hibbs v. Winn*, 124 S. Ct. 2276, 2301 (2004) (Kennedy, J., dissenting).

¹⁸⁴ See BLACK’S LAW DICTIONARY 110 (2d pocket ed., West 2001) (defining “comity” as “[c]ourtesy among political entities (as nations, states, or courts of different jurisdictions), involving esp. mutual recognition of legislative, executive, and judicial acts”; and defining “judicial comity” as “[t]he respect a court of one state or jurisdiction shows to another state or jurisdiction in giving effect to the other’s laws and judicial decisions”) (emphasis added).

¹⁸⁵ See *Leading Case: F. Tax Injunction Act*, *supra* note 168, at 495, 496 n.80 (discussing how the principle of comity stems from the abstention doctrine found in *Younger v. Harris*, 401 U.S. 37 (1971), which prevents federal courts from interfering with a state case in which there exists an adequate state court remedy, and when it would be proper to abstain from taking jurisdiction when a respect for state functions demands it).

¹⁸⁶ *Winn*, 124 S. Ct. at 2300 (Kennedy, J., dissenting); see also *Rosewell v. LaSalle Nat’l Bank*, 450 U.S. 503, 522 (1981) (noting that the principal purpose of the TIA is “to limit drastically federal court jurisdiction to interfere with so important a local concern as the collection of taxes”).

¹⁸⁷ Brief for Petitioners, *supra* note 18, at 28.

¹⁸⁸ *Winn*, 124 S. Ct. at 2300.

state tax administration might be thrown into disarray.”¹⁸⁹

Furthermore, the TIA is meant to ensure that state courts are granted the exclusive authority to interpret state law, and in turn, to ensure that the State is accountable to its citizens for its policies and decisions.¹⁹⁰ A federal court order either invalidating or upholding a state tax law has the unfortunate effect of a lack of political accountability—distraught citizens are unable to hold state officials accountable because the challenge was adjudicated in federal court, and federal judges are appointed officials who are not subject to the political election process as are state judges. As previously noted by the Court, even if a state tax law has federal constitutional implications, as does the Arizona STO tax credit, “federal constitutional issues are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts.”¹⁹¹ In the distinct interest of maintaining longstanding principles of judicial comity among the federal and state courts, the *Winn* Court erred in allowing the challenge to the Arizona STO tax credit to proceed in federal court, since principles of comity demand federal courts to refrain from interfering in so delicate and vital an interest as a State’s tax system. As noted by Justice Kennedy, “the majority’s ruling has implications far beyond this case and will most certainly result in federal courts in other States and in other cases being required to interpret state tax law in order to complete their review of challenges to state tax statutes.”¹⁹²

IV. CONCLUSION

Whether the *Winn* Court has opened Pandora’s Box in terms of federal court intrusion into state tax systems has yet to be determined, and the true ramifications of the Court’s decision are speculative at the present moment. However, what remains true and apparent is that the *Winn* majority disregarded the plain language of a seemingly clear, concise, and unambiguous federal statute and stretched the congressional intent of the TIA to illogical levels. By accepting the Ninth Circuit’s definition of “assessment,” the Court has essentially approved of federal courts that pick and choose among relevant definitions of a statutory term in order to use those definitions necessary to

¹⁸⁹ *California v. Grace Brethren Church*, 457 U.S. 393, 410 (1982) (quoting *Perez v. Ledesma*, 401 U.S. 82, 128 n.17 (1971) (Brennan, J., concurring in part and dissenting in part)).

¹⁹⁰ *Winn*, 124 S. Ct. at 2299 (Kennedy, J., dissenting).

¹⁹¹ *Grace Brethren Church*, 457 U.S. at 410 (quoting *Perez*, 401 U.S. at 128 n.17 (Brennan, J., concurring in part and dissenting in part)).

¹⁹² *Winn*, 124 S. Ct. at 2300 (Kennedy, J., dissenting).

achieve a desired statutory interpretation.

The *Winn* decision has struck a vital blow to the principles of federalism on which our constitutional jurisprudence and maintenance of state sovereignty are based since federal courts are now granted jurisdiction in a realm previously off-limits to these courts: state tax systems. State court judges, in the eyes of the *Winn* Court, are merely second-rate constitutional interpreters who are not as fit for interpreting delicate constitutional issues as are their federal court counterparts. This result is especially troubling in light of the fact that state courts are traditionally known as courts of general jurisdiction, fully competent to litigate any constitutional issue so long as the issue does not fall under the exclusive jurisdiction of the federal courts.

As a result of *Winn*, with some clever pleading, a taxpayer or taxpaying entity seeking to challenge a State tax law is able to sidestep the State court for the more favorable federal forum, so long as the challenge does not inhibit the State's ability to *collect* revenue. As this Note has attempted to demonstrate, Congress was not exclusively concerned with protecting a State's ability to collect revenue in enacting the TIA, but instead intended to exclude federal courts from interfering with the State's *entire* tax system in any way so long as the State court provides an adequate remedy to the litigant. The *Winn* Court failed to acknowledge the clear intent of Congress in enacting the TIA, thus opening the door for federal court intervention in a traditionally restricted state area.

Hopefully, in light of this troubling decision, Congress, or the Court itself, will act quickly to remedy this wrong in order to maintain fundamental principles of federalism and state sovereignty in the administration of state tax systems. The integrity of our federal judicial system and the maintenance of our States as sovereign entities demand no less.