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FUNDAMENTAL RIGHTS IN THE UNITED STATES COURT OF FEDERAL CLAIMS

Jeremy P. Kehr[*]

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INTRODUCTION

The United States Court of Federal Claims has

> jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.[1]

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[1] 28 U.S.C. § 1491(a)(1) (2018).

This, the Tucker Act, has set the general parameters of the court's jurisdiction since 1887.[2] Thus, citizens can go to the Court of Federal Claims to enforce promises made to them by the federal government to pay money.[3] The Fifth Amendment's Takings Clause provides the most basic example by guaranteeing persons subject to the Constitution the right to payment should the government take their property for public use.[4] If the government has not paid a person for such a taking, he may seek recourse at the Court of Federal Claims under the Tucker Act.[5] In addition to the Fifth Amendment, a host of federal statutes, regulations, and contracts with federal agencies make promises to pay money to individuals and corporations.[6] These are also enforceable at the Court of Federal Claims.[7]

Several articles have examined the role of the United States Court of Federal Claims as the primary forum within the federal judiciary to mediate claims between the citizen and the sovereign.[8] Namely, they have made the case that the court has a unique and necessary role as a release valve to let off pressure generated by the frequent friction between the ever-expanding activities of the federal government and the

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[2] Tucker Act, ch. 359, § 1, 24 Stat. 505, 505 (1887) (codified as amended at 28 U.S.C. § 1491(a)(1)).

[3] *See* 28 U.S.C. § 1491(a)(1) (granting the United States Court of Federal Claims jurisdiction over claims against the United States involving "any express or implied contract[s] with the United States" as well as non-tort claims for "liquidated or unliquidated damages").

[4] U.S. CONST. amend. V.

[5] 28 U.S.C. § 1491(a)(1).

[6] *See, e.g.*, *Statistical Report for the Fiscal Year of October 1, 2021 – September 30, 2022*, U.S. CT. FED. CLAIMS, https://www.uscfc.uscourts.gov/sites/default/files/AOstats-2022.pdf (last visited Dec. 29, 2022) (noting that as of September 30, 2022, there are 299 pending contract cases before the Court of Federal Claims); Federal Employees' Compensation Act, 5 U.S.C. §§ 8101–8193 (2012); 28 C.F.R. §§ 74.1–.17 (implementing "section 105 of the Civil Liberties Act of 1988, which authorizes the Attorney General to locate, identify, and make payments to all eligible individuals of Japanese ancestry who were evacuated, relocated, and interned during World War II").

[7] *See* 28 U.S.C. § 1491(a)(1), (b)(2); *Statistical Report for the Fiscal Year of October 1, 2021 – September 30, 2022*, *supra* note 6 (indicating that the Court of Federal Claims decided 122 contract cases in the 2022 fiscal year).

[8] *See, e.g.*, Loren A. Smith, *Why a Court of Federal Claims?*, 71 GEO. WASH. L. REV. 773, 773 (2003) (discussing how the Court of Federal Claims provides accountability by hearing the claims of those the government has wronged); Gregory C. Sisk, *The Jurisdiction of the Court of Federal Claims and Forum Shopping in Money Claims Against the Federal Government*, 88 IND. L.J. 83, 89 (2013) (describing how the Court of Federal Claims serves as a major forum for monetary claims against the United States); Isaiah Richard Kalinowski, *The House Built on a Hillside: The Unique and Necessary Role of the United States Court of Federal Claims*, 23 TEX. REV. L. & POL. 542, 544–45 (2019) (noting that the Court of Federal Claims operates to level the playing field between individual claimants and the government, which traditionally enjoys sovereign immunity).

constitutionally- and statutorily-protected rights of citizens.[9] This friction often generates money damages, which may be recompensed in the Court of Federal Claims under the Tucker Act.[10] This Article seeks to highlight within that general role the types of cases in which the Court of Federal Claims has been and will continue to be called upon to protect certain key individual liberties guaranteed by the Constitution.

The Court of Federal Claims's cases are almost all for money.[11] The court does not have general, federal-question jurisdiction nor, with limited exception, injunctive powers.[12] Thus, the public often perceives the court as uninvolved in the difficult legal questions regarding the line between legitimate and illegitimate government conduct.[13] Those tasks enumerated in the first five articles of the Constitution set the metes of what the government may and should do, and the first ten amendments establish the bounds of what it may not.[14] As the breadth of those lines is

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[9] *See* Kalinowski, *supra* note 8, at 544–45, 548 (describing the Court of Federal Claims "as a necessary intermediary between the federal government and . . . individual citizens"); Smith, *supra* note 8, at 773, 778 (discussing how the Court of Federal Claims adds accountability by ensuring that private individuals can litigate fairly with the federal government).

[10] *See* Kalinowski, *supra* note 8, at 544 (noting there is "tension" between "federal sovereignty" and "individual liberty"); Sisk, *supra* note 8 (explaining the Court of Federal Claims principally deals with pecuniary disputes involving the United States and has the power to award monetary relief).

[11] *See* Sisk, *supra* note 8 ("The Tucker Act [and, in turn, the Court of Federal Claims] remains the 'foundation stone' in the adjudication of non-tort money claims against the United States.").

[12] *See id.* at 87–89 (observing that the Tucker Act only conveys jurisdiction to hear "money claims (other than in tort) based on federal statutes, executive regulations, and contracts" upon the Court of Federal Claims and that it only has the authority to grant monetary relief and incidental non-monetary relief).

[13] *Cf.* Steven L. Schooner, *The Future: Scrutinizing the Empirical Case for the Court of Federal Claims*, 71 GEO. WASH. L. REV. 714, 717–18, 720–21 (2003) (arguing for the elimination of the Court of Federal Claims because, inter alia, it is not truly a specialty court which provides a unique venue for claimants).

[14] U.S. CONST. art. I (concerning the United States House of Representatives and the United States Senate, enumerating their powers and highlighting restrictions); *id.* art. II (creating the executive office of the president and detailing the president's powers and limitations); *id.* art. III (vesting judicial power in a Supreme Court and describing the Court's jurisdiction); *id.* art. IV (outlining the relationship between the States and requiring that each State operates as a republican form of government); *id.* art. V (describing the amendment process); *id.* amend. I (prohibiting Congress from making laws infringing on religious liberty, free speech, the free press, assembly, and petition for the redress of grievances); *id.* amend. II (establishing the right to keep and bear arms); *id.* amend. III (restricting the government's ability to keep soldiers in a person's house); *id.* amend. IV (limiting unreasonable searches and seizures of a person or his/her property); *id.* amend. V (enshrining several rights, including the right to indictment by a grand jury, the prohibition against double jeopardy, the protection against self-incrimination, and due process); *id.* amend. VI (outlining rights of a criminal defendant); *id.* amend. VII (securing the right to a jury trial "in suits at common law" when the amount in controversy exceeds twenty dollars);

pushed out by the expansion of the regulatory state,[15] the use of spending and taxing to achieve policy aims,[16] and the changing rules and regulations governing federal employees and those transacting with the government,[17] the chances to overstep the lines and violate a constitutionally protected right increase.

Likewise, the instances in which citizens have the right to payment from the government, whether sourced commercially in contracts or due to some right or benefit guaranteed by federal law, are expanding rapidly.[18] Therefore, it stands to reason that the chances of an unconstitutional refusal of payment by federal administrators also increases. Monetary recourse for such a failure to pay most often lies in the Court of Federal Claims.[19] Thus, I argue that the court stands as an important forum for the vindication of constitutional rights. The first Section of this Article considers examples from the past twenty-seven years.[20] The second Section briefly looks to the future.

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id. amend. VIII (proscribing excessive punishment); *id.* amend. IX (recognizing there may be rights not listed in the Constitution); *id.* amend. X (stating that the federal government only has the powers enumerated in the Constitution and reserving the remainder "to the States respectively, or to the people").

[15] *See, e.g.*, Joseph P. Tomain, *Gridlock, Lobbying, and Democracy*, 7 WAKE FORREST J.L. & POL'Y 87, 91–92 (2017) (explaining how increased regulation is evidenced by expanding legislative activity and the growing number of pages in the Federal Register).

[16] *See* Ruth Mason, *Federalism and the Taxing Power*, 99 CALIF. L. REV. 975, 977, 983 (2011) (explaining how Congress uses its taxing and spending power to accomplish its policy goals).

[17] *See* MAEVE P. CAREY, CONG. RSCH. SERV., R43056, COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF FEDERAL REGULATIONS, AND PAGES IN THE *FEDERAL REGISTER* 5–6 tbl.1 (2014) (cataloging how each year thousands of new federal rules are published in the Federal Register). *See generally Federal Register Office*, FED. REG., https://www.federalregister.gov/agencies/federal-register-office (last visited Dec. 23, 2022) (explaining how the Federal Register contains published executive orders, agency regulations, and rules).

[18] *E.g.*, Brendan Williams, *The Inexorable Expansion of Medicaid Expansion*, 39 N. ILL. U. L. REV. 240, 240–42 (2019) (examining how Medicaid has expanded across the United States); Andrew Hammond, *Litigating Welfare Rights: Medicaid, SNAP, and the Legacy of the New Property*, 115 NW. U. L. REV. 361, 382–87 (2020) (detailing how medical- and food-assistance programs have continued to grow since their inception).

[19] *See* 28 U.S.C. § 1491(a)(1), (b)(2) (limiting the scope of the Court of Federal Claims's jurisdiction to non-tort claims for damages based upon the Constitution, federal statutes, federal regulations, or contracts with the United States); *Court Role and Structure*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/court-role-and-structure (last visited Jan. 11, 2022) ("The U.S. Court of Federal Claims deals with most claims for money damages against the U.S. government.").

[20] The Court of Federal Claims's current iteration dates to 1982, when the Federal Courts Improvement Act of 1982 separated the trial and appellate functions of the old United States Court of Claims into the Court of Federal Claims for the trial jurisdiction and the Court of Appeals for the Federal Circuit for the appellate jurisdiction. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25.

I. FUNDAMENTAL RIGHTS IN THE COURT OF FEDERAL CLAIMS

Although the property rights protected by the Takings Clause are the most obvious example within the court's jurisdiction, vital as they are, this survey is focused on cases that implicate the First and Fifth Amendments' guarantees of fundamental personal rights: namely, the freedoms of speech and religion protected by the First Amendment and the guarantees of due process and equal protection found in the Fifth Amendment.

A. Freedom of Religion

We begin with the First Amendment, which enjoins Congress from making any law "prohibiting the free exercise" of religion.[21] Since the federal government—any agency, branch, department, or arm of it—may act only pursuant to a constitutional grant of authority,[22] no federal action may prohibit the free exercise of religion.[23] Moreover, religion may not be discriminated against, nor may penalties be imposed on the basis of religion, without a compelling state interest that cannot be accomplished in a less intrusive way.[24] No government action may deprive persons of promised payments or benefits due to their religious beliefs or exercise of religion.[25] Federal employees, members of the military, taxpayers, and persons otherwise transacting with the United States benefit from this protection in their commercial and employment relationships with the government.

1. Pay Cases

First Amendment questions arise in the Court of Federal Claims's jurisdiction over disputes regarding military pay. The court has jurisdiction to consider claims brought by current or former members of

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[21] U.S. CONST. amend. I.

[22] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 534–35 (2012) (opinion of Roberts, C.J.) ("The Federal Government has expanded dramatically over the past two centuries, but it still must show that a constitutional grant of power authorizes each of its actions."); *see* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 323–24, 405 (1819) ("This government is acknowledged by all to be one of enumerated powers.").

[23] Emp. Div. v. Smith, 494 U.S. 872, 877 (1990) ("Thus, the First Amendment obviously excludes all 'governmental regulation of religious *beliefs* as such.'" (quoting Sherbert v. Verner, 374 U.S. 398, 402 (1963))). Of course, as recognized in *Smith*, that does not mean that the government cannot regulate any conduct taken in pursuit of religious conviction. In *Smith*, the Court upheld an Oregon controlled substance-ban despite it making the religious use of peyote illegal. *Id.* at 890. The Court stated that, although belief could never be regulated, a neutral, generally-applicable regulation of religious conduct was permissible under the First Amendment. *Id.* at 878–82.

[24] *E.g.*, Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2024 (2017) (applying strict scrutiny because a governmental program effectively "impose[d] a penalty on the free exercise of religion" by requiring a church to renounce its religious character to participate).

[25] *See id.* at 2024–25 (holding that a Missouri law disqualifying religious institutions from certain grant funds violated the Free Exercise Clause).

the military based on the Military Pay Act, which provides that "member[s] of a uniformed service" are "entitled to the basic pay of the pay grade to which [they are] assigned."[26] If a member is discharged in violation of law or regulation, jurisdiction is available under the Tucker Act because the Military Pay Act provides a substantive right to payment, *i.e.*, it gives rise to a money claim.[27] Similarly, a reduction in pay, adverse evaluation, or failure to promote might also give rise to actions at the court if those claims implicate a right to present payment.[28] A fairly recent case, *Klingenschmitt v. United States*,[29] discussed below, is an excellent example of a First Amendment challenge to the discharge of a service member brought at the Court of Federal Claims.

In *Klingenschmitt*, a naval chaplain was discharged after the Navy failed to recertify him as a chaplain.[30] Dr. Klingenschmitt changed the protestant denomination with which his chaplaincy was associated.[31] Under the applicable regulations, the fact that he lost his ecclesiastical endorsement—even though he obtained a new endorsement prior to being discharged—gave the Navy the opportunity to reconsider whether he should continue as a chaplain.[32] The discharge was a culmination of several years of disagreement between Dr. Klingenschmitt and his chains of command, which started with a dispute over the sectarian nature of his public prayers and sermons.[33] He was counseled by the captain of the ship on which he served to "deliver a more ecumenical message" and to help the captain "in 'inspiring Sailors to reach for their better selves' no matter

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[26] 37 U.S.C. § 204(a)(1) (2018); *see* Martinez v. United States, 333 F.3d 1295, 1303 (Fed. Cir. 2003) (referring to 37 U.S.C. § 204 as the "Military Pay Act"). Members of the Reserves receive pay pursuant to 37 U.S.C. § 206.

[27] *Martinez*, 333 F.3d at 1303.

[28] *See* Smith v. Sec'y of the Army, 384 F.3d 1288, 1294–95 (Fed. Cir. 2004) (explaining that although generally the Military Pay Act does not entitle a service member to the pay of a rank for which he/she is not selected, failure to promote does not give rise to a cause of action when "'there is a clear-cut legal entitlement' to the promotion in question" or if "the decision not to promote . . . leads to the service member's compelled discharge" (quoting Skinner v. United States, 594 F.2d 824, 830 (Ct. Cl. 1979))); Volk v. United States, 111 Fed. Cl. 313, 317, 326 (2013) (deciding whether the Navy improperly revoked plaintiff's classification as a Navy SEAL, which resulted in a reduction in pay). Other statutes that grant rights to payment, such as retirement pensions, disability benefits, and separation pay, also give rise to claims at the court. *See, e.g.*, Fisher v. United States, 402 F.3d 1167, 1175 (Fed. Cir. 2005) (holding that the Court of Federal Claims has jurisdiction over claims for disability retirement pay); Collins v. United States, 101 Fed. Cl. 435, 455–56 (2011) (finding jurisdiction over a separation pay claim); Gant v. United States, 18 Cl. Ct. 442, 442–43, 447–48 (1989) (holding the court had jurisdiction over claims for retirement pay), *rev'd on other grounds*, 918 F.2d 168 (Fed. Cir. 1990).

[29] 119 Fed. Cl. 163 (2014).

[30] *Id.* at 175–77.

[31] *Id.* at 175–76.

[32] *Id.* at 175–76, 192.

[33] *See id.* at 167–77.

what faith or belief system they practice."[34] Dr. Klingenschmitt was eventually court martialed after he wore his uniform, in contravention of an order, to a public event put on by a clergy-lobbying group protesting a Navy policy that prohibited concluding public prayers with the phrase "through Jesus Christ our Lord."[35] Dr. Klingenschmitt averred that the event was a bona fide religious service, while his commanding officer maintained that it was a press conference.[36] Dr. Klingenschmitt was court martialed and convicted for disobeying his superior's order.[37] During the two years in which these events were taking place, his performance ratings decreased, owing largely to the frequent friction Dr. Klingenschmitt experienced with his command.[38] His declining service record and court martial were cited as reasons why the Navy decided it would administratively separate Dr. Klingenschmitt from service rather than recertify him as a chaplain with his new ecclesiastical endorsement.[39]

After attempting a variety of administrative avenues and an unsuccessful suit in district court,[40] Dr. Klingenschmitt filed a complaint at the Court of Federal Claims, challenging his court martial, negative performance record, and ultimately his discharge.[41] He alleged, among other things, a violation of the Religious Freedom Restoration Act

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[34] *Id.* at 168 (quoting Administrative Record at 899, *Klingenschmitt*, 119 Fed. Cl. 163 (No. 11-723C)).

[35] *Id.* at 170–73, 175 (quoting Administrative Record, *supra* note 34).

[36] *See id.* at 173–74, 193 (recounting how Dr. Klingenschmitt's commanding officer initiated disciplinary proceedings against him for attending "the March 30th press conference" in uniform while Dr. Klingenschmitt argued the order violated his First Amendment rights).

[37] *Id.* at 174–75.

[38] *See id.* at 169–74 (recounting how Dr. Klingenschmitt's scores on his fitness reports declined over time and explaining the friction between Dr. Klingenschmitt and his superior officers, including his filing of a complaint against his former captain and the ongoing conflict with his commanding officer about permissible activities while in uniform).

[39] *Id.* at 177.

[40] Klingenschmitt v. Winter, 275 Fed. App'x 12, 13 (D.C. Cir. 2008) (affirming the district court's dismissal of the complaint); *see Klingenschmitt*, 119 Fed. Cl. at 174–75, 177–80 (noting the different appeal avenues Dr. Klingenschmitt pursued).

[41] *Klingenschmitt*, 119 Fed. Cl. at 166–67.

("RFRA"),[42] the First Amendment, and naval regulations.[43] The essence of Dr. Klingenschmitt's complaint was that the actions of his superiors and naval policies operated to deprive him of his free exercise of religion in violation of the First Amendment and RFRA.[44]

The government moved to dismiss the First Amendment and RFRA claims as outside of the court's jurisdiction because neither by itself mandates the payment of money.[45] The court denied the motion, holding that the law was clear that, because the Military Pay Act was a substantive right to payment, the court had jurisdiction over his allegations of statutory and constitutional violations.[46] On the merits, however, Judge Kaplan ruled against Dr. Klingenschmitt on all counts.[47]

The court affirmed the decision of the Board for Correction of Naval Records ("BCNR") regarding the legality of the negative performance reports.[48] Dr. Klingenschmitt alleged that the negative marks were in retaliation for his sermons and advocacy against naval policies governing chaplains.[49] Judge Kaplan disagreed, finding no evidence of any procedural violation and declining to go behind the record to "second guess the evaluation of his performance or his superior's assessment of his promotion potential" because such matters are beyond the purview of the courts.[50] The court also relied on an advisory opinion from the Navy Personnel Command submitted to the BCNR regarding the allegations of

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[42] *Id.* at 167. RFRA, largely in response to the *Smith* decision of the Supreme Court, prohibits the federal government from "substantially burden[ing] a person's exercise of religion" if the burden results from a rule of general applicability unless that burden "(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest." 42 U.S.C. § 2000bb-1(a)–(b) (2018); *see id.* § 2000bb(a)(4), (b)(1) (indicating Congress's purpose was to undo *Employment Division v. Smith* and return to the "compelling interest test" of *Sherbert v. Verner*, 374 U.S. 398 (1963)). RFRA states that it can be asserted "as a claim or defense in a judicial proceeding" and used to "obtain appropriate relief against a government." § 2000bb-1(c). The Supreme Court has held RFRA unconstitutional as applied against the States because it is beyond the authority granted by the Fourteenth Amendment to enforce the earlier amendments, City of Boerne v. Flores, 521 U.S. 507, 536 (1997), but it continues as a valid regulation of federal agency conduct, *e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 695 (2014).

[43] *Klingenschmitt*, 119 Fed. Cl. at 167.

[44] *Id.*

[45] *Id.* at 181.

[46] *Id.* at 184 (holding that back-pay cases that allege wrongful discharge based on constitutional or statutory grounds are within the Court of Federal Claims's Tucker Act jurisdiction). However, the court dismissed the plaintiff's specific First Amendment challenge to the naval regulation regarding sectarian prayers as unnecessary to resolve plaintiff's pay claims, and it further held those claims were therefore outside of the court's jurisdiction because it was not part and parcel with a claim for pay owed under the statute. *Id.* at 185.

[47] *Id.* at 187–89, 191, 193–94.

[48] *Id.* at 186–87.

[49] *Id.* at 186.

[50] *Id.*

retaliation in violation of Dr. Klingenschmitt's religious rights.[51] Navy Personnel Command relied on an earlier investigation conducted when Dr. Klingenschmitt first complained about his declining scores.[52] As a result, neither the Navy nor the BCNR found any evidence that these actions were taken in retaliation for Dr. Klingenschmitt's religious activities.[53] The court agreed, finding no irrationality in those conclusions.[54]

The court also upheld the eventual discharge of Dr. Klingenschmitt.[55] Judge Kaplan considered first the procedural regularity of the discharge proceedings and found no fault in the Navy's actions because the applicable regulations gave the Navy the right not to recertify him.[56] The court also considered the First Amendment implications of the order that Dr. Klingenschmitt received not to wear his uniform to a media or political event.[57] Dr. Klingenschmitt argued that he was participating in a religious service, and, thus, the order and everything that flowed out of it (court martial and discharge) were violations of his religious freedom and RFRA.[58] Judge Kaplan held for the Navy, finding that the event in question was of a political, not religious, character.[59] Thus, the order that he not wear the uniform to the event did not violate his religious freedom.[60]

Besides its importance as an example of a First Amendment challenge brought at the Court of Federal Claims, the *Klingenschmitt* case provides an excellent opportunity to examine the intersection of constitutional law and administrative review. Because the court applies a deferential standard of review to the record in military pay cases[61] and because that record typically includes only the service member's personnel file, there is a potential tension between the standards of review in such

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[51] *Id.* at 187–89.

[52] *Id.* at 187 ("[The advisory opinion] . . . was based upon an extensive internal investigation of Dr. Klingenschmitt's . . . grievance, which had pressed essentially the same allegations of retaliation . . . that Dr. Klingenschmitt presented to the BCNR regarding his 2005 fitness report.").

[53] *See id.* at 170, 179–80.

[54] *See id.* at 186–89 (finding the 2005 and 2006 fitness reports were legally sound).

[55] *Id.* at 193–94.

[56] *Id.* at 191–93.

[57] *Id.* at 193.

[58] *Id.* at 190, 193.

[59] *Id.* at 193.

[60] *Id.* ("The Order did not limit Dr. Klingenschmitt's right to engage in any religious practices . . . . It simply prohibited Dr. Klingenschmitt from engaging in this activity while wearing his uniform at what was clearly a political event and not, as Dr. Klingenschmitt seems to suggest, a bona fide religious service. Therefore, taking this infraction into consideration [when contemplating his recertification] . . . did not violate either his First Amendment rights or RFRA.").

[61] *See, e.g.*, Heisig v. United States, 719 F.2d 1153, 1156 (Fed. Cir. 1983) (noting the strong deference paid to administrative board decisions by the judiciary).

a case and a claimant's ability to vindicate his or her fundamental rights in court.[62] The *Klingenschmitt* court generally took a "hands-off" approach to the record, as is normally required in administrative review cases, taking at face value the conclusions reached by the Navy when it investigated Dr. Klingenschmitt's initial complaints of constitutionally impermissible retaliation.[63]

Religious accommodation in the military is another First Amendment issue that can arise within Tucker Act jurisdiction over Military Pay Act claims.[64] The denial of an accommodation will often result in discharge or other negative consequence for service members impacted by the decision not to accommodate.[65] The court may again be called upon in the future to decide a challenge to such a decision on First Amendment grounds.

2. Tax Cases

The court's tax jurisdiction can also touch upon the First Amendment's protections for the practice of religion. Congress has seen fit to use the Internal Revenue Code ("IRC") as a tool with which policy goals might be achieved.[66] One such long-standing policy, often the subject of political debate, is the hands-off approach that Congress has dictated the Internal Revenue Service ("IRS") take with religious institutions, exempting them from taxation completely and generally keeping the IRS out of their activities.[67] Although the law considers such protections to be a matter of legislative grace,[68] the legal issues that arise when that grace

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[62] *See* Steven B. Lichtman, *The Justices and the Generals: A Critical Examination of the U.S. Supreme Court's Tradition of Deference to the Military, 1918-2004*, 65 MD. L. REV. 907, 915–16, 922–25, 927–28 (2006) (detailing several instances in which the deferential standard of review towards military decisions prevented military members from protecting their basic civil rights).

[63] *Klingenschmitt*, 119 Fed. Cl. at 186–87. The Federal Circuit affirmed by per curiam order without an opinion. Klingenschmitt v. United States, 623 F. App'x. 1014 (Fed. Cir. 2015) (per curiam).

[64] *See, e.g.,* Carmichael v. United States, 66 Fed. Cl. 115, 116–17 (2005) (detailing a military-pay case originating from a religious-accommodation dispute).

[65] *See id.* at 117–18 (detailing how a discharged Navy officer brought suit challenging the lack of accommodation for his belief that use of his social security number as his Navy personnel identification number was evil).

[66] *See* Mason, *supra* note 16, at 991–92 (noting several examples of how Congress passes tax laws to promote certain policy initiatives).

[67] The Internal Revenue Code exempts from taxation any organization "operated exclusively for religious . . . purposes." I.R.C. § 501(a), (c)(3) (2018). Churches are exempt from filing tax returns. *Id.* § 6033(a)(3)(A)(i). Other religious organizations are required to file only informational returns, § 6033(a)(1), and they are protected from audit unless a specific written determination has been made by a "high-level Treasury official," *id.* § 7611(a)(2).

[68] *E.g.*, Church of the Visible Intel. that Governs the Universe v. United States, 4 Cl. Ct. 55, 65 (1983) ("Exemption from taxation as a church is not a right, but a matter of legislative grace.").

is not afforded to a particular group skirt the line drawn by the First Amendment's Free Exercise Clause.[69]

The IRS does not always accept the representations of groups claiming religious exemption from taxation.[70] This often results in federal litigation, jurisdiction over which is limited to the Court of Federal Claims, United States Tax Court, and United States District Court for the District of Columbia.[71] A noteworthy example is a 1992 decision, *Church of Spiritual Technology v. United States*, in which an organization within the umbrella of the Church of Scientology challenged the IRS Commissioner's decision denying it tax-exempt status as a religious organization.[72]

The court in *Church of Spiritual Technology* reviewed a voluminous administrative record regarding the organization's activities in response to the IRS's assertion that its activities were not limited to those that were religious.[73] The plaintiff's legal challenge called upon the court to decide whether the church's activities comported with the definition of tax-exempt status found in the Treasury Regulations implementing § 501(c)(3) of the IRC.[74] The court was careful, however, to avoid questioning the legitimacy of Scientology as a religion.[75] The Treasury Regulations implementing § 501(c)(3) impose a two-part test that an organization must meet to qualify as exempt: it "must be both [(1)] organized and [(2)] operated exclusively for one or more of the purposes

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[69] *See* Erika King, *Tax Exemptions and the Establishment Clause*, 49 SYRACUSE L. REV. 971, 1011–13 (noting potential First Amendment concerns when the government defines some groups as religious and others as non-religious, including how such a practice gives rise to Free Exercise questions, even if not precluded by the *Employment Division v. Smith* decision).

[70] *Id.* at 1011 ("Nevertheless, plenty of instances can be found where the I.R.S. . . . concluded that a particular entity was simply not a 'church.'").

[71] I.R.C. § 7428(a) (2018). Challenges to the IRS Commissioner's decision to withdraw tax-exempt status from an organization are one area of the court's jurisdiction that is not limited to money claims. *See id.* Section 7428(a) of the Internal Revenue Code creates a cause of action for declaratory relief at the Court of Federal Claims to challenge decisions by the IRS to deny tax-exempt status. *Id.*

[72] 26 Cl. Ct. 713, 714, 719–20 (1992).

[73] *See id.* at 728 (noting that the administrative record was one of the largest in history).

[74] *Id.* at 729–30. Although challenges to IRS determinations on tax exemption are decided on an administrative record, the court's review is de novo. New Dynamics Found. v. United States, 70 Fed. Cl. 782, 794–95 (2006). Plaintiffs in such cases bear the burden to establish that the IRS's decision was legally infirm or factually incorrect. *See* Church of Spiritual Tech. v. United States, 18 Cl. Ct. 247, 250 (1989) ("[T]he facts in the administrative record are deemed true and the taxpayer bears the burden of proving the IRS ruling was wrong.").

[75] *See Church of Spiritual Tech.*, 26 Cl. Ct. at 738 (mentioning the legitimacy of Scientology only to say, "Nor does the court hold that Scientology is not a religion. Plainly it is").

specified" in § 501(c)(3), including religious purposes.[76] Judge Bruggink found that the record established the opposite.[77] Ultimately, while steering clear of judging the "sincerity of the beliefs of those who practice Scientology," the court upheld the Commissioner's decision based on that particular organization's financially-motivated purpose and history of "hostility and uncooperativeness that [was] inconsistent with removing doubts" about its tax-exempt status.[78]

A similar vein of cases under the court's tax jurisdiction regarding the bona fides of an organization's claim to be a church, although again ostensibly matters of statutory construction, touch upon the religious liberty guaranteed by the First Amendment.[79] Status under the tax code as a church, rather than a religious organization, brings with it additional tax benefits.[80] Cases challenging the IRS's assessment that an organization is not a church present a difficult question given the First Amendment's prohibition against government interference in religion. The Court of Federal Claims's decision in *Foundation of Human Understanding v. United States* is a good example.[81] There, the IRS revoked the foundation's status as a church but left intact its status as an otherwise tax-exempt entity.[82] Plaintiff sought declaratory relief at the Court of Federal Claims both under the applicable regulations and guidelines[83] and as a First Amendment challenge to the IRS action.[84]

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[76] Treas. Reg. § 1.501(c)(3)–1(a).

[77] *See Church of Spiritual Tech.*, 26 Cl. Ct. at 735, 737–38.

[78] *Id.* at 735–36, 738. The court's predecessor, the Court of Claims, heard a similar claim in the 1960s brought by the Founding Church of Scientology. *See* Founding Church of Scientology v. United States, 412 F.2d 1197 (Ct. Cl. 1969). The Court of Claims held then that the Founding Church was engaged in the business of enriching its founder, Mr. L. Ron Hubbard, and thus had a purpose at odds with the code's tax exemption for churches. *Id.* at 1201–02.

[79] *E.g.*, Found. of Hum. Understanding v. United States, 88 Fed. Cl. 203, 207, 234 (2009) (upholding an IRS determination that an organization did not qualify as a church as defined under I.R.C. § 170(b)(1)(A) although it was a private, religious institution); Church of the Visible Intel. that Governs the Universe v. United States, 4 Cl. Ct. 55, 65 (1983) (holding that the plaintiff was a tax-exempt religious organization but not a church under § 170(b)(1)(A)).

[80] *See supra* note 67 and accompanying text (highlighting that churches are exempt from filing tax returns).

[81] *See* 88 Fed. Cl. at 217 (noting the court's uneasiness regarding the designation of organizations as churches by the government because of the constitutional boundaries between church and state).

[82] *Id.* at 207–08 (noting that, after an investigation, the IRS revoked the foundation's status as a church but allowed it to remain a tax-exempt organization).

[83] *Id.* at 208. The IRS has published guidelines for how it decides the tax-exempt status of a church. IRS, PUB. 1828, TAX GUIDE FOR CHURCHES & RELIGIOUS ORGANIZATIONS 2, 33 (2015). Although not the subject of notice and comment rulemaking, the IRS applies them regularly to make these determinations, and the courts have followed suit. *See Found. of Hum. Understanding*, 88 Fed. Cl. at 219 (providing multiple citations to courts that have applied the IRS's fourteen criteria).

[84] *Id.* at 216.

Ultimately the court did not reach the constitutional challenge because it found the issue to have been too vaguely asserted and not fully briefed by the parties.[85] The court did express its reservations that "[t]he criteria used by the IRS to determine church status for tax purposes . . . appears to favor some forms of religious expression over others," which the court cautioned might run afoul of both the Establishment and Free Exercise Clauses of the First Amendment.[86] The end result for the plaintiff in *Foundation of Human Understanding* was that the IRS's determination was left undisturbed because the core purpose of the organization was not found to be primarily that of a church.[87] The decision stands, however, as a reminder of what may be at stake in tax litigation at the Court of Federal Claims.

B. Freedom of Speech

Issues involving the First Amendment's guarantee of freedom of speech[88] also arise within the court's jurisdiction. In military-pay cases, a discharge or other negative consequence of some protected speech might violate the First Amendment.[89] Because a service member has a statutory right to receive pay until legally separated from service, jurisdiction under

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[85] *Id.* at 216–17.

[86] *Id.* at 217.

[87] *Id.* at 234. The court first considered fourteen different factors that the IRS uses in deciding whether an entity is a church under the Internal Revenue Code. *Id.* at 223–32 (finding that the lack of a congregation and lack of regular worship services was inconsistent with being a church). The court also applied an "associational test" often employed by the Tax Court and district courts, holding that plaintiff was not a church because its activities lacked the associational aspects traditionally fulfilled by a church. *Id.* at 232, 234.

[88] The First Amendment prohibits Congress from making any law "abridging the freedom of speech." U.S. CONST. amend. I.

[89] Tucker Act jurisdiction over civilian pay claims was limited by the advent of the Civil Service Reform Act of 1978 ("CSRA"), which created a comprehensive scheme of administrative review, divesting the court of its Tucker Act jurisdiction over Back Pay Act cases stemming from adverse personnel actions. *See* United States v. Fausto, 484 U.S. 439, 454 (1988) ("[W]e find that under the comprehensive and integrated review scheme of the CSRA, the Claims Court (and any other court relying on Tucker Act jurisdiction) is not an 'appropriate authority' to review an agency's personnel determination."). One example prior to the holding in *Fausto* (arising also prior to the CSRA) is that of *Pearson v. United States*, 555 F. Supp. 388 (Cl. Ct. 1983). In *Pearson*, the court heard a challenge to the firing of a research veterinarian by the Department of the Interior's Fish and Wildlife Service. *Id.* at 389. Mr. Pearson filed suit under the Tucker Act, claiming that his firing was retaliation for protected speech. *Id*. at 389, 397. After a lengthy recitation of the facts, the court ruled against Mr. Pearson, finding that the record showed that the firing was for legitimate, non-speech related reasons. *Id*. at 402–03. The Court of Federal Claims's civilian-pay-claim jurisdiction now primarily consists of suits for discriminatory pay differences under the Equal Pay Act, 29 U.S.C. § 206(d)(1) (2018), and for withheld overtime under the Federal Labor Standards Act, 29 U.S.C. § 207 (2018) (FLSA's "Maximum Hours" provision). *See, e.g.,* Boyer v. United States, 159 Fed. Cl. 387, 390 (2022) (observing that the plaintiff filed under Equal Pay Act); Medrano v. United States, 159 Fed. Cl. 537, 539–40 (2022) (observing that the plaintiffs filed under Fair Labor Standards Act).

the Tucker Act attaches if a service member is discharged for exercising his freedom of speech.[90] In *Lee v. United States*, a former military officer sued after being discharged for substandard performance of duty based on his disclosure of moral reservations regarding the use of nuclear weapons.[91] Mr. Lee brought suit in the Court of Federal Claims, alleging wrongful discharge based on the Air Force's failure to properly follow its own procedures and because his discharge was otherwise a violation of his freedom of speech and liberty rights guaranteed by the First and Fifth Amendments.[92]

The court found that it had jurisdiction over the First Amendment cause of action because it was connected to a claim for a statutory right to payment.[93] The court thus considered the merits of the free-speech claim, undertaking a two-part analysis of whether the speech regarded a public or private concern and whether plaintiff's right to speak was outweighed by the Air Force's need to ensure that members carry out lawful orders.[94] The court found against Mr. Lee on both questions because his private reservations regarding the use of nuclear force did not concern the claimed safety interest of the public and because the military had a compelling need to be assured that service members carry out lawful orders.[95]

One more example from the court's jurisprudence bears mentioning: a class action brought by Federal Bureau of Investigation ("FBI") police officers seeking back pay for an alleged failure to follow the statutory scheme for pay rates and raises.[96] None of the claims asserted by the plaintiffs involved the First Amendment, but a free-speech issue arose in the context of a request from the government that any documents submitted to class counsel be first submitted to the FBI for review and

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[90] *See* Smith v. Sec'y of Army, 384 F.3d 1288, 1294–95 (Fed. Cir. 2004) (noting that the Military Pay Act confers a statutory right to pay until legally separated from service, creating jurisdiction in the Federal Court of Claims under the Tucker Act); 28 U.S.C. § 1491(a)(1) ("The United States Court of Federal Claims shall have jurisdiction to render upon any claim against the United States founded . . . upon the Constitution . . . ."); U.S. CONST. amend. I (prohibiting the government from restricting free speech).

[91] 32 Fed. Cl. 530, 534 (1995).

[92] *Id.* at 536.

[93] *Id.* at 542. The court also found, however, that it did not have jurisdiction to consider the due-process challenge because the asserted liberty interest involved—a stigmatizing public record of discharge (substandard performance)—would be vindicated by a hearing at which the claimant could clear his name but would not give right to back pay or reinstatement to active duty. *Id.* at 545–46. The court noted that several of its other decisions had assumed jurisdiction existed over due-process allegations connected to pay claims, but it declined to follow the same assumption. *Id.* at 543–45.

[94] *See id.* at 542.

[95] *Id.* at 543. The court also rejected plaintiff's argument that the Air Force had not followed its own regulations in discharging him for a mandatory disclosure, finding that no mandated process was denied and that the decision to release a member of the reserves was otherwise purely discretionary and, therefore, not justiciable. *Id.* at 540–42.

[96] King v. United States, 96 Fed. Cl. 99, 100 (2011).

released only if it determined that they were not confidential.[97] The plaintiffs objected, arguing both an attorney-client privilege and free-speech basis on which the request should be denied.[98] The plaintiffs offered an alternative arrangement aimed at protecting the defendant's interests in protecting confidential information from unauthorized disclosure.[99]

Ultimately, the court found neither party's proposal appropriate under the First Amendment.[100] The court balanced "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees."[101] Relying on precedent from the D.C. Circuit, the court stated that the First Amendment does not provide a blank check to government employees to disclose confidential information to counsel.[102] The government's interest in preserving the confidentiality of certain information had to be accounted for.[103] The court found that the fact that the FBI was the agency involved weighed heavily in favor of the government because of its role in law enforcement and national security.[104] The government's suggestion, however, that it have unfettered discretion in deciding whether information could be shared with the plaintiffs' counsel was a bridge too far for the court under the First Amendment.[105] The court thus struck a balance by requiring the FBI to disclose and explain to the court by written memo, for *in camera* review, any instance in which it denied documents to plaintiffs' counsel.[106] The court reserved a veto if it disagreed with the FBI's determination.[107]

C. Due Process and Equal Protection

The Fifth Amendment to the Constitution provides for the protection of several basic rights that preserve the fundamental fairness of our

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[97] *Id.* at 100–01.

[98] *Id.* at 100.

[99] *Id.* (noting that the plaintiffs' proposed protective order would allow members to provide documents to class counsel so long as (1) the documents were normally available to the members in their respective positions, (2) the documents would be kept confidential until they could be reviewed for privileged information by the Department of Justice, and (3) the documents that had privileged information would be returned to the defendant).

[100] *Id.* at 104.

[101] *Id.* at 101 (alterations in original) (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968)).

[102] *Id.*

[103] *See id.* at 101–02, 104.

[104] *Id.* at 102.

[105] *See id.* at 104.

[106] *Id.* at 104–05. The court also allowed defendant to request from the court a claw back of any information already anonymously produced to counsel. *Id.* at 105.

[107] *Id.* at 104–05.

government's actions.[108] As briefly mentioned above, it limits the government's eminent-domain power so that property may only be taken for a legitimate public purpose, and, when taken, it guarantees "just compensation" be paid to the owner.[109] The Court of Federal Claims has a particular expertise in protecting the latter promise,[110] though that is beyond the scope of this Article. A number of cases at the Court of Federal Claims, however, involve other of the fundamental-fairness and liberty protections afforded by the Due Process Clause of the Fifth Amendment.

1. Pay Cases

In the arena of pay cases, a number of claims have been brought at the Court of Federal Claims alleging discriminatory differences in wages or hiring and retention policies in violation of the equal protection under the law promised by the Due Process Clause.[111] The Equal Pay Act, in fact, enforces one aspect of that protection by prohibiting gender-based pay discrepancies and creating a cause of action under the Tucker Act in the Court of Federal Claims.[112] The act provides that no employer may discriminate

> between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . . .[113]

The act provides four bases on which pay may differ: "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by

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[108] *See* U.S. CONST. amend. V; *see also* The Informed Citizen, *Fifth Amendment All About Protecting Individual Rights*, N.J. STATE BAR FOUND. (Nov. 8, 2020), https://njsbf.org/2020/11/08/fifth-amendment-all-about-protecting-individual-rights/ (noting how the Founding Fathers passed the Fifth Amendment to protect individuals from the government's abuse of power).

[109] U.S. CONST. amend. V; *see, e.g.*, Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 9–10 (1984) ("The United States has the authority to take private property for public use by eminent domain . . . but is obliged by the Fifth Amendment to provide 'just compensation' to the owner thereof.").

[110] *See, e.g.*, *Statistical Report for the Fiscal Year of October 1, 2021 – September 30, 2022*, *supra* note 6 (noting that takings cases made up over twenty-six percent of the filed cases in the Court of Federal Claims for the 2022 fiscal year). The subject of the takings jurisprudence at the Court of Federal Claims deserves its own lengthy discussion and is thus beyond the scope of this survey.

[111] *See, e.g.*, Schlesinger v. Ballard, 419 U.S. 498, 500 n.3 (1975) (stating that although the Fifth Amendment does not contain the phrase "equal protection," it "prohibits the government from engaging in discrimination").

[112] *See, e.g.*, Alverson v. United States, 88 Fed. Cl. 331, 332–33 (2009) (noting that the Equal Pay Act was designed to prevent gender-based discrimination and creates jurisdiction for the Federal Court of Claims under the Tucker Act).

[113] 29 U.S.C. § 206(d)(1) (2018).

quantity or quality of production; or (iv) a differential based on any other factor other than sex."[114] The cases thus resolve based on whether the jobs of the claimant and comparator are sufficiently similar and, if so, whether the government employer can establish a legitimate basis on which the pay differs, i.e., seniority, merit, output, or any differential "other than sex."[115] On several occasions, the court has thus had to decide whether the pay and promotion systems of certain federal agencies were sufficiently grounded on non-discriminatory factors.[116]

In the area of military pay, the case of *Christian v. United States*[117] is a keen example of an equal-protection issue of national importance to the military brought to the Court of Federal Claims. In *Christian*, a lieutenant colonel selected for retirement due to having been twice passed over for promotion to full colonel challenged the Army's decision to separate him, and others similarly situated, as constitutionally void due to the application of a gender- and race-based qualification system.[118] Just as in *Klingenschmitt*, the court found that it had jurisdiction due to the application of the Military Pay Act because "[i]f plaintiff's retirement was 'involuntary and improper' under the Constitution . . . , he retains his right to active duty pay under [the Military Pay Act]."[119]

Under 10 U.S.C. § 638(a)(1), the military services may consider for early retirement officers who had been passed over for promotion a number of times or officers who have served for a period of time, depending on rank, without being placed on the list for promotion.[120] A list of such officers is presented to a Selective Early Retirement Board ("SERB") for consideration and recommendation of who should be forced to retire.[121] At the time of the *Christian* case, the Secretary of the Army issued a Memorandum of Instruction ("Memorandum") to the SERB, which contained goals and requirements for various career field categories of

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[114] *Id.*

[115] *See, e.g.*, Cooke v. United States, 85 Fed. Cl. 325, 341–42 (2008).

[116] *See, e.g.*, Brooks v. United States, 101 Fed. Cl. 340, 341, 348 (2011) (holding that a salary differential in the Navy was the result of the agency's change "from one merit-based system to another," not gender discrimination); Jordan v. United States, 122 Fed. Cl. 230, 244–45 (2015) ("[T]he government nonetheless prevails because the difference in pay is supported by factors other than sex, including a merit system . . . .").

[117] 46 Fed. Cl. 793 (2000).

[118] *Id.* at 797, 803.

[119] *Id.* at 799 (quoting West v. United States, 35 Fed. Cl. 226, 230 (1996)). *See generally* Klingenschmitt v. United States, 119 Fed. Cl. 163, 184 (2014) (observing the Court of Federal Claims had jurisdiction to hear First Amendment and RFRA claims associated with Dr. Klingenschmitt's Military Pay Act claim).

[120] *E.g.*, 10 U.S.C. § 638(a)(1)(A) (2018) ("An officer holding the regular grade of lieutenant colonel or commander who has failed of selection for promotion to the grade of colonel or, in the case of an officer of the Navy, captain two or more times and whose name is not on a list of officers recommended for promotion [is eligible for early retirement].").

[121] *Id.* § 638(a)(2).

officers considered by the board.[122] The Memorandum set out a process to ensure that the percentage of female and minority officers selected for retirement did not exceed the overall rate of all officers selected for retirement in a particular job category.[123] The SERB also was instructed to consider any personal and institutional discrimination that might have disadvantaged minority and female officers.[124] If the resulting ratio was not equal, then the board was to revote and adjust the merits scores of minority and female officers.[125] The instructions regarding consideration of past discrimination included a list of potential indicators of discrimination, including "disproportionately lower evaluation reports, assignments of lesser importance or responsibility, and a lack of opportunity to attend career-building military schools."[126] The plaintiff, and others similarly situated, were among the 1,169 lieutenant colonels selected for retirement by the SERB convened in 1992.[127] He first challenged his non-selection at the Army Board for Correction of Naval Records, but the challenge was unsuccessful.[128]

Judge Smith at the Court of Federal Claims held that the Army's instructions to the SERB created a racial classification system and examined its legality under a strict-scrutiny analysis.[129] The key fact for the court was that the Memorandum imposed "a race-based goal" (*i.e.*, a quota).[130] The court also found it problematic that minority officers were evaluated under additional criteria pursuant to the instruction that the SERB consider possible past discrimination.[131] The fact that the SERB had to revote and adjust scores if the percentage of minorities selected was too high was all the more proof that a classification based on race was in place.[132] The fact that the race-based goal was meant to remediate prior discrimination, though well intentioned, did not excuse the Army's actions from strict scrutiny by the court.[133] Thus, the court turned to the

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[122] *Christian*, 46 Fed. Cl. at 797–98.

[123] *Id.* at 798.

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.* at 798–99.

[128] *Id.* at 799.

[129] *Id.* at 803–804.

[130] *Id.* at 804. The government argued its program sought to remediate past discrimination and did not impose a quota. *Id.* Judge Smith asserted that the distinction was irrelevant for due-process analysis because special procedures and separate considerations for certain races are racial classifications. *Id.* at 804–05.

[131] *Id.*

[132] *Id.* at 804 ("In addition, the Phase II procedures, requiring the reevaluation of members of minority groups . . . , gives members of certain races different opportunities from other races . . . .").

[133] *Id.* at 806 ("All government action based on race . . . should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed." (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995))).

consideration of whether the government had cited a compelling state interest that might support the classification that it employed.[134]

The court found generally compelling the Army's proffered remedial interest in "remedying 'actual past discrimination.'"[135] Judge Smith relied on the goals stated in the Memorandum itself as well as a declaration of the Army Deputy Chief of Staff for Personnel and concluded "that remedying actual past discrimination was a motivation for the Army's policy."[136] The court held, however, that the proponent of such a policy must also make a factual showing that the particular remedial action was necessary.[137] The court found that the government had not met its burden because (1) the government unit involved was not the unit in which the prior discrimination had taken place, and (2) the Army could not show that there were present effects of past discrimination to justify the classification at issue.[138]

The court went on to also consider whether the Army's classification was narrowly tailored.[139] Judge Smith held that the administrative record was sufficient to establish that the classification was not narrowly tailored because "targeted affirmative action measures at the hiring or recruitment stage," in addition to additional promotions, were all available to "remedy past institutional discrimination."[140] Further, the duration of the SERB classification system was indefinite, which the court found indicative of a broadly tailored solution, not a narrow one.[141]

Having held the SERB's racial classification to be unconstitutional, the court avoided the question of whether the gender classification inherent in the SERB's procedure would also run afoul of the Fifth Amendment because its holding on the race question was sufficient to award relief to the entire class.[142] The question of remedy was appealed

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[134] *Id.*

[135] *Id.* at 807.

[136] *Id.* at 807–08.

[137] *Id.* at 808.

[138] *Id.* at 808–11. The court relied on *Hopwood v. Texas*, 78 F.3d 932, 949, 952 (5th Cir. 1996). 46 Fed. Cl. at 808. *Hopwood* has since been abrogated by the Supreme Court in *Grutter v. Bollinger*. 539 U.S. 306, 335–37, 343–44 (2003). In *Grutter*, the Court held that a diverse student body was a sufficiently compelling state interest to justify considering race in academic admissions. *Id.* at 343–44. The fact that no quota was used by the university was critical to the Court in reaching its conclusion that the admission's guidelines were narrowly tailored. *Id.* at 334–37, 343–44.

[139] *Christian*, 46 Fed. Cl. at 811.

[140] *Id.* at 812.

[141] *Id.* at 812–13. The court also found the Army's failure to consider a race-neutral remedy problematic. *Id.* at 813.

[142] *Id.* at 815.

by the government, but the merits of the *Christian* decision were left undisturbed.[143]

The Court of Federal Claims's decision in *Christian* was of national importance, applying across the Army and no doubt cautioning the other service branches against similar conduct.[144] The *Christian* decision also stands as somewhat of a contrast to the way the result was reached in *Klingenschmitt*, where the court decided the First Amendment issue on the administrative record in a manner highly deferential to the Navy's own earlier consideration of some of the issues.[145] In *Christian*, Judge Smith accepted the Army's own statements regarding its interests in promoting the racial classification system but did not afford them any deference when deciding whether the government had met its burden of establishing a compelling state interest.[146]

The Court of Federal Claims has also heard several important equal-protection challenges to military policies regarding homosexual conduct. For example, in *Collins v. United States*, the court found jurisdiction over a class-action, equal-protection claim based on a difference in separation pay for individuals discharged from the Air Force for homosexual conduct.[147] The court found the constitutional issue to be justiciable and properly presented for resolution.[148] The case subsequently settled.[149] In

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[143] *See* Christian v. United States, 337 F.3d 1338, 1339, 1349 (Fed. Cir. 2003) (discussing only whether the Court of Federal Claims's refusal to apply harmless error, which affected the remedy, was proper).

[144] A similar challenge to that in *Christian* was brought contemporaneously against the Air Force. Berkley v. United States, 48 Fed. Cl. 361 (2000), *rev'd*, 287 F.3d 1076 (Fed. Cir. 2002). The court first found for the government. *Id.* at 363–64, 379. The Federal Circuit reversed, holding that strict scrutiny applied to the use of race and gender by the Air Force. Berkley v. United States, 287 F.3d 1076, 1081–82, 1091 (Fed. Cir. 2002). The case was settled on remand. Berkley v. United States, 59 Fed. Cl. 675, 677 (2004). Prior to *Christian*, the court had the opportunity to consider a similar circumstance involving the Air Force's early retirement program for officers. Baker v. United States, 34 Fed. Cl. 645, 648–49 (1995). In *Baker*, Judge Miller found that the Air Force mandated consideration of race and gender but did not impose a quota on the decision makers. *Id.* at 656. Relying on the testimony of a colonel and a general, who explained that the SERB took race and gender into account but did not mandate that it be considered in any particular way, the court held for the government. *Id.* at 652–53, 657–58. That decision was later vacated by the Federal Circuit after the government admitted on appeal that the testimony of the two officers was not reliable. Baker v. United States, 127 F.3d 1081, 1088–89 (Fed. Cir. 1997).

[145] *Compare Christian*, 46 Fed. Cl. at 806, 814–15 (applying strict scrutiny and holding that the government did not have a compelling interest despite its statements to the contrary and that the Army's affirmative action was not narrowly tailored), *with* Klingenschmitt v. United States, 119 Fed. Cl. 163, 186–87 (2014) (applying great deference to the military correction board's decisions and holding that Dr. Klingenschmitt's First Amendment claim was meritless as a result).

[146] *Christian*, 46 Fed. Cl. at 804, 806.

[147] 101 Fed. Cl. 435, 455–59 (2011) (holding that the separation pay statute was not discretionary and thus gave rise to a claim under the Tucker Act).

[148] *Id.* at 459, 461.

[149] Settlement Agreement, *Collins*, 101 Fed. Cl. 435 (No. 10-778C), ECF No. 76-1.

Loomis v. United States, the court upheld an Army discharge of an individual for violating a sodomy ban and, by extension, upheld the "Don't Ask, Don't Tell" policy then in force.[150] The plaintiff challenged the Army's policy as a violation of substantive due process, relying on the Supreme Court's decision in *Lawrence v. Texas*.[151] The Court of Federal Claims ultimately applied a rational-basis review, finding that the maintenance of unit cohesion was a legitimate state interest.[152] These two examples, like the *Christian* case, were undoubtedly of great importance to the military services.

2. Bid Protests

The final area of the Court of Federal Claims's docket to be examined herein is the court's jurisdiction

> to render judgment on an action . . . objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement.[153]

These cases are known as "bid protests" and are generally injunctive challenges to agency action taken or not taken in connection with a federal procurement.[154] The court hears these cases under the deferential standards set out in the Administrative Procedures Act, 5 U.S.C. § 706.[155] Procurement programs aimed at achieving policy goals, such as remedying past discrimination and promoting minority businesses, can run afoul of the Due Process Clause's promise of equal protection under the law.

The case that best illustrates the point comes from the Federal Circuit, albeit incidentally, not by way of the Court of Federal Claims. The case was brought in district court for bid-preparation costs under the "Little Tucker Act's" grant of concurrent jurisdiction to the district courts

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[150] 68 Fed. Cl. 503, 505, 517–18 (2005).

[151] *Id.* at 517. *See generally* Lawrence v. Texas, 539 U.S. 558, 577–79 (2003) (striking down a Texas statute criminalizing sodomy).

[152] *Loomis*, 68 Fed. Cl. 503, 520–21. Of critical importance to the court was that the Supreme Court had not declared homosexual conduct to be a fundamental right. *Id.* at 518. The court applied the same analysis to Mr. Loomis's equal protection argument. *Id.* at 521–22.

[153] 28 U.S.C. § 1491(b)(1).

[154] *See, e.g.*, Galen Med. Assocs. v. United States, 369 F.3d 1324, 1329–30 (Fed. Cir. 2004) (explaining bid protest jurisdiction generally under § 1491(b)).

[155] "In any action under this subsection, the court[] shall review the agency's decision pursuant to the standards set forth in section 706 of title 5." 28 U.S.C. § 1491(b)(4). This is the "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" standard used in Administrative Procedures Act cases. 5 U.S.C. § 706(2)(A) (2018).

over money claims under $10,000 in value.[156] In *Rothe Development Corp. v. U.S. Department of Defense*, a disappointed bidder challenged the award of a contract by the Air Force under a ten-percent price preference granted to minority-owned businesses.[157] The plaintiff alleged a violation of equal protection.[158] The Western District of Texas ruled for the government, holding that the price preference was constitutional.[159]

On appeal, the Federal Circuit reversed and remanded because the trial court had impermissibly applied an intermediate-scrutiny review instead of strict scrutiny as required when a race-based classification is alleged.[160] It also found that the trial court impermissibly relied on evidence to support the government's interest in authorizing the program that post-dated the enactment of the statute in question.[161] After another remand,[162] the Federal Circuit eventually had before it a sufficient record to reach the merits, and it struck down the statute as unconstitutional because the government had not established a compelling state interest through its proffer of studies on disparities in public contracting at the state and local level.[163]

Although not brought at the Court of Federal Claims, the *Rothe* case is a good example of the sort of claim implicating a fundamental liberty interest that is within the court's jurisdiction. There is no question that the case would have fit under Section 1491's grant of bid-protest jurisdiction at the Court of Federal Claims.[164] In fact, a similar case was

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[156] 28 U.S.C. § 1346(a)(2) (2018). In Little Tucker Act cases, appeals go exclusively to the Federal Circuit rather than the regional circuits. *Id.* § 1295(a)(2).

[157] 49 F. Supp. 2d 937, 941 (W.D. Tex. 1999).

[158] *Id.*

[159] *Id.* at 950–51.

[160] Rothe Dev. Corp. v. U.S. Dep't of Def., 262 F.3d 1306, 1321 (Fed. Cir. 2001).

[161] *Id.* at 1328.

[162] The Federal Circuit first remanded the case to the Western District of Texas, directing it to apply strict scrutiny. *Id.* at 1329, 1332. The Western District of Texas dismissed the Little Tucker Act claim as moot on remand. Rothe Dev. Corp. v. U.S. Dep't of Def., 324 F. Supp. 2d 840, 845 (W.D. Tex. 2004). Rothe Development Corporation ("Rothe") appealed again, and the Federal Circuit remanded the case again "for development of a record," holding the Little Tucker Act claim was not moot. Rothe Dev. Corp. v. Dep't of Def., 413 F.3d 1327, 1339 (Fed. Cir. 2005). On the second remand, the Western District of Texas found the minority bidding preference was supported by a compelling state interest and was narrowly tailored. Rothe Dev. Corp. v. U.S. Dep't of Def., 499 F. Supp. 2d 775, 884 (W.D. Tex. 2007). Rothe appealed for a third time. Rothe Dev. Corp. v. U.S. Dep't of Def., 545 F.3d 1023, 1034 (Fed. Cir. 2008).

[163] *Id.* at 1045, 1050 (finding state and local studies not properly controlled for firm size and qualification insufficient for establishing a basis for a national bidding preference based on race). The court also rejected anecdotal evidence before Congress and statistics relayed in speeches during congressional debate to be insufficient to establish the basis for a national race-based classification. *Id.* at 1047–49.

[164] *See generally* 28 U.S.C. § 1491(b)(1) ("[T]he Unite[d] States Court of Federal Claims . . . shall have jurisdiction to render judgment on an action by an interested party

brought at the Court of Federal Claims in 2008, but it was voluntarily dismissed after extensive motion practice regarding the state of the record that the court would have in front of it to decide the constitutional issue.[165] The point remains the same: under the Tucker Act and its amendments, the jurisdiction of the Court of Federal Claims includes cases of national importance regarding the fundamental rights protected by the Constitution: religion, speech, due process, and equal protection.[166]

II. THE FUTURE

As the federal government grows and its regulatory ambit widens, the chances that a government actor might deprive a citizen of a promised payment, benefit, or chance to compete for a contract for a constitutionally impermissible reason grows. In the future, the Court of Federal Claims's jurisdiction will be even more essential for citizens to vindicate their fundamental rights in these circumstances.

One issue ripe for conflict in the courts, including the Court of Federal Claims, is the tension, on the one hand, between protecting individuals from discrimination based on conduct now found to be constitutionally protected and, on the other hand, protecting the freedoms of speech and religion. The advent of non-discrimination provisions and regulations aimed at protecting gender identity and sexual orientation in public contracts, employment regulations, and military policies will likely cause friction for certain individuals transacting with the federal government or

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objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or egulation in connection with a procurement or a proposed procurement."). Another example of an important equal-protection case brought under the Little Tucker Act jurisdiction of the district courts, which could have been brought at the Court of Federal Claims, dealt with the federal ban on using appropriated funds to pay for abortions. Britell v. United States, 372 F.3d 1370, 1372 (Fed. Cir. 2004). Plaintiff was denied coverage for an abortion by the Civilian Health and Medical Program and brought a suit challenging that ban on equal-protection grounds, seeking reimbursement for the cost of the abortion. *Id.* at 1373–74. The Federal Circuit held that the regulations implementing the medical program were money mandating, meaning Tucker Act jurisdiction was available and appellate jurisdiction was appropriate at the Federal Circuit. *Id.* at 1378–79. On the merits, the court found that the statutory ban was constitutional because it was rationally related to the government's legitimate interest in the protection of human life. *Id.* at 1382–84.

[165] Stipulation of Dismissal with Prejudice, Kevcon, Inc. v. United States, No. 09-625 (Fed. Cl. dismissed Oct. 12, 2010), ECF No. 105.

[166] Due-process issues that do not involve an allegation of discrimination also arise within the court's jurisdiction. For example, the Court of Federal Claims possesses jurisdiction to hear collateral attacks against courts martial on fundamental-fairness grounds. *E.g.*, Matias v. United States, 923 F.2d 821, 825 (Fed. Cir. 1990) (affirming Court of Federal Claims's jurisdiction over collateral attacks to court martial proceedings on constitutional grounds); Pittman v. United States, 135 Fed. Cl. 507, 523 (2017) (holding collateral attacks must prove that fundamental fairness has been deprived to the detriment of due process).

members of the armed services, and, as detailed above, those disputes would fall within the Court of Federal Claims's jurisdiction.

In the area of public contracting, companies may be required to agree to non-discrimination clauses in contracts that are contrary to sincerely held religious beliefs. The result of not signing such an agreement or abiding by such a regulation may be the loss of opportunity to compete or termination of an already-held contract. The Tucker Act may bring these very disputes to the court for resolution.[167] The former circumstance could be challenged at the court as a bid protest. The latter circumstance could be challenged under the Contracts Disputes Act, also at the Court of Federal Claims.[168]

Likewise, members of the military, particularly chaplains, may be required to adhere to non-discrimination practices that force them to endorse or participate in conduct contrary to their religious beliefs. Will the services grant religious accommodations, and what will be the result for the service members involved if they do not? The court's Military Pay Act jurisdiction may be invoked to answer those questions. Or, in the vein of the *Klingenschmitt* case discussed above, what of chaplains compelled not to publicly proclaim certain traditional moral stances of their denominations? If they are discharged as a result, monetary relief above $10,000 will only be available at the Court of Federal Claims under the Little Tucker Act.[169]

In the area of tax law, future disputes may concern the IRS's approach to churches' or other religious institutions' public positions regarding moral issues that implicate political speech. The First Amendment may be invoked by such organizations if their tax-exempt status is denied based on unfavored speech or religious conviction. These organizations may file suit at the Court of Federal Claims.[170]

Although these predictions are not meant to be exhaustive, as other important constitutional issues come to the fore, it takes no great augur to predict that, as the political tides ebb and flow, these conflicts will likely be fought in the courts. The Court of Federal Claims will remain an essential venue to hear the claims of those whose pecuniary interests are implicated by federal action in violation of the fundamental rights guaranteed by the Constitution.

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[167] 28 U.S.C. § 1491 (granting the Court of Federal Claims jurisdiction over "claims against the United States . . . upon express or implied contract with the United States" as well as "action[s] . . . objecting to a solicitation by a Federal agency").

[168] 41 U.S.C. § 7104(b)(1) (2018) (stating that a de novo appeal of a contracting officer's decision may be taken to the Court of Federal Claims).

[169] 28 U.S.C. § 1346(a)(2) (granting district courts concurrent jurisdiction with the Court of Federal Claims but limiting such jurisdiction to claims "not exceeding $10,000").

[170] Various sections of the United States Code provide the Court of Federal Claims with jurisdiction to hear cases involving religious organizations' tax-exempt status. *See, e.g.*, I.R.C. § 7428(a).

EDUCATIONAL PERMUTATIONS: THE CHURCH'S CANON LAW AS INSPIRATION FOR CHANGES TO EDUCATION REGULATION

Ariel J. Liberman[*]

ABSTRACT

This Article argues for a new federal requirement that community members should become more involved in the governance, administration, and decision-making concerning public schools. A survey of current education administration and jurisprudence reveals that such a restructuring might ensure a more efficient system that addresses the discrete and various needs of different districts. This community-consultative governance model has existed and proved effective in the Catholic school context for the last two centuries. It is based on the Church's well-articulated educational prerogatives, ideals, and rules found in its codes of canon law. A comparative study of these codes and secular education law history reveals common ideas, which counsel in favor of drawing upon the Church's models to effectively address issues endemic to the current education system.

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"Law is nought else than an ordinance of reason for the common good made by the authority who has care of the community . . . ."

—St. Thomas Aquinas, Summa Theologiae[1]

INTRODUCTION

The COVID-19 pandemic continues to loom in our collective periphery, and all we seek is a return to a semblance of normalcy. When it comes to our children, no challenge seems more harrowing than a safe return to 'normal' schooling. "Abrupt shifts to remote," adjusted learning have negatively impacted the younger generation,[2] and districts presently scramble to realize a grand homecoming.[3] The Department of Education ("DOE") has acknowledged the unprecedented nature of the districts' back-to-school situation, and, in response, proffered an innovative funding plan known as the Elementary and Secondary School Emergency Relief Fund ("ESSER").[4] The plan is lauded for featuring a novel, collaborative requirement that brings together communities and districts for major decision-making.[5] This represents a shift away from standard DOE

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[1] [28 LAW AND POLITICAL THEORY] ST. THOMAS AQUINAS, SUMMA THEOLOGIAE 15, 17 (Thomas Gilby trans., Blackfriars, Cambridge 1966).

[2] *Supporting Students During the COVID-19 Pandemic*, U.S. DEP'T OF EDUC. (citations omitted), https://www.ed.gov/coronavirus/supporting-students-during-covid-19-pandemic#ftn1 (last visited Oct. 16, 2022) ("Abrupt shifts to remote learning over the past two school years have affected students, negatively impacting their social, emotional, and mental well-being and academic achievement.").

[3] *See, e.g.*, Catherine Gewertz & Stephen Sawchuk, *Can Schools Really Open in 100 Days? How Staffing Could Hobble Biden's Plan*, EDUC. WEEK (Jan. 27, 2021), https://www.edweek.org/leadership/reopening-schools-in-100-days-how-staff-shortages-could-hobble-bidens-plan/2021/01 (noting that "the heat [was] on" to reopen schools and noting the uncertainties schools faced); WHAM Staff, *Schools in Monroe County Scramble to Implement Reopening Guidance*, ABC 13 WHAM (Apr. 12, 2021), https://13wham.com/news/coronavirus/schools-in-monroe-county-scramble-to-implement-reopening-guidance (discussing the challenges faced by some school districts causing them to scramble to reopen with operating constraints because of mitigation for transmission rates of COVID-19).

[4] U.S. DEP'T OF EDUC., STATE PLAN FOR THE AMERICAN RESCUE PLAN ELEMENTARY AND SECONDARY SCHOOL EMERGENCY RELIEF FUND 2 (2021), https://oese.ed.gov/files/2021/04/ARP-ESSER-State-Plan-Template-04-20-2021_130PM.pdf.

[5] *See, e.g.*, Kara Arundel, *Expectations for ESSER: Will the Improvements Be Sustainable?*, K-12 DIVE (June 14, 2022), https://www.k12dive.com/news/expectations-for-esser-will-the-improvements-be-sustainable/624726/ (noting how a school superintendent considered his community to be taking a collaborative effort in applying ESSER funding to students); U.S. DEP'T OF EDUC., FREQUENTLY ASKED QUESTIONS: ELEMENTARY AND SECONDARY SCHOOL EMERGENCY RELIEF PROGRAMS GOVERNOR'S EMERGENCY EDUCATION RELIEF PROGRAMS 14 (2021), https://oese.ed.gov/offices/education-stabilization-fund/elementary-secondary-school-emergency-relief-fund/ ("[E]ach LEA that receives ARP ESSER funds must develop a plan for its use of ARP ESSER funds and submit it to the SEA . . . . In developing its plan, an LEA must engage in meaningful consultation with stakeholders including students; families; school and district administrators (including special education administrators); and teachers, principals, school leaders, other educators,

funding schemas that are typically based on often problematic, impersonal statistical models and metrics.[6] Put another way, ESSER demonstrates that the DOE understands how out-of-touch its schemas have been with the community and student needs.[7]

Though perhaps new in the American school context, a community-consultative governance model has existed in the Catholic-Christian school ("Christian school") context since the 19th century.[8] The existence

school staff, and their unions."). *But see, e.g.*, Austin Reid, *How Schools Are Spending Unprecedented Education Relief Funding*, NAT'L CONF. ST. LEG. (May 11, 2022), https://www.ncsl.org/research/education/how-schools-are-spending-unprecedented-education-relief-funding-magazine2022.aspx (noting that school districts are given wide discretion under ESSER to spend funds according to their choosing); John Fensterwald, *Analysis of Covid Funding Reveals California Districts Have Spent Little So Far to Address Learning Loss*, EDSOURCE (July 15, 2022), https://edsource.org/2022/analysis-of-covid-funding-reveals-california-districts-have-spent-little-so-far-to-address-learning-loss/675557 (discussing how the ESSER funding was not used by school districts quite as it was intended).

[6] Funding disbursement typically dispenses with any community engagement aspect, opting for funding based on objective statistical analysis of district needs and then district discretion once the funding is transferred. *See* Atanu Das, *An "Adequate" Education Needs an "Adequate" Approach to School Funding*, 12 PUB. INT. L. REP. 81, 84–85 (2007) (discussing the methodologies typically used "to determine 'adequate' school funding"); Bruce D. Baker & Preston C. Green III, *Tricks of the Trade: State Legislative Actions in School Finance Policy That Perpetuate Racial Disparities in the Post*-Brown *Era*, 111 AM. J. EDUC. 372, 373–75 (2005) (describing the changing commonly-utilized approaches to analyzing and allocating school funding and the shortcomings of different approaches).

[7] CARMEL MARTIN ET AL., CENTER FOR AMERICAN PROGRESS, A QUALITY APPROACH TO SCHOOL FUNDING 2, 7 (2018), https://www.americanprogress.org/wp-content/uploads/2018/11/LessonsLearned_SchoolFunding-report-4.pdf. The problems of the current funding schemas on the federal and state level are discussed later in the piece. With this said, as a matter of brief overview, I highlight the following problem this piece addresses: the DOE relies on tailored formulas for the disbursement of federal funding to complement local (based in property taxes) and state education expenditures (based in analyzing per-pupil expenses). *See id.* at 7 (discussing the relationships between federal, state, and local funding when allocating spending in underperforming districts); Alana Semuels, *Good School, Rich School; Bad School, Poor School*, ATLANTIC (Aug. 5, 2016), https://www.theatlantic.com/business/archive/2016/08/property-taxes-and-unequal-schools/497333/ (explaining that the Department of Education supplements state and local funding for school districts). For this distant administrative agency to comprehend the precise needs of students nationwide, with such vastly different resources available to them in this unprecedented time, is Sisyphean. *See* Peter Smagorinsky, *Why the Ed Department Should be Reconceived–or Abolished*, WASH. POST (Mar. 11, 2012), https://www.washingtonpost.com/blogs/answer-sheet/post/why-the-ed-department-should-be-reconceived--or-abolished/2012/03/09/gIQAHfdB5R_blog.html (noting that the Department of Education is so far removed from local school districts that the policies set forth by the Department of Education are unworkable). Better, instead, to go directly to the people intimately familiar with situations on the ground and have them adopt responsive plans that reflect community needs.

[8] *See* Regina M. Haney, *Design for Success: New Configurations and Governance Models for Catholic Schools*, 14 J. CATH. EDUC. 195, 195–98, 200–01, 204, 206 (2013) (recognizing the board structure of Catholic schools that has existed since the 19th Century which was designed to increase community involvement through a community-consultative

of this model can be directly attributed to the way the Church has articulated its educational prerogatives, ideals, and rules on the highest institutional levels, and represents a strong example of the proactive, humanistic innovation needed in education administration.[9]

With the DOE's newest initiative ushering in change, this Article argues for a restructuring of the American secular school system governance model based on the Church's more developed, albeit similar, community-focused schema. This should take the form of a new federal requirement that a chosen group of community members, representing a proper cross-section of their school district, a *body politic*, be involved in all manner of decisions associated with educational resource allocation. If caring for the intellectual and mental growth of our children is the ultimate goal of an education system, then such an innovation would provide the nuanced approach necessary to ensuring that every school in its own community context is set up with what it specifically needs to succeed.

Section I provides the necessary background into relevant aspects of American education law, emphasizing particularly that the absence of a formal, detailed constitutional right to education, or really any universal administrative structural demands, allows reformers to be creative in proposing fixes to the existing schemas to address discrete issues. Section II examines the realm of Church doctrine on education, exploring the fundamental principles that underlay their view of an affirmative right to education, as well as the associated pronouncements translating this right into set duties, responsibilities, and obligations for schools. Section III synthesizes and highlights the differences between the Church's community-oriented governance stratagems and America's comparatively distant governance model. This Article then argues for an adoption of the Church's community-focused perspective on education, as well as Christian schools' nuanced governance model, and translating it into the formation of district-level body politics of community members involved in school decisions. Section IV forays into a discussion of how the Church's ideas might inform an American right to education. Then this Article concludes by traversing larger questions surrounding education reform and suggests that the COVID-19 pandemic afforded new chances for development and formation of education administration.

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structure and discussing the shift that occurred in Catholic schools to increase the collaborative structure of American Catholic schools). For further information on the nature of Christian school governance, the inclusion of consultative school boards, and the role of boards of limited jurisdiction, see generally DESIGN FOR SUCCESS: NEW CONFIGURATIONS FOR CATHOLIC SCHOOLS 5, 6, 8–10, 15, 18, 23, 38, 55, 61 (Regina M. Haney & Joseph M. O'Keefe, eds., 2009).

[9] *See* GRAVISSIMUM EDUCATIONIS (1965), *reprinted in* VATICAN COUNCIL II: THE CONCILIAR AND POSTCONCILIAR DOCUMENTS 726–32, 734, 736 (Austin Flannery ed., Liturgical Press new rev. ed. 2014) (1975).

I. EDUCATION LAW IN AMERICA

There is no federal fundamental right to education in the United States Constitution.[10] This realization is especially shocking after considering some of the language used in significant court opinions dealing with this very subject. Take, for instance, the pivotal decision of *Brown v. Board of Education*, in which the Supreme Court famously and unanimously held that an education system that is "separate but equal" is unconstitutional.[11] There, the Court took a stand and recognized "the importance of education to our democratic society" as the "very foundation of good citizenship" but failed to raise education to the level of, say, free speech.[12]

San Antonio Independent School District v. Rodriguez set the stage for a modern conversation of the right to education on the federal level. There, the Supreme Court was examining a challenge to Texas' method for funding school districts and the resulting educational disparity between richer and poorer districts.[13] Specifically, the Appellees maintained that their school district had the highest tax rates in the county and raised only $37 per pupil while a neighboring, wealthier district raised $412 per student with less taxes.[14] The Appellees fought for a "fundamental personal right" to education that guaranteed some fiscal equity in resource allocation so that substantive learning gaps could be bridged whereby all students would have access to learning that allows for the meaningful appreciation of one's constitutional rights.[15] They lost.[16]

Justice Powell, writing for the majority, acknowledged education's "undisputed importance" but offered that "[e]ven if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of [one's] right[s], we have no indication that the present levels of educational expenditures in Texas provide an education that falls short."[17] Texas was providing, at the very least, the bare minimum to all districts to ensure some schooling. In other words, *Rodriguez* was not the proper case for the Supreme Court to upend the state legislature's authority over how resources are allocated.

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[10] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973); *see* Derek W. Black, *The Fundamental Right to Education*, 94 NOTRE DAME L. REV. 1059, 1061–62 (2019) (noting that current constitutional jurisprudence does not recognize a federal right to education).

[11] 347 U.S. 483, 495 (1954).

[12] *Id.* at 493. How, indeed, can a child be "expected to succeed in life if he is denied the opportunity of an education"? *Id.*

[13] *Rodriguez,* 411 U.S. at 4–6, 8, 11.

[14] Brief for Appellees at 1, 3–4, 14, *Rodriguez,* 411 U.S. 1 (No. 71-1332).

[15] *Rodriguez*, 411 U.S. at 35–37.

[16] *Id.* at 35–36, 58–59.

[17] *Id.* at 4, 35–37.

Justice Marshall firmly disagreed and passionately lambasted the majority for "ignor[ing] the constitutional importance of the interest at stake." [18] He emphasized the "close relationship between education and some of our most basic constitutional values"; indeed, he noted that case precedent informs "the right of students 'to inquire, to study and to evaluate, to gain new maturity and understanding.'"[19] Education will only enhance enjoyment of one's constitutional rights.[20] Furthermore, the disproportionate impact that the Texas funding scheme, based on taxable property wealth, has on quality of education constitutes direct discrimination against schoolchildren from property-poor districts.[21] In other words, he believed that wealth should be a suspect class and that schemas promoting fiscal inequity ought to constitute discrimination. This effectively set the stage for continuing the conversation about education as a fundamental right and opened the door for another case to ensure education, equally, to every American.[22] Yet, so far, no case has really answered the call. Nevertheless, one important takeaway from *Rodriguez* is an acknowledgment of the intimate connection between resource allocation, funding, and educational quality.[23]

One of two post-*Rodriguez* lines of cases obviates this connection: litigation surrounding equitable school funding.[24] These cases took place

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[18] *Id.* at 70–71, 110 (Marshall, J., dissenting).

[19] *Id.* at 111–12 (quoting Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957)).

[20] *Id.* at 112–13. "Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government." *Id.* at 113 (quoting Abington Sch. Dist. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring)).

[21] *Id.* at 120–21.

[22] Indeed, Justice Marshall goes so far as to state in a footnote that "nothing in the Court's decision today should inhibit further review of state educational funding schemes under state constitutional provisions," though there are no concrete facts given to indicate the sort of challenge that might bring renewed review. *Id.* at 133 n.100.

[23] *Id.* at 58 (majority opinion).

[24] This first line, dealing with substantive education requirements, is not directly relevant to our inquiry in this Article. Suffice to say, the debate in the federal courts is ongoing and active as to what constitutes a "minimally adequate education." Gary B. v. Whitmer, 957 F.3d 616, 620, 647–48 (6th Cir. 2020), *vacated*, 958 F.3d 1216 (2020). Importantly though, cases discussing the scope of a fundamental right to a "minimally adequate education" mostly feature school districts with incredibly poor funding and underperforming schools. *See, e.g.*, Robinson v. Kansas, 117 F. Supp. 2d 1124, 1129–30, 1150 (D. Kan. 2000) (holding that a state school funding system did not violate the Fourteenth Amendment when it funded schools at lower levels creating poor educational results); Martinez v. Malloy, 350 F. Supp. 3d 74, 79–81, 83–84 (D. Conn. 2018) (analyzing a funding system for education that was alleged to produce poor educational results seen in student performance); *Gary B.*, 957 F.3d at 620–21, 648 (examining a school district with poor performance and low funding to determine if a right to a "minimally adequate education" was applicable). Thus, any case that decides the fundamentality of an education right must necessarily broach the issue of adequate and equitable school funding. One cannot exist without the other. *See, e.g.*, *Gary B.*, 957 F.3d at 620–21, 648 (evaluating a statutory scheme for school funding which challenged the efficacy of school funding); Williams v. Bryant, No.

on the state level, dealt with the states' disparate treatment of school-districts based on socio-economic levels, and spoke to the problematic gaps that exist in the current system.

Serrano v. Priest, in California, struck down tax-based regulatory systems that made school funding inequitably dependent on district property wealth which violated the Fourteenth Amendment's Equal Protection Clause.[25] *Serrano* declared boldly and unabashedly the necessity of education:

> [E]ducation is so important that the state has made it compulsory—not only in the requirement of attendance but also by assignment to a particular district and school. Although a child of wealthy parents has the opportunity to attend a private school, this freedom is seldom available to the indigent. In this context, it has been suggested that a 'child of the poor assigned willy-nilly to an inferior state school takes on the complexion of a prisoner, complete with a minimum sentence of 12 years.'[26]

Following *Serrano*, in response to an outcry of plaintiffs from underperforming school districts, virtually every state began to equalize its property tax rates and revenues and unified their approach to a minimal amount of per-pupil spending.[27] By 1986, 90% of California had an educational funding disparity of less than $100 between districts.[28] Texas reduced its disparities between wealthy and poor districts from 700:1 to 28:1 after enacting a regulatory scheme that took tax revenues from wealthy districts and redistributed them to poorer districts.[29]

These pushes for equitable distribution of resources eventually led to reforms involving state obligations to allocate funding for specific

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3:17-cv-404-WHB-LRA, 2018 WL 8996382, at *2 (S.D. Miss. 2018) (examining a law involving school funding and plaintiff's concerns regarding the relationship between that school funding and educational performance); Edgewood Indep. Sch. Dist. v. Kirby, 804 S.W.2d 491, 495–96 (Tex. 1991) (considering the constitutionality under the Texas Constitution of a law providing for school funding).

[25] 487 P.2d 1241, 1241, 1243–45 (Cal. 1971).

[26] *Id.* at 1259 (quoting John E. Coons et al., *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CALIF. L. REV. 305, 388 (1969)).

[27] MARTIN ET AL., *supra* note 7, at 9, 14–15 (noting that virtually every state has had litigation to make their educational systems more equitable and that many states have then gone on to modify their educational funding schemas); Jeffrey S. Sutton, San Antonio Independent School District v. Rodriguez *and Its Aftermath*, 94 VA. L. REV. 1963, 1971–72 (2008) (recognizing that most states have passed legislation altering school funding models.

[28] Serrano v. Priest, 226 Cal. Rptr. 584, 613 (Cal. Ct. App. 1986) (holding that the requirement that the disparity between districts fell within a $100 band was met in 93% of school districts); *see also* Daphne Kenyon, Bethany Paquin, & Semida Munteanu, *Public Schools and the Property Tax: A Comparison of Education Funding Models in Three U.S. States*, LAND LINES, Apr. 2022, at 32 (explaining the holding of the California Court of Appeals in 1986 and its recognition of the 93% of districts that had less than a $100 discrepancy in funding due to the new formula).

[29] *See* Sutton, *supra* note 27, at 1976.

programming that would help ensure a "thorough and efficient" education.[30] In 2000, the New Jersey Supreme Court in *Abbott ex rel. Abbott v. Burke*, revisited a series of old cases concerning its mandate for the New Jersey Department of Education to enact "good faith, broad-based educational reform in New Jersey's poor, urban school districts."[31] The court held that reform efforts are about school quality as much as fiscal equity, governance as much as resources, and so directly articulated discrete school matters be brought up to standard, including but not limited to pre-school programming, certified and qualified teaching staff, smaller class sizes, construction and renovation of schools, and more.[32] To date, *Abbott* illustrates the most interventionist approach that courts have taken to rectify educational governance inequities on both a funding and programming level. It is the hope of educational reformers across the nation that other courts, as was done after *Serrano*, will follow suit.[33] So far, though, not much has happened.[34]

That said, Congress and the DOE have made certain efforts towards a "thorough and efficient" education.[35] Indeed, in response to *Abbott*, New Jersey adopted Success for All, a national literacy initiative focused on helping low-income, at-risk students statewide.[36] Other federal

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[30] *See* Das, *supra* note 6, at 81–84 (discussing the change in approaches that states have taken after *Rodriguez* to improve the adequacy of education).

[31] 748 A.2d 82, 84–85 (N.J. 2000), *modified in part sub nom.*, Abbott v. Burke, 852 A.2d 185 (N.J. 2004), *and modified judgment sub nom.*, Abbott v. Burke, 857 A.2d 173 (N.J. 2004).

[32] *See id.* at 85, 87–89, 91–92, 94–96 (explaining and determining which factors increase school quality).

[33] *See* The History of Abbott v. Burke, EDUC. L. CTR., https://edlawcenter.org/litigation/abbott-v-burke/abbott-history.html (last visited Jan. 22, 2023) (discussing that Abbott made New Jersey the first state to address inequities by mandating through litigation funding schemas that equalized school funding across districts); *see, e.g.*, Das, *supra* note 6, at 82–83 (promoting litigation on school funding as a promising means to obtain improvements in the adequacy of school funding by utilizing courts to require more in the area of funding); Sid Wolinsky, *Reflections of a Litigator:* Serrano v. Priest *Goals and Strategies*, 2022 BYU EDUC. & L. J. (SPECIAL ISSUE) 1, 1–2, 38 (explaining the litigation and advocacy strategy of Serrano v. Priest and making recommendations for how to adopt this strategy in future litigation efforts); John Pincus, *The* Serrano *Case: Policy for Education or for Public Finance?*, 59 PHI DELTA KAPPAN 173, 173–75 (1977) (noting that Serrano provides a basis for pursuing equalization of education funding through litigation).

[34] Das, *supra* note 6, at 81–83 (noting that very few courts since *Serrano* have advanced a right to an "adequate" education by failing to define what constitutes an "adequate" education).

[35] *See, e.g.*, *Burke*, 748 A.2d at 83; U.S. DEP'T OF EDUC., *supra* note 4 (describing the Elementary and Secondary School Emergency Relief program from the DOE to improve school funding); Das, *supra* note 6, at 83 (discussing the No Child Left Behind Act as an attempt by Congress to improve education).

[36] MARILYN SAVARESE MUIRHEAD ET AL., GEO. WASH. U. CTR. FOR EQUITY & EXCELLENCE IN EDUC., STUDY OF WHOLE SCHOOL REFORM IMPLEMENTATION IN NEW JERSEY

programs attempted to standardize educational quality, though, with admittedly problematic results. The Common Core (2009) endeavored to set national education metrics, standardized examinations, and federally-created benchmarks for success.[37] Critics, however, cited worrisome federal overreach, unrealistic educational goals, and the usurpation of teacher control in the classroom.[38] The No Child Left Behind Act (2002),[39] which was geared towards establishing standardized achievement goals and measuring "adequate yearly progress" across students in the nation, was also heavily criticized for emphasis on rigorous standardized testing which resulted in cheating and falsified reports by schools.[40] Further, the Act failed to account for individual student needs and impacted teaching quality.[41] Lastly, the Every Student Succeeds Act (2015) departed from its predecessors by allowing states to institute their own metrics for academic progress, but the complaints persisted.[42] Arguably, the increase in state

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ABBOTT DISTRICTS 14 (2001); WHAT WORKS CLEARINGHOUSE, U.S. DEP'T OF EDUC., SUCCESS FOR ALL 1 (2017), https://files.eric.ed.gov/fulltext/ED573328.pdf (explaining the Success for All program).

[37] *The Common Core FAQ*, NPR (May 27, 2014), https://www.npr.org/sections/ed/2014/05/27/307755798/the-common-core-faq#top (explaining that the Common Core standards were developed collaboratively by a group of individuals nationwide to set uniform standards which have been adopted by most jurisdictions in developing standardized examinations).

[38] Sen. Edward M. Kennedy, *The No Child Left Behind Act: Fulfilling the Promise*, A.B.A., Fall 2005 (noting that concerns about the No Child Left Behind Act have been raised regarding unfair accountability standards and usurpation of teacher control of classrooms).

[39] No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425.

[40] *Id.*; Alyson Klein, *No Child Left Behind: An Overview*, EDUC. WEEK (Apr. 10, 2015), https://www.edweek.org/policy-politics/no-child-left-behind-an-overview/2015/04; *see* W. James Popham, *Educator Cheating on No Child Left Behind Tests*, EDUC. WEEK (2006), https://www.edweek.org/teaching-learning/opinion-educator-cheating-on-no-child-left-behind-tests/2006/04 (discussing how educational institutions have increasingly cheated in order to meet funding benchmarks).

[41] *See, e.g.*, Daniel Kortez, *Moving Past No Child Left Behind*, 326 SCI. 803, 803–04 (2009) (discussing the disparity the Act created by neglecting underperforming students, failing to account for their needs, and a lack of teacher accountability); Linda Darling-Hammond, *Evaluating 'No Child Left Behind'*, SCOPE (Oct. 11, 2022), https://edpolicy.stanford.edu/library/blog/873 (explaining how the No Child Left Behind Act impacted teaching quality).

[42] The Every Student Succeeds Act departed from its predecessors by giving discretion to states to determine how performance would be measured. *See* Every Student Succeeds Act, Pub. L. No. 114-95, § 1111, 129 Stat. 1802, 1820 (codified as amended at 20 U.S.C. § 6311); Derek W. Black, *Abandoning the Federal Role in Education: The Every Student Succeeds Act*, 105 CALIF. L. REV. 1309, 1309, 1340–42 (2017) (recognizing that the Every Student Succeeds Act returned the authority to develop and oversee educational programs and testing schemes to the states). *See, e.g.*, *id.* at 1340 (contending that several flaws exist in the Every Student Succeeds Act regulatory structure in returning regulatory power to the states); Chris Chambers Goodman, *Class in the Classroom: Poverty Policies and Practices Impeding Education*, 27 AM. U. J. GENDER, SOC. POL'Y, & L. 95, 117–18, 120 (2019) (explaining the changes in federal education policy created by the Every Student Succeeds

input is detrimental to ensuring access to education for disadvantaged children and children of color in poor districts.[43] In short, neither this new approach to the federal-state relationship in education legislation, nor any of its predecessors have been uniformly appreciated as an answer to the question of ensuring educational adequacy and equity on an individual district (and school) level.

We conclude here, therefore, with two realizations and pending issues: first, that the state and district level task of finding the right metric for allocating funds properly and equitably to districts is under scrutiny and in need of advisement; and second, that a substantive right to education, though its importance has been praised, has yet to be conceived and delineated by our courts. Both are integral to achieving the goal of basic, uniform educational adequacy.

II. THE CATHOLIC CHURCH ON EDUCATION

This section transitions into a field of an entirely different persuasion. Indeed, the Church's view that the project of education is fundamentally important is without question. The first part of this section delves into the major players, theories, principles, and values encapsulated in the Church's vision of schooling. Then continues with a survey of the regulations that allow for this vision of education to be effectuated and organized, focusing particularly on the community component of the Church's education governance. Together, these two aspects lend important background to subsequent conversations about specific Christian school governance mechanisms and potential applications in the American system.

A. Gravissimum Educationis*, A Fundamental Right to Education*

In 1959, the Second Vatican Council was called to solve issues of Christian unity and renewal; in other words, to shift the Church towards open dialogue with modernity without abandoning its ancient intellectual mission.[44] Two conciliar documents—the Dogmatic Constitution on the Church, *Lumen Gentium*, and the Pastoral Constitution on the Church in the Modern World, *Gaudiem et spes*, proclaimed that, at the core of this task, was the promotion of the "unity of the family," posing the Church as an "instrument of intimate union with God, and of the unity of the whole human race."[45] Together, the Church invited the faithful (and the world)

Act and discussing various criticisms of the Act, including with regards to funding and performance).

[43] Black, *supra* note 42, at 1340–41.

[44] Lisa Zengarini, *An Overview of the Second Vatican Council*, VATICAN NEWS (Oct. 11, 2022), https://www.vaticannews.va/en/vatican-city/news/2022-10/vatican-ii-council-60th-anniversary-video-history-background.html.

[45] GAUDIUM ET SPES (1965), *reprinted in* VATICAN COUNCIL II: THE CONCILIAR AND

to work towards the common good, defined as "the sum total of social conditions which allow people, either as groups or as individuals, to reach their fulfillment more fully and more easily."[46] The reinvigoration of the Church's educational agenda, unabashedly articulated in *Gravissimum Educationis*, was one step on this humanistic journey.

The Second Vatican Council proclaimed that all men have an "inalienable right to education." [47] A "true" education, it avers, seeks to serve the whole human person, and, just as importantly, contributes to the good of a whole society.[48] "[E]ducation . . . ha[s] been rendered both easier and more necessary by the circumstances of our times. [M]en . . . are eager to take an ever more active role in social life and especially in the economic and political spheres."[49] Thus, a Christian education must nurture "the new self, justified and sanctified through the truth."[50] This means more than preparing one for apostolic activity but encouraging professional development, indoctrinating one into a value-system building on cultural legacy. *Gravissimum Educationis* calls for a Christian education that is more than just about faith, and, importantly, provides a new standard for the Church's education agenda.

Underlying *Gravissimum Educationis* is the reality that the Church finds itself at a crossroads – in a modernizing world, the faithful cannot be called on always to wear two separate hats, that of the religious and that of the secular. Rather, instead of resisting modernity and maintaining separation, the Church must encourage excellence in both secular and religious senses to remain relevant. The Church must offer resources in service of producing change-makers and leaders of the world, to promote a grand vision of unity through faith, and set followers up on a path for success. But how? The Church makes a distinction between education and schooling, the former being a life-long commitment to erudition and the other simply being a phase of one's life.[51] In the interest of the former, the Church makes a pact between itself and the State: let us come together and build a better person, one who seeks out knowledge,

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POSTCONCILIAR DOCUMENTS ¶ 42, at 903 (Austin Flannery ed., Liturgical Press new rev. ed. 2014) (1975); LUMEN GENTIUM, *reprinted in* VATICAN COUNCIL II: THE CONCILIAR AND POSTCONCILIAR DOCUMENTS ¶ 54, at 350 (Austin Flannery ed., Liturgical Press new rev. ed. 2014) (1975).

[46] GAUDIUM ET SPES, *supra* note 45, ¶ 26, at 927.

[47] GRAVISSIMUM EDUCATIONIS, *supra* note 9, at 726–27.

[48] *Id.* at 727.

[49] *Id.* at 725.

[50] *Id.* at 728.

[51] *See* GRAVISSIMUM EDUCATIONIS, *supra* note 9, at 726 ("Holy Mother Church . . . is under an obligation to promote the welfare of the whole life of man . . . she has therefore a part to play in the development and extension of education."). Michael Bayldon, *Gravissimum Educationis 30 Years On*, 77 NEW BLACKFRIARS 131, 131 (1996) (noting, in the context of schooling (a phase of one's life) and education (a lifelong process), that "[a] turning-point arose at Vatican II").

and let us provide the tools for doing so. "[T]he Catholic School can be such an aid to . . . fostering . . . dialogue between the Church and mankind," "in the highest degree to the protection of freedom of conscience . . . as well as to the betterment of culture itself."[52]

If the Church should offer its schools, teachers, and resources to the cultivation of secular skills, what must the State give in exchange? To see to it that "public subsidies to schools are so allocated that parents are truly free to select schools for their children in accordance with their conscience,"[53] that "citizens . . . are prepared for the proper exercise of their civic rights and duties,"[54] and provide resources to the parents as "primarily and principally responsible for their [children's] education."[55] The council implores the State that they, along with individual households themselves,[56] assure equal contribution to the mission "to all peoples for the promotion of a well-balanced perfection of the human personality, for the good of society in this world and for the development of a world more worthy of man."[57]

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[52] GRAVISSIMUM EDUCATIONIS, *supra* note 9, at 733.

[53] *Id.* ¶ 6, at 732.

[54] *Id.* ¶ 6, at 731–32. It should be noted that this language, in addition to other supplementary documents authored by the Church, help support my contention that it is within the purview, and, indeed, obligation, of the U.S. federal and state government to assure an adequate civics education nationwide. *See* Kevin J. Jones, *Funding for Poor Los Angeles Catholic Schools in Limbo as Judge Nixes Lawsuit*, CATH. NEWS AGENCY (Apr. 22, 2022, 2:57 PM), https://www.catholicnewsagency.com/news/251040/funding-for-poor-los-angeles-catholic-schools-in-limbo-as-judge-nixes-lawsuit (recognizing that the *Gravissimum Educationis* directs Catholics to provide opportunities for educational choices for their children).

[55] GRAVISSIMUM EDUCATIONIS, *supra* note 9, ¶ 3, at 728; PONTIFICAL COUNCIL FOR JUST. & PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH ¶¶ 209–11, 95–96 (2004) [hereinafter COMPENDIUM OF THE SOCIAL DOCTRINE]; CATECHISM OF THE CATHOLIC CHURCH ¶¶ 2201–31 (2d ed. 1997).

[56] The weight placed on individual households, and parents themselves, when it comes to the education of children cannot be understated. GRAVISSIMUM EDUCATIONIS, *supra* note 9, ¶ 3, at 728 ("As it is the parents who have given life to their children, on them lies the gravest obligation of educating their family. They must therefore be recognized as being primarily and principally responsible for their education. The role of parents in education is of such importance that it is almost impossible to provide an adequate substitute. It is therefore the duty of parents to create a family atmosphere inspired by love and devotion to God and their fellow-men which will promote an integrated, personal and social education of their children. The family is therefore the principal school of the social virtues which are necessary to every society."(footnote omitted)).

[57] *Id.* The underlying humanism is further expressed in the COMPENDIUM OF THE SOCIAL DOCTRINE, *supra* note 55, ¶¶ 7–9, at 3–4 (emphasis omitted) ("The Christian knows that in the social doctrine of the Church can be found the principles for reflection, the criteria for judgment and the directives for action which are the starting point for the promotion of an integral and solidary humanism."); *id.* (discussing the centrality of human dignity as fashioned by God in the human nature for the promotion of the common good and world recognition of such value and dignity of each person).

The act of calling upon the State to assist the Church in this humanistic project transitions the conversation from the theoretical to the practical, a move that the papal post-conciliar Compendium of Social Doctrine ("the Compendium") built on. With a full discussion of the Code of Canon Law set forth below, a brief discussion of the important example of the practical approach the Compendium brought to the education question is necessary. In the 2004 Compendium, a papal council framed education not only as a safeguard against the lapsing morality of humanity,[58] but as an issue of grave economic and cultural consequence.[59] Indeed, "[a]t the root of the poverty of so many peoples are also various forms of cultural deprivation and the failure to recognize cultural rights."[60] Such cultural rights include "the right of families and persons to free and open schools; freedom of access to the means of social communication together with the avoidance of all forms of monopolies and ideological control of this field; freedom of research, sharing one's thoughts, debate and discussion."[61] The equitable standardization of the attainment of knowledge, therefore, protects against destitution and preserves a quality of life "in harmony with the dignity of the human

[58] COMPENDIUM OF THE SOCIAL DOCTRINE, *supra* note 55, ¶¶ 556–57, at 242.

[59] *See id.* ¶ 166, at 73 (noting that the common good depends on "social conditions" which include the provision of "education and access to culture" (emphasis omitted)); *id.* ¶ 191, at 84 (noting the importance of education for overcoming cultural and social barriers); *id.* ¶ 198, at 88 ("Modern times call for an intensive educational effort and a corresponding commitment on the part of all . . . [to] the quest for truth . . . . This is an issue that involves the world of public communications and that of the economy in a particular way." (emphasis omitted) (footnote omitted)); *id.* ¶ 557, at 242 ("At the root of the poverty of so many peoples are also various forms of cultural deprivation and the failure to recognize cultural rights. The commitment to the education and formation of the person has always represented the first concern of Christian social action."). The Compendium discusses the role of education and economics on the individual level, *see id.* ¶¶ 289–90, at 127, ¶ 376, at 161 (discussing the effect of education and high unemployment levels on human fulfillment, the education system's responsibilities in light of the increased "necessity of changing jobs," and the urgent need to educate consumers regarding responsible choices), which will be discussed here, and also on the national level, *see id.* ¶ 447, at 194. As to the latter, countries that suffer from poverty and underdevelopment are oft unfairly excluded from the international market, and other causes include illiteracy, the absence of structures and services, and institutional instability. *Id.* "There is a connection between poverty and, in many countries, the lack of liberty, possibilities for economic initiative and a national administration capable of setting up an adequate system of education and information." *Id.* It is the purview and mission of the Church to help in the facilitation of these systems—individually and nationally—to ensure a global culture of dignity, equality, and respect. *See id.* ¶ 19, at 7, ¶ 35, at 17, ¶ 240, at 109, ¶ 376, at 161, ¶ 426, at 182, ¶ 428, at 185, ¶ 532, at 233, ¶ 557, at 242 (mentioning the Church's role in aiding parents as they educate their children; proposing educational formation, seeking the freedom to form associations for educational purposes, and through its educational institutions, enculturating the Church's message).

[60] *Id.* ¶ 557, at 242.

[61] *Id.*

person."[62] Here, Pope John Paul II frames education as a concrete tool for social advancement, for individual empowerment, and for the cultivation of a culture of dignity, equality, and respect. In effect, he warns that systems without an effective, equitable education system are impoverished; their citizens are "in poverty."[63] Marred by litigious histories, demonstrably inequitable gaps between districts, and problematic resource allocation algorithms–America might take heed of this warning.[64]

B. A New, Universal Corpus Juris Cononici

Efforts towards a practicable education regulatory schema have no greater manifestation than in Pope John Paul II's codes of canon law. The 1983 Code of Canon Law ("CIC-1983") and Code of Canons of the Eastern Churches ("CCEO-1990")[65] "encourage[] a course of human action in

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[62] *Id.* (quoting GAUDIUM ET SPES, *supra* note 45, ¶ 60, at 964); *see* UNESCO INST. FOR STAT., HANDBOOK ON MEASURING EQUITY IN EDUCATION 4 (2018) (noting that education correlates to higher individual income and reductions in poverty); Pervez Zamurrad Janjua & Usman Ahmed Kamal, *The Role of Education and Income in Poverty Alleviation: A Cross-Country Analysis*, 16 LAHORE J. ECON. 143, 150 (2011) (noting that education can reduce poverty); Nicholas Burnett, *Education for All: An Imperative for Reducing Poverty*, 1136 ANN. N.Y. ACAD. SCIS. 269, 269 (2008) (stating that education plays a role in reducing poverty). Additionally, education is viewed as a check against humanity's degradation towards a culture of materialism. *See* COMPENDIUM OF THE SOCIAL DOCTRINE, *supra* note 55, ¶ 129, at 57, ¶ 170, at 75, ¶ 271, at 120, ¶¶ 375–76, at 161, ¶ 433, at 187, ¶¶ 556–59, at 242–43 (describing the dangers reductionist materialism poses to a proper understanding of the human person in multiple spheres of life and the importance of Christians' commitment to truth and education to provide a proper perspective on human beings and society).

[63] *See* COMPENDIUM OF THE SOCIAL DOCTRINE, *supra* note 55, ¶ 447, at 194, ¶ 557, at 242 (discussing the link between a lack of education and poverty).

[64] Steve Smith, *Education Adequacy Litigation: History, Trends, and Research*, 27 U. ARK. LITTLE ROCK L. REV. 107, 108–09 (2004) (discussing the history of school financing litigation since *Brown v. Board of Education*); SYLVIA ALLEGRETTO ET AL., PUBLIC EDUCATION FUNDING IN THE U.S. NEEDS AN OVERHAUL 2, 8–9, 13, 15 (2022) (examining the inadequate and inequitable distribution of per-student spending in public schools across the United States); BRUCE D. BAKER & SEAN P. CORCORAN, THE STEALTH INEQUITIES OF SCHOOL FUNDING: HOW STATE AND LOCAL SCHOOL FINANCE SYSTEMS PERPETUATE INEQUITABLE STUDENT SPENDING 16, 25–27 (2012) (explaining how state funding formulas lead to inequalities in educational funding).

[65] 1983 CODE OF CANON LAW, *translated in* CODE OF CANON LAW: LATIN-ENGLISH EDITION (Canon L. Soc'y of Am. Trans., 1983; CODEX CANONUM ECCLESIARUM ORIENTALIUM (1990), *translated in* CODE OF CANONS OF THE EASTERN CHURCHES: LATIN-ENGLISH EDITION (Canon L. Soc'y of Am. Trans., new English trans. 2001). For a discussion on the integration of *Gravissiumus Educationis* into the Codes, see generally Zenon Grocholewski, *The Catholic School According to the Code of Canon Law*, 12 J. CATH. EDUC. 148, 149–53 (2008) (discussing how conciliar documents like *Gravissimum Educationis* found expression in the Code of Canon Law); KEVIN E. MCKENNA, A CONCISE GUIDE TO YOUR RIGHTS IN THE CATHOLIC CHURCH 17–18 (2006) (noting that the Code of Canon Law and the Code of Canons of the Eastern Churches contain the rights of the laity); CANON L. SOC'Y AM., NEW COMMENTARY ON THE CODE OF CANON LAW 272–73, 954, 957–58 (John P. Beal, James A.

accord with the natural rights and responsibilities that are ontologically grounded in the human person."[66] The right to a Christian education, "by which they will be properly instructed so as to develop the maturity of a human person," of course, being contemplated as a natural right,[67] is codified at CIC-1983, Canon 217, and at CCEO-1990, Canon 20.[68] Yet, importantly and uniquely, this right is a shared right between parents, the Church, and the State based on a necessarily collaborative relationship. This tripartite structure, as we shall see, has proven effective in terms of governance.[69] We should explore these three aspects of the larger duty to educate in turn, focusing first on the overarching duty itself and then the modes of its implementation.[70]

The duty, specifically, of parents to educate children is paramount and foremost, codified in CCEO-1990, Canon 627, §1, as well as in CIC-1983, Canon 226, § 2. The CIC-1983 provision specifically reads, "[b]ecause they have given life to their children, parents have a most serious obligation and enjoy the right to educate them; therefore Christian parents are especially to care for the Christian education of their children according to the teaching handed on by the Church."[71] At once, the Church offers an articulation of the right to education and a defense for why the parents bear the weight of its enactment. Importantly, the responsibility of parents as primary educators is left vague and universal; it does not depend on membership in the Church but on a natural and original endowment.[72]

Coriden & Thomas J. Green eds., 2000) (discussing how *Gravissimum Educationis* shaped specific provisions of the Code of Canon Law and the Code of Canons of the Eastern Churches).

[66] *See* John J. Coughlin, *Canon Law and the Human Person*, 19 J.L. & RELIGION 1, 57 (2003).

[67] 1983 CODE c.217; *see, e.g.*, JOHN PAUL II, FAMILIARIS CONSORTIO [ON THE FAMILY] ¶ 35, at 50 (1982) ("The right and duty of parents to give education is essential, since it is connected with the transmission of human life; it is original, and primary with regard to the educational role of others, on account of the uniqueness of the loving relationship between parents and children; and it is irreplaceable and inalienable, and therefore incapable of being entirely delegated to others or usurped by others.").

[68] 1983 CODE c.217 ("The Christian faithful since they are called by baptism to lead a life in conformity with the teaching of the gospel, have the right to a Christian education by which they will be properly instructed so as to develop the maturity of a human person and at the same time come to know and live the mystery of salvation."); CODEX CANONUM ECCLESIARUM ORIENTALIUM, *supra* note 65, c.20 (similar).

[69] *See* Lorraine Ozar & Patricia Weitzel-O'Neill, *National Catholic School Standards: Focus on Governance and Leadership*, 17 J. CATH. EDUC. 157, 159 (2013) (noting that school governance is important for building successful schools).

[70] In-text quotations will be taken from CIC-1983, with cognate canons from CCEO-1990 included in footnotes.

[71] 1983 CODE c.226, § 2.

[72] For a discussion of the history of Supreme Court decisions that have recognized a parental right to direct children's education, irrespective of religious status, see John J.

How, functionally, are parents expected to act in the interest of educating their child within the Christian school structure? Both CCEO-1990 and CIC-1983 offer extensive wisdom on the mediation, regulation, and role of parents in the education of children. At the outset, they have dominion over school-choice, able to choose based on the needs of their own children and "local circumstances"[73] so long as they entrust their children to "those schools in which Catholic education is provided," or, if unable to, a school that complements the goals of Catholic education paired with "suitable Catholic education outside the schools."[74] CIC-1983, Canon 796, §2, further delves into the necessary parent-teacher relationship that is just as important as school choice: "It is incumbent upon parents to cooperate closely with the school teachers . . . [and] teachers are to collaborate closely with parents, who are to be willingly heard and for whom associations or meetings are to be inaugurated and held in great esteem."[75]

The Church joins the conversation as a partner with the parents.[76] Whereas the parents' role is in the selection of schools, the Church's is in

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Coughlin, *Common Sense in Formation for the Common Good—Justice White's Dissents in the Parochial School Aid Cases: Patron of Lost Causes or Precursor of Good News*, 66 ST. JOHN'S L. REV. 261, 282–89 (1992). Such an articulation represents a concrete response to very real historical situations where the State threatened to out-maneuver the parents on matters of education. *See* Erik M. Zimmerman, Note, *Defending the Parental Right to Direct Education:* Meyer *and* Pierce *as Bulwarks Against State Indoctrination*, 17 REGENT U. L. REV. 311, 316–19 (2005) (recounting the erosion of parental control over education as state governments created compulsory systems of education).

[73] 1983 CODE c.793, § 1 ("Catholic parents also have the duty and the right to select those means and institutions through which they can provide more suitably for the Catholic education of the children according to local circumstances."); CODEX CANONUM ECCLESIARUM ORIENTALIUM, *supra* note 65, c.627, §§ 2–3 ("To the extent that it is beyond their own resources to provide for the overall education of their children, it is also up to them to entrust others with a share of their educational task and to choose those means of education that are necessary or useful. . . . It is necessary that parents have just freedom in the choice of the means of education . . . therefore, the Christian faithful are to see that this right is recognized by the civil society and even fostered by suitable assistance in accord with the requirements of justice.").

[74] 1983 CODE c.798; *see also* CODEX CANONUM ECCLESIARUM ORIENTALIUM, *supra* note 65, c.627, § 3 (placing perhaps an even greater emphasis on "just freedom in the choice of the means of education").

[75] 1983 CODE c.796, § 2. While CCEO-1990 has no specific cognate of this canon, it does make reference to the fact that the "Catholic school is to be fostered with special care and should be the focus of the concern of parents, teachers, and the ecclesial community." CODEX CANONUM ECCLESIARUM ORIENTALIUM, *supra* note 65, c.631, § 1; *see also id.* c.639 ("Teachers . . . should be outstanding in doctrine and exemplary in the witness of their lives; they are to collaborate primarily with the parents, but also with other schools."); *id.* c.628, § 2 ("All those to whom the care of souls has been committed must help parents in educating their children, make them aware of their rights and obligations, and provide for the religious education especially of young people.").

[76] *See* 1983 CODE c.794, § 1 ("The duty and right of educating belongs in a unique way to the Church which has been divinely entrusted with the mission to assist men and women

the offerings of schools themselves.[77] "The Church has the right to establish and supervise schools of any discipline, type and grade whatsoever,"[78] and also retains final authority over the content of instruction, as well as the conferral of Christian school status.[79] Centralizing administrative power allows for the perpetuation of a unified message, the conformity and standardization of quality across schools in the Holy See, and underscores the position of the Universal Church as principle interlocutor of content in the classroom.

The final aspect of Christian school governance concerns the external relationship with the State. Both CIC-1983 and CCEO-1990 contemplate assistance by the State in securing a Catholic education,[80] and call for "the Christian faithful [to] be concerned that civil society acknowledge this freedom for parents and also safeguard it with its resources."[81] CIC-1983 goes so far as to urge "the Christian faithful . . . to strive so that in civil society the laws which regulate the formation of youth provide also for their religious and moral education in the schools themselves."[82]

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so that they can arrive at the fullness of the Christian life."); CODEX CANONUM ECCLESIARUM ORIENTALIUM, *supra* note 65, c.628, § 1 ("The Church, since it has generated new creatures through baptism, is to care for their Catholic education together with parents.").

[77] *See* 1983 CODE c.794, § 1 ("The duty and right of educating belongs in a unique way to the Church which has been divinely entrusted with the mission to assist men and women so that they can arrive at the fullness of the Christian life.").

[78] 1983 CODE c.800, § 1. The CCEO-1990 has a similar pronouncement. CODEX CANONUM ECCLESIARUM ORIENTALIUM, *supra* note 65, c.631, § 2 ("It is the right of the Church to establish and supervise schools of any type or level.").

[79] 1983 CODE c.803, § 3 ("Even if it really be Catholic, no school may bear the title *Catholic school* without the consent of the competent ecclesiastical authority."); *id.* c.804, § 1 ("Catholic religious formation and education which are imparted in any schools whatsoever as well as that acquired through the various media of social communications are subject to the authority of the Church; it is the responsibility of the conference of bishops to issue general norms in this area, and it is the responsibility of the diocesan bishop to regulate such education and be vigilant over it."); CODEX CANONUM ECCLESIARUM ORIENTALIUM, *supra* note 65, c.633, § 1 ("The eparchial bishop is competent to judge any school whatever and to decide whether it fulfills the requirements of Christian education or not; for a grave cause, he is also competent to forbid the Christian faithful from attending a particular school.").

[80] 1983 CODE c.793, § 2 ("Parents also have the right to make use of those aids to be furnished by civil society which they need in order to obtain Catholic education for their children."); CODEX CANONUM ECCLESIARUM ORIENTALIUM, *supra* note 65, c.627, § 3 ("It is necessary that parents have just freedom in the choice of the means of education with due regard for can. 633; therefore, the Christian faithful are to see that this right is recognized by the civil society and even fostered by suitable assistance in accord with the requirements of justice.").

[81] 1983 CODE c.797; *see also* CODEX CANONUM ECCLESIARUM ORIENTALIUM, *supra* note 65, c.627, § 3 ("It is necessary that parents have just freedom in the choice of the means of education with due regard to can. 633; therefore, the Christian faithful are to see that this right is recognized by the civil society and even fostered by suitable assistance in accord with the requirements of justice.").

[82] 1983 CODE c.799.

While this all has to do with the Church's external treatment of the State, the State also offers something to the Church. Namely, the State provides a model for content that could help prepare Christian students to occupy active roles in civic society. As CIC-1983 articulates, "a true education must strive for the integral formation of the human person, a formation which looks toward the person's final end, and at the same time toward the common good of societies."[83] To this end, the law requires that "children and young people are to be so reared that they can develop harmoniously their physical, moral and intellectual talents, that they acquire a more perfect sense of responsibility and a correct use of freedom, and that they be educated for active participation in social life."[84] In this way, the State and the Church act symbiotically; the codes propound a certain level of dogmatism while retaining a practical, society-oriented aspect to Christian learning.

While this symbiosis is markedly important, a key aspect of the codes is the focus and obligation not on the State, the parents, or even the Church, but on the Christian community *writ large*. CCEO-1990, Canon 630, § 1 propounds that "*[t]he Christian faithful* are to work generously so that the appropriate benefits of education and instruction can be extended to all people everywhere," and that "*the Christian faithful* should support the initiatives of the Church in promoting education, especially in erecting, directing and supporting schools."[85] CIC-1983, Canon 800, § 2, similarly notes that "[*t*]*he Christian faithful* are to foster Catholic schools by supporting . . . their maintenance."[86] Why treat the Christian faithful as distinct from clergy, parents, students, or others? One can point to their passion and zealousness for their community, for their creed, for their schools, as well as to their nuanced knowledge of the needs of their Christian schools based on their known contextual situations. In other words, nobody knows better than the Christian faithful in a given diocese about their own needs, a point well-taken by the Church in facilitating its educational project.

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[83] *Id.* c.795.

[84] *Id.*; *see also* CODEX CANONUM ECCLESIARUM ORIENTALIUM, *supra* note 65, c.629 ("All educators are to see to the formation of the whole human person in such a way that young people, having cultivated their physical, intellectual, and moral talents harmoniously, and being well versed in the Christian virtues, may be disposed to knowing and loving God more perfectly, to evaluating human and moral values with right conscience and embracing them in true freedom, and, having developed a sense of justice and social responsibility, to pursuing loving fellowship with others.").

[85] CODEX CANONUM ECCLESIARUM ORIENTALIUM, *supra* note 65, c.630, §§ 1–2 (emphasis added).

[86] 1983 CODE c.800, § 2 (emphasis added).

III. THE CHURCH'S METHOD INSPIRES THE INVOLVEMENT OF A COMMUNITY BODY POLITIC IN SECULAR EDUCATION DECISION-MAKING

The school is perceived to be an extension of the home in the Catholic community.[87] While American public schools offer more opportunities for parent involvement than Christian schools, the depth of parent involvement in Christian schools is far greater.[88] In other words, whereas community members at public schools might have opportunities to work with teachers or petition districts on curriculum matters, community members in the Christian school context can potentially be equal, co-determinative administrative authorities on matters as far-ranging as programming to governance.[89] And even if they are not involved in every case, dioceses across the nation uniformly and constantly preoccupy themselves with ways to evolve and strengthen the parent-school relationship in light of Canon Law,[90] and, by extension, hone in on the most effective way to better the lives of students and schools.

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[87] *See* CONGREGATION CATH. EDUC., THE RELIGIOUS DIMENSION OF EDUCATION IN A CATHOLIC SCHOOL (Apr. 7, 1988) https://www.vatican.va/roman_curia/congregations/ccatheduc/documents/rc_con_ccatheduc_doc_19880407_catholic-school_en.html (noting that many Catholic children view Catholic schools as an extension of their own homes); James M. Frabutt et al., *Pastors' Views of Parents and the Parental Role in Catholic Schools*, 14 J. CATH. EDUC. 24, 24–30 (2010) (reviewing thirty-three Catholic Church documents that revealed six major themes of parent involvement in education).

[88] Gail M. Mulligan, *Sector Differences in Opportunities for Parental Involvement in the School Context*, 7 J CATH. EDUC. 246, 257–58, 260, 262–63 (2003) (suggesting that public schools provide more formal opportunities for parental involvement than Catholic schools, but Catholic schools enjoy greater actual parental participation); Chandra Muller, Univ. of Tex. At Austin, Parent Involvement in Education and School Sector 8–9 (Apr. 1993) (noting how parents are much more involved in activities with Catholic schools than public schools); Patricia A. Bauch & Ellen B. Goldring, *Parent Involvement and School Responsiveness: Facilitating the Home-School Connection in Schools of Choice*, 17 EDUC. EVALUATION & POL'Y ANALYSIS 1, 15 (1995) (noting how parents choose Catholic schools because of greater parental involvement).

[89] For further background, see generally Haney, *supra* note 8, at 204–06, 208 (describing the rise of lay participation and guidance on Catholic school governing boards), Mulligan, *supra* note 88, at 247 (noting that although parental involvement can take many forms, such as volunteering or attending open houses, teachers ultimately control how much access parents have), and Mary-Michele Upson Hirschoff, *Parents and the Public School Curriculum: Is There a Right to Have One's Child Excused from Objectionable Instruction?*, 50 S. CAL. L. REV. 871, 957 (1977) (noting that parents have limited legal rights to oversee their children's instruction).

[90] *See* 1983 CODE c.226, § 2 (focusing on the parents' role in educating children); CODEX CANONUM ECCLESIARUM ORIENTALIUM, *supra* note 65, c.627, §§ 1–2 (discussing parents' duty to educate their children either themselves or to entrust that task to others); *id.* c.628, § 1–2 (explaining the Church's role in helping and equipping parents to educate their children); *id.* c.639 (noting teachers' duty to collaborate with parents in educating children). For examples of Catholic schools partnering with parents, see, e.g., Katie Warner, *Stewards of Education: How Schools Partner with Parents*, NAT'L CATH. REG. (Aug. 19, 2017)

This communicative approach predicated on equivalent exchange, and, generally, the Catholic preoccupation with community engagement, has something to teach the secular system. As we will discuss, families, parents, and students, after all, are first-hand observers of the deficits and issues plaguing schools and are aware of the nuanced issues facing their institutions.[91] Yet, despite this wealth of information at their fingertips, American school districts avoid community consultation, resulting in fiscal inequity, poor resource allocation, and achievement gaps.[92]

Meanwhile, the inequitable distribution of government school funding is hailed as the most important issue in the field of American education today.[93] Cases, like *Abbot* and *Serrano*, inform the contention

(discussing two Catholic schools, in Florida and Minnesota, which created programs to facilitate closer relations with parents); Diocese of Manchester Cath. Schs., *Statement on Parental Partnership in Education*, CATH. SCHS. N.H. (last visited Dec. 19, 2022) (stating the Manchester, NH diocese's commitment to partner with parents in educating their children); *The Parent–School Partnership*, REGINA ACADS. (last visited Dec. 19, 2022) (articulating how the Academies seek to support children by partnering with their parents).

[91] For examples of how parents grasp the issues facing their children's schools, see, e.g., Karen Ann Cullotta, *Frustrated by Chicago Public Schools' Union Battles, a Growing Number of Weary Parents Enroll Kids in City's Catholic Schools*, CHI. TRIB. (Jan. 14, 2022, 5:00 AM) (discussing the desire of some parents in Chicago to move their children from public schools to Catholic schools because of Chicago Public Schools' battles with the teachers' union as well as excessive remote learning); Brittany Edney, *Students Complain District Needs to Correct Violence Problem at Gwinnett Schools*, FOX 5 ATLANTA (Dec. 6, 2022), (describing how students are speaking out against school violence that has gone unaddressed by public school officials); Joe Hong, *Frustration over COVID, Unions, Politics Spurs California Parents to Run for School Boards*, TIMES SAN DIEGO (Aug. 21, 2022), (discussing the concern of parents in California for how school money is being spent); Zharia Jeffries, *Some SC Parents of Kids with Disabilities Frustrated Navigating Special Needs Education*, POST & COURIER (Apr. 24, 2022), (reporting on hurdles families with disabled children face in public school systems); Kolbie Satterfield, *Loudon County Parents Fed Up Over High School Building Conditions*, WUSA9 (last updated Feb. 17, 2022, 11:35 PM), (describing how parents and students were pushing for needed renovations to a decaying school building).

[92] *See* Delores C. Peña, *Parent Involvement: Influencing Factors and Implications*, 94 J. EDUC. RSCH. 42, 43–44 (2000) (describing how many schools and teachers avoid parental involvement in their children's education); Pedro A. Noguera, *The Achievement Gap: Public Education in Crisis*, NEW LAB. F., Spring 2009, at 63–64 (noting the prevailing achievement gap in student outcomes and its roots in economic and resource allocation inequality).

[93] *See* Brenda Alvarez et al., *10 Challenges Facing Public Education Today*, NEA (Aug. 3, 2018), https://www.nea.org/advocating-for-change/new-from-nea/10-challenges-facing-public-education-today (describing the poor financial situation of public schools and pointing out disparities in funding between schools); Tom Vander Ark, *The Biggest Source of Inequity Might Be the Way We Fund Schools*, FORBES (Oct. 6, 2020, 2:48 PM) ("[School funding] might be the biggest source of inequity in America . . . ."); Lydia Saad, *Americans Satisfaction with K-12 Education on Low Side*, GALLUP (Sept. 1, 2022) ("The [second] most common theme [expressed by Americans who are dissatisfied with education], raised by 23% of respondents, is that schools or students suffer from a lack of resources. Chief among these is mentions of unequal access to quality education for low-income students or due to racism (8%)."); BRUCE D. BAKER ET AL., THE ADEQUACY AND FAIRNESS OF STATE SCHOOL FINANCE SYSTEMS 7 (5th ed. 2022) (arguing that effective school policies require sufficient funds to

that part of the issue is that (1) school adequacy and fiscal equity go hand-in-hand, and (2), at present, state governance structures are demonstrably ill-equipped to recognize where resources and funding should be allocated to.[94] A governance model that makes use of the nuanced expertise of community members might rectify this issue. As is the case in the Christian model, authorities should be required to meaningfully communicate with permanently assembled district community body politics, representing cross-sections of communities affected by funding allocations. Based on that interaction, districts should consequently articulate a clearer picture to which schools and for what purposes state funds ought to be applied. States, in turn, benefiting from the on-the-ground expertise of community members, will appreciate fiscal inequity amongst districts to a greater degree than they are presently with a simple per-pupil funding formula.[95]

I now approach this argument piecemeal. First, the concrete aspects of the Christian school model that are worth appropriating in the secular school context are discussed. Then, the findings are applied to the contours of a body politic.

A. Lessons from the Christian School Context

Christian schools in the diocese of Sioux City, Iowa, faced trouble in 2009.[96] Declining student enrollment, dilapidated buildings, and shifting student needs muddied the system, along with scarcely sustainable

support them); Evie Blad, *Education's Biggest Problem Is a Lack of Money, Many Americans Agree*, EDUC. WEEK (Aug. 7, 2019) **(**noting that, for almost twenty years, financial support has been "the most common response" to the PDK International Poll's question regarding problems facing public schools).

[94] *See* Abbott *ex rel.* Abbott v. Burke, 784 A.2d 82, 96–97 (N.J. 2000) (Stein, J., concurring) (discussing how the failure of state government education initiatives and the resulting shift in courts' jurisprudence from focusing on solely funding equity to including educational adequacy), *modified in part sub nom.*, Abbott v. Burke, 852 A.2d 185 (N.J. 2004), *and modified judgment sub nom.*, Abbott v. Burke, 857 A.2d 173 (N.J. 2004); Serrano v. Priest, 487 P.2d 1241, 1247–48, 1255–59 (Cal. 1971) (discussing how government funding of public schools widened economic gaps and how that undermined children's educational and economic opportunities).

[95] *See* PETER G. PETERSON FOUND., *How is K-12 Education Funded?*, PETER G. PETERSON FOUND. (Aug. 16, 2022) (discussing how the majority of states allocate funds through foundation programs, which disperse funds on a per-pupil basis); Carly Flandro, *Per Pupil Expenditure Explained: A Crash Course on How It's Calculated and Compared*, IDAHO EDUC. NEWS (Aug. 8, 2022) ("The way states fund schools is complex and is often measured with a number called per-pupil expenditure (PPE). . . . Generally, PPE is calculated by taking the amount of money a district spends on students in a given year and dividing it by the number of students in that district."); MICHAEL GRIFFITH, STATE EDUCATION FUNDING FORMULAS AND GRADE WEIGHTING 1 (2005), https://www.ecs.org/clearinghouse/59/81/5981.pdf (explaining various types of education funding formulas).

[96] Anthony Sabatino et al., *Strategic Restructuring of School Boards in the Diocese of Sioux City* 17 J. CATH. EDUC. 186, 199 (2013).

funding.[97] The Office of Education might have handled matters internally; the superintendent and an educational leadership team certainly had cause to do so by virtue of their academic training, professional charge, and position in relation to finances. However, they didn't. Instead, they resolved to use their unique, centralized position in the diocese to respond innovatively "through the conduit of the local school board structure."[98] Or, in other words, community engagement.

As discussed in the previous section, the primacy of parental involvement in Christian school administration and organization is not understated.[99] In addition to being codified in the Canon Law at Canon 796, § 2, the notion is propounded by Catholic principles of subsidiarity and collaboration.[100] Subsidiarity, centrally, is about the collective – a "network of social relationships," or more specifically "the sum of relationships between individual and intermediate social groupings,

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[97] *Id.*

[98] *Id.* at 201.

[99] It should be noted that, as with any system, there is no uniformity in approach when it comes to parental involvement in Catholic schooling. Different school leaders have different views on how parents should (and can) be helpful in their students' education. Sioux County represents an example of a progressive approach to mobilizing community involvement. Sabatino et al., *supra* note 96, at 201–02, 207–08. Other views of such involvement are more dismissive. Especially to the extent that clergy and leadership are concerned about micromanaging or the usurpation of the diocesan authority, there have been arguments made that say satisfying Vatican II and Canon Law pronouncements on parental involvement need not require more than involving parents in sports and regular briefings. *See, e.g.*, Frabutt, *supra* note 87, at 38–40 (discussing how parental involvement in Catholic schools is desired but should be limited); James Arthur, *Parental Involvement in Catholic Schools: A Case of Increasing Conflict,* 42 BRITISH J. EDUC. STUD. 174, 187–88 (1994). These leaders are also content with saying that parental power really stops at school choice. *See id.* at 188–89 (discussing tension in England between cardinals who wish to retain more control over children's education and the English government which wants to provide parents with more choices). Yet, importantly, even these limited views of parental involvement arise from the base-notion that parents *must* be involved *in some way* and that this is helpful in achieving the overall goals of schooling.

[100] 1983 CODE c.796, § 2 ("It is incumbent upon parents to cooperate closely with the school teachers to whom they entrust their children to be educated; in fulfilling their duty teachers are to collaborate closely with parents who are to be willingly heard and for whom associations or meetings are to be inaugurated and held in great esteem."); JOHN PAUL II, LETTER TO FAMILIES ¶ 16 (Teams of Our Lady 2011) (1994) ("[T]he mission of education must always be carried out in accordance with a proper application of the principle of subsidiarity. This implies the legitimacy and indeed the need of giving assistance to the parents, but finds its intrinsic and absolute limit in their prevailing right and their actual capabilities. The principle of subsidiarity is thus at the service of parental love, meeting the good of the family unit. For parents by themselves are not capable of satisfying every requirement of the whole process of raising children, especially in matters concerning their schooling and the entire gamut of socialization. Subsidiarity thus complements paternal and maternal love and confirms its fundamental nature, inasmuch as all other participants in the process of education are only able to carry out their responsibilities in the name of the parents, with their consent and, to a certain degree, with their authorization.").

which are the first relationships to arise."[101] Only through individuals and their networks can "higher forms of social activity" manifest.[102] Recognizing the importance of these atomic structures within the larger social fabric, the law of subsidiarity forbids "assign[ment] to a greater and higher association what lesser and subordinate organizations can do."[103] Higher associations must adopt an "attitude[] of help"–*subsidium*–support and promotion with respect to lower or distilled social orders in the interest of dignity, freedom, and preservation of the status quo.[104]

In the context of Sioux City, *subsidium* means that the head of the school, rather than an estranged bishop or diocese Office of Education, could more appropriately manage the school.[105] In other words, successful governance requires participation and cooperation of all individuals in the church-school-family ambit.[106] Sioux City thus connected local school leaders with a community of school-specific, committee-driven boards that focused on, primarily, identifying and remediating school-specific needs, and, secondarily, addressing larger issues concerning education objectives for the diocese as a whole.[107] They committed themselves to developing an efficient, effective network "grounded in their unified effort to ensure that the Catholic education mission thrives in their diocese." [108] In turn, they reaped substantial rewards for doing so.[109] Specifically, the new structure allowed for the diocese to take advantage of on-the-ground community board members, develop a per-school individualized support plan to drive actions, and offer a forum for community members to self-advocate for resources.[110]

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[101] COMPENDIUM OF THE SOCIAL DOCTRINE, *supra* note 55, ¶ 185, at 81. The Catechism defines subsidiarity as the principle that "a community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to co-ordinate its activity with the activities of the rest of society, always with a view to the common good." CATECHISM OF THE CATHOLIC CHURCH, *supra* note 55, ¶ 1883, at 460 (quoting JOHN PAUL II, CENTESIMUS ANNUS ¶ 48 (1991)).

[102] COMPENDIUM OF THE SOCIAL DOCTRINE, *supra* note 55, ¶ 185, at 81.

[103] PIUS IX, QUADRAGESIMO ANNO ¶ 16 (1931).

[104] COMPENDIUM OF THE SOCIAL DOCTRINE, *supra* note 55, ¶ 186.

[105] Sabatino et al., *supra* note 96, at 206 (describing how local school boards took the lead in identifying in developing and implementing long term plans while tailoring programs to address local problems).

[106] *See* DESIGN FOR SUCCESS, *supra* note 8, at 59–60 (discussing how the effectiveness of Catholic education programs derives from community effort and collaboration).

[107] Sabatino et al., *supra* note 96, at 200–02, 204–08.

[108] *Id.* at 201.

[109] *Id.* at 207 ("[L]ocal boards of education—in collaboration with their administrators—have rapidly developed their capacity to conduct long-range planning. . . . [And g]reater collaboration among the boards, along with stronger relationships between local representatives and the Office of Education, fostered the formation of a new culture.").

[110] *Id.* at 201–03, 205–07.

Moving away from Sioux City specifically, the prototypical Christian school board must be properly characterized. In broad strokes, there are three basic Christian school board types ranging in the scope of their power and authority in relation to Church offices.[111] Advisory boards participate in decision-making processes and recommend policy, but their advice has no force and can be ignored.[112] Consultative boards have equally little enactment power, but, nevertheless, the Church authority is required to consult with the Board in the formulation and adaptation of policy.[113] Boards of Limited Jurisdiction, however, are "delegated final authority to enact policy regarding certain areas . . . [with] jurisdiction . . . limited to those . . . [matters] that have been delegated to [them] by [primary authorities]," and are consultative on other matters.[114] In 1994, "[a]lmost 60 percent of private secondary schools and 33 percent of diocesan, regional or interparish secondary schools . . . [had] boards with limited jurisdiction."[115] These boards are the "mechanism to gather the 'best people in terms of knowledge, experience, and ability' to make decisions affecting the Catholic schools and the entire Catholic community as well as the secular community."[116] To that end, Catholic education leaders, since the mid-1960s, advocated that the majority of board members be laypersons who represented the community.[117]

The term 'community,' or, in a certain sense, 'society,' in the Catholic context takes on a unique spirit that is also worth examining. As framed by the Catechism of the Catholic Church ("the Catechism"), the terms denote "an assembly that is at once visible and spiritual, a society endures through time: it gathers up the past and prepares for the future. By means of society, each man is established as an 'heir' and receives certain 'talents' that enrich his identity . . . . "[118] This definition offers three interlacing aspects to the term 'community,' especially as it relates to their role on school boards.

The first is the "visible and spiritual" assemblage, implying that participants of a community are characterized by attentiveness and

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[111] DESIGN FOR SUCCESS, *supra* note 8, at 17, 31, 69–70.

[112] *Id.* at 69.

[113] *Id.* at 24, 70.

[114] *Id.* at 27–28, 70.

[115] JOHN J. CONVEY & REGINA M. HANEY, BENCHMARKS OF EXCELLENCE: EFFECTIVE BOARDS OF CATHOLIC EDUCATION 14 (1997).

[116] *Id.* at 204 (citation omitted) (quoting OLIN J. MURDICK, CATH. EDUC. ASS'N, THE PARISH SCHOOL BOARD 7 (1967)).

[117] *See* Lourdes Sheehan, *Emerging Governance Models for Catholic Schools*, 1 J. CATH. EDUC. 130, 131-32, 140–42 (1997) (discussing the advocacy for, and rise of, school boards in Catholic schools following Vatican II and the emphasis on lay participation); LOURDES SHEEHAN, BUILDING BETTER BOARDS: A HANDBOOK FOR BOARD MEMBERS IN CATHOLIC EDUCATION, at vi, viii–ix (1990) (describing the arguments made by proponents of lay participation involvement in school boards in the wake of Vatican II).

[118] CATECHISM OF THE CATHOLIC CHURCH, *supra* note 55, ¶1880, at 459.

utmost sincerity in the work around which they are gathered.[119] In other words, community representation on school boards assures intention and care, with physical and spiritual fervor, to the craft of school governance.[120]

The second aspect highlights the role of renewal and continuous innovation in community; "a society endures through time: it gathers up the past and prepares for the future."[121] The Compendium gives much attention to the Catholic emphasis on "renewal."[122] There, the value-set of the Church "is presented as a 'work site' . . . always in progress, where perennial truth penetrates and permeates new circumstances."[123] In the school context, by extension, the community must be dedicated to the unceasing project of renewing, building, and innovating their work with changing times.[124] The nuanced knowledge of the changing aspects of their particular school make the board community "leaven of innovation and creativity . . . develop[ing] [ideas] through reflection applied to the changing situations."[125]

The third important aspect of community is the focus on the individuals themselves: "each man is established as an 'heir' and receives certain 'talents' that enrich his identity."[126] Per the Catechism, each individual "rightly owes loyalty to the communities of which he is part."[127] This arises out of the notion that God "entrusts to every creature the functions it is capable of performing, according to the capacities of its own nature."[128] In other words, every individual offers something unique to the collective and so should feel empowered to contribute to the larger

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[119] *Id.*

[120] This reading is supported by the text of the Catechism:

> "Participation" is the voluntary and generous engagement of a person in social interchange. It is necessary that all participate, each according to his position and role, in promoting the common good. This obligation is inherent in the dignity of the human person. . . . Participation is achieved first of all by taking charge of the areas for which one assumes *personal responsibility:* by the care taken for the education of his family, by conscientious work, and so forth, man participates in the good of others and of society.

Id. ¶¶ 1913–14, at 466.

[121] *Id.* ¶ 1880, at 459.

[122] *See* COMPENDIUM OF THE SOCIAL DOCTRINE, *supra* note 55, ¶¶ 85–86, at 38–39 (discussing how the Church's social doctrine, grounded in the Gospel, ensures consistency while integrating new ideas and developments).

[123] *Id.* ¶ 86, at 38.

[124] *See id.* ¶¶ 85–86, at 38 (discussing how the Christian social doctrine is defined by continuous work, innovation, and renewal).

[125] *Id.* ¶ 86, at 38 (quoting PAUL VI, OCTOGESIMA ADVENIENS ¶ 42, at 15 (1971)).

[126] CATECHISM OF THE CATHOLIC CHURCH, *supra* note 55, ¶ 1880, at 459 (referring to the parable in *Luke* 19 in which the nobleman gives his servants talents and expects them to be profitable with the talents by doing business).

[127] *Id.*

[128] *Id.* ¶ 1884, at 460.

whole.[129] Empowerment is a key component of this individual focus. But it is through community-orientation (termed "socialization" in the Catechism) that one "develops the qualities of the person, especially the sense of initiative and responsibility, and helps guarantee his rights."[130] A form of empowerment is thus helping to attain "objectives that exceed individual capacities" and perpetuating the common good.[131]

Taken together, these three aspects help paint an honest picture of the value-sets the Christian faithful presumably bring to their work. The unique community-participant mentality, together with the community-oriented structure of school boards themselves, provide an effective model of school governance. And, importantly, this model can be applied with success in the American education system.

B. Outlining the Body Politic

The body politic calls upon similar structural designs, conceptions of community involvement, and guiding principles as found in the Christian school context.

With regard to structure, it is important to note that while the level of authority granted Boards of Limited Jurisdiction has not been seen in the American context, the notion of collaboration between the community and the district is not itself new in the American education scene. "Forty [U.S.] jurisdictions . . . have enacted laws directing school districts . . . to implement family engagement policies" through board-making initiatives.[132] Yet, there is more (or less) to this than meets the eye. Of the forty, only five states have councils with authority to influence funding or governance policy in line with what the body politic would possess: Georgia, Illinois, Massachusetts, Minnesota, and Nevada.[133] But, a closer look at any one of these more progressive legal schemes reveals anything but the sort of district-parent-school structure we find in the Christian context.

Consider, for instance, the laws of Massachusetts.[134] With a diverse array of school boards ranging in focus[135] – from "gifted . . . education" to

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[129] *Cf. id.* ("The way God acts in governing the world . . . should inspire the wisdom of those who govern human communities.").

[130] *Id.* ¶ 1882 (emphasis omitted).

[131] *Id.* ¶ 1882; *see id.* ¶ 1883 (stating that the goal of social action is always the common good).

[132] SHAKTI BELWAY, MISHAELA DURAN, & LELA SPIELBERG, NAT'L PARENT TEACHER ASS'N, STATE LAWS ON FAMILY ENGAGEMENT IN EDUCATION 15 (n.d.), https://www.academia.edu/34511010/State_Laws_on_Family_Engagement_in_Education_State_Laws_on_Family_Engagement_in_Education_Reference_Guide.

[133] *Id.*

[134] MASS. GEN. LAWS ANN. ch. 15D, § 3 (West 2008).

[135] *See* MASS. GEN. LAWS ANN. ch. 15, § 1G (West 2013) (discussing diverse sorts of school board focuses including "school and district accountability and assistance" to "home

"violence prevention" – and a requirement that at least one member of any policymaking board be a parent of a child,[136] the State is far more progressive than others.[137] Yet, parental involvement begins only after the annual school budget has been allocated. There are no provisions for parental involvement in funding processes or district-wide administrative restructuring and reorganizing and no co-determinative authority afforded community members on matters that go to the heart of the issues presented in *Abbott* or *Serrano*. The issue at the heart of education equality is not whether a home economics curriculum should be reformed or whether school staff ought to be hired and fired, but rather finding a way to break away from the state and district level cycle of inequitable funding. The current schema is a deception! To address the problem of fiscal inequity, community engagement must take place at the highest echelons of the education hierarchy; departments of education should rely on the proven expertise of community members across their many districts to better address the needs of individual schools rather than (or in addition to) their per-pupil funding formulas. This is the purview of the body politic.

Taking this from another angle, the body politic channels the law of subsidiarity.[138] The construction represents a symbiotic relationship between community members and district-level education authorities as they relay information to the state on issues pertaining to the governance of their schools.[139] Each grants the other authority in the form of respect

economics," "gifted and talented education," and "violence prevention."). These focuses are distinct from those of school councils, which focus more on the institutional level and are charged with "identifying educational needs of the students," assessing curriculum, and assisting in the review of the annual budget. ch. 71, § 59C.

[136] ch. 15, § 1E. Also, parents generally may serve on any advisory council such that "a reasonable balance of members . . . shall be maintained." § 1G.

[137] At least eleven states have *no* such community engagement provisions in the law, and the others that do are much less robust than Massachusetts. *See* BELWAY, DURAN, & SPIELBERG, *supra* note 134, at 15, 16, 40, 41, 43, 59, 60–61. 75, 87, 89, 90 (summarizing how Georgia, Illinois, Michigan, and Nevada give far less authoritative power to what are essentially merely advisory boards). Georgia, for instance, has established a state-wide "Quality Basic Education Program" in response to the need for "[p]roviding for parent and community participation in the establishment of school programs, policies, and management so that the school and community are connected in meaningful and productive ways," GA. CODE ANN. § 20-2-131 (1985), but has no requirements that school board seats be reserved for parents, nor does it offer any concrete directives on how to do that work. *See*, *e.g.*, § 20-2-86 (2000).

[138] *See* CATECHISM OF THE CATHOLIC CHURCH, *supra* note 55, ¶ 1883, at 460 (quoting CENTESIMUS ANNUS, *supra* note 101, ¶ 48, at 39) ("The teaching of the Church has elaborated the principle of *subsidiarity*, according to which 'a community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to co-ordinate its activity with the activities of the rest of society, always with a view to the common good.'").

[139] The symbiosis or interdependence of human beings is the fundamental premise of

and dignity; education experts on the state and district level might guide community members on discrete issues to resolve, but power is in the hands of capable community members to offer frank opinions that impact policy. This relationship ensures that every school is treated equitably in the great race for resources at the state level.

As mentioned, the DOE's recent ESSER landscape affords a first glimpse of a world where this high-level, co-determinative community participation in funding allocation is made mandatory. The lynchpin 'return to normalcy' funding plan provides districts with great discretion in how to use millions in funds,[140] but they must do so in demonstrated, "meaningful" consultation with community stakeholders—students to tribes to civil rights organizations, teachers, and school leaders now have a say in the amount and use of their school's funding.[141]

How have school districts taken to the new obligation? The answer is a resounding "very well, indeed," and a survey of school district approaches reveals just how community engagement has revolutionized the effectiveness of school funding.

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the body politic. *See* ARISTOTLE, POLITICS 1, 5 (C.D.C. Reeve trans., Hackett Publ'g Co. 1998) (c. 322 B.C.) ("We see that every [city-state] is a [community] of some sort, and that every community is established for the sake of some [good] (for everyone performs every [action] for the sake of what he takes to be good). . . . Anyone who cannot form a community with others, or who does not need to because he is self-sufficient, is no part of a city-state—he is either a beast or a god."). The principle of subsidiarity encourages the body politic to employ a cooperative approach that both counters the negative effects of the bureaucratic state and also encourages creative solutions. *See* CENTESIMUS ANNUS, *supra* note 101, ¶ 48, at 39 ("By intervening directly and depriving society of its responsibility, the Social Assistance State leads to a loss of human energies and an inordinate increase of public agencies, which are dominated more by bureaucratic ways of thinking than by concern for serving their clients, and which are accompanied by an enormous increase in spending. In fact, it would appear that needs are best understood and satisfied by people who are closest to them and who act as neighbours to those in need.").

[140] *See* Press Release, U.S. Dep't of Educ., U.S. Education Department Releases State Plan Template for the American Rescue Plan Elementary and Secondary School Emergency Relief Fund (Apr. 21, 2021), https://www.ed.gov/news/press-releases/us-education-department-releases-state-plan-template-american-rescue-plan-elementary-and-secondary-school-emergency-relief-fund (noting that, as of April 2021, nearly $81 billion has been allocated to states for the purposes of "safely reopen[ing] schools, sustain[ing] their safe operations, and support[ing] students," with another $41 billion on the way).

[141] *See* U.S. DEP'T OF EDUC., AMERICAN RESCUE PLAN ELEMENTARY AND SECONDARY SCHOOL EMERGENCY RELIEF FUNDS (ARP ESSER): STATE AND LOCAL EDUCATIONAL AGENCY (LEA)/SCHOOL DISTRICT PLANS (2021), https://oese.ed.gov/offices/education-stabilization-fund/elementary-secondary-school-emergency-relief-fund/stateplans/ (explaining how the Department of Education required states and school districts/LEAs to create plans for spending American Rescue Plan ESSER funds and to engage "a broad range of . . . stakeholders" in doing so); U.S. DEP'T OF EDUC., AMERICAN RESCUE PLAN ELEMENTARY AND SECONDARY SCHOOL EMERGENCY RELIEF FUND STATE PLAN REQUIREMENTS 10, 11 (2021), https://oese.ed.gov/files/2021/05/ARP-ESSER-Plan-Office-Hours-5.6.21.pdf (defining meaningful stakeholder consultation and showing how it is to be implemented).

In order to satisfy ESSER community input requirements, school districts got inventive. Boston Public Schools initiated roundtable discussions on how to use the new funding and Boulder Valley, Colorado started online forums for parental outreach and suggestions on potential uses of the new resources.[142] All of the involved districts learned something from their "meaningful [stakeholder] consultation," most notably, Chicago Public Schools.[143] Always caught in a web of multiple, oft-competing, issues regarding its facilities, educational quality, and staff inventory, the district, after consulting with its student and family communities, decided it best to allocate $160 million to the school heads themselves to deal with their own school's problems and priorities rather than be micro-managed by the district.[144] And, again, now full circle! The allocation of these funds features a decentralized funding strategy, like in the Christian school context, which affords opportunities for schools to develop "systemic approaches for collecting community input" throughout the spending process.[145] Furthermore, Chicago joined 21% of all school districts in communicating plans to invest in long-term community engagement strategies that involve family and student input in the proper allocation of funds to address school-specific and student-specific issues.[146]

Justice Marshall's dissent in *Rodriguez* highlights that

> the issue of quality needs to move front and center and drive school funding debates moving forward. In short, low-income students need more than equity or adequacy; they need sufficient funding to ensure success—which means more funding, not equal funding—as well as equal access to core services with accountability for outcomes.[147]

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[142] Alvin Makori et al., *Analysis: How 100 Large Urban Districts Are Wrapping Family & Community Input into Plans for Spending Federal Emergency School Relief Funds*, 74 (Aug. 2, 2021), https://www.the74million.org/article/analysis-how-100-large-urban-districts-are-wrapping-family-community-input-into-plans-for-spending-federal-emergency-school-relief-funds/.

[143] *Id.*

[144] *Id.*

[145] *Moving Forward Together*, CHI. PUB. SCH. (July 2021), https://www.cps.edu/strategic-initiatives/moving-forward-together.

[146] *See* Makori et al., *supra* note 142. These engagement strategies could manifest in many different ways. The Detroit Public School District, for instance, will be using new funds to hire outreach coordinators and make home visits. *Id.* These strategies, in turn, can empower individual advocacy for different funding opportunities and a new perspective on higher-level resource allocation to meet student needs.

[147] CARMEL MARTIN, MEG BENNER, ULRICH BOSER & PERPETUAL BAFFOUR, CTR. AM. PROGRESS, A QUALITY APPROACH TO SCHOOL FUNDING (Nov. 13, 2018), https://www.americanprogress.org/article/quality-approach-school-funding/; *see also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 70 (1973) (Marshall, J., dissenting) ("The Court today decides, in effect, that a State may constitutionally vary the quality of education which it offers its children in accordance with the amount of taxable wealth located in the school districts within which they reside.").

Without a fundamental right to education, administrative restructuring, and reform in the funding processes specifically, is the optimal, if not only, way to better disparities between districts. ESSER money, in one sense, cultivates a space to empower vulnerable populations with tools to help better their failing schools; to trust in their own expertise rather than leave the practice of dispensing all-important resources to the distant school district and state which, all too often, have competing, inequitable priorities.[148] In still another, even more important sense, ESSER demonstrates an interest in encouraging the practice of "meaningful consultation" with community members in the annual budgeting process, promoting them to the level of co-determinative stakeholders (as in the Catholic context) rather than just advisors, and ensuring that resources are given after due consideration of on-the-ground needs.[149] The trick, now, is not to let a good foundation slip away.

A new, integral community body politic would operate on principles similar to those expressed in CIC-1983, Canon 796, §2: "in fulfilling their duty teachers are to collaborate closely with parents who are to be willingly heard and for whom associations or meetings are to be inaugurated and held in great esteem."[150] The districts, states, and even the federal government, in a sense, all act as teachers. They are charged with ensuring resources, staffing, and physical space for learning; albeit indirectly, they have as much impact on student success as professional educators.[151] The obligation to work with parents and, just as importantly, students, community-members, and other stakeholders, is part and parcel to their office.[152] Through a clear medium of communication, the body politic and the district can help ensure students are served in meaningful ways and enabled with resources that are sorely needed, and, importantly, are not afforded by the current funding formula.

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[148] *See supra* note 145 and accompanying text (requiring each state to consult with local stakeholders in formulating a plan for the use of funds based on a template); U.S. DEP'T OF EDUC., *supra* note 4, at 2, 5, 8, 13 (showing that local authorities are given discretion about how to best decide to use funding based on their knowledge of local needs).

[149] *See* U.S. DEP'T OF EDUC., *supra* note 4, at 8–9 (showing how various members of the community are to be consulted in formulating local educational policies).

[150] 1983 CODE c.796, § 2.

[151] *See* U.S. DEP'T OF EDUC., FISCAL YEAR 2022 BUDGET SUMMARY (2022), 6, 7, 10, 14, 15, https://www2.ed.gov/about/overview/budget/budget22/summary/22summary.pdf (listing federal grant money given to states and school districts for, among other purposes, the training and formation of teachers and personnel as well as the construction and improvement of school buildings and infrastructure); *see also* Laura Jimenez, *The Case for Federal Funding for School Infrastructure*, CENT. AM. PROGRESS (Feb. 12, 2019), https://www.americanprogress.org/article/case-federal-funding-school-infrastructure/ (showing the urgent need for investment by federal, state and local authorities in school infrastructure, an essential element for student success).

[152] Bayldon, *supra* note 51, at 134.

So then, as a final question, who would serve on the district-level community body politic? And, just as importantly, what procedure would be in place for them to proffer their school-specific opinions to themselves, the district, and the state?

Members should not be relegated only to parents of children in specific schools, but should also include interested community organizers and activists who understand the dynamic of the community surrounding the school and could help expand the body politic "field of sight."[153] In low-income areas, where low district property taxes pay for schools, and states neglect to fill the gap, children face poverty, abuse, neglect, and exposure to criminality.[154] Understanding these outside community factors, through the voices of concerned district members in the body politic, and how that might inform state decisions to provide certain funding to certain districts, is just as important as representing the internal needs of schools within a given district. Thus, members should not just include the most influential or loudest people in connection with each school in the district but represent a proper cross-section of community life.

The body politic community should also exemplify the same level of intention, care, commitment to innovation, and sense of empowerment as is expected of the Christian faithful in their communities per the Catechism and the Compendium. The work of these new associations, after all, requires both a physical and spiritual fervor to change and disrupt a failing system; they are participants "in a work site always in progress," aiming for innovation and creativity . . . developing [ideas] through reflection applied to the changing situations."[155] Furthermore, as the Second Vatican Council held and Pope John Paul II affirmed, in some sense their goal of education innovation protects against the very real threat of individual destitution and the preservation of a quality of life "in harmony with the dignity of the human person." [156] Thus, they ought to be a held to a higher physical and moral commitment standard.

One might then ask: what is to prevent the appointment of members to the body politic that do not prioritize education in a way expected of the community above? Channeling the Church's notion of *subsidium* as

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[153] *See* Gregory J. Geruson & Christine L. Healey, *Sustaining Catholic Schools: Ten Essentials for Startup Boards*, 17 J. CATH. EDUC. 186, 191 (2013) (noting how schools may expand their "field of sight" by selecting members based on how the school's needs can be met).

[154] Matthew Lynch, *Poverty and School Funding: Why Low-Income Students Often Suffer*, EDVOCATE, (Feb. 6, 2016) https://www.theedadvocate.org/poverty-and-school-funding-why-low-income-students-often-suffer/.

[155] CATECHISM OF THE CATHOLIC CHURCH, *supra* note 55, ¶ 1884, at 460; COMPENDIUM OF THE SOCIAL DOCTRINE, *supra* note 55, ¶ 557, at 252.

[156] GAUDIUM ET SPES, *supra* note 45, ¶ 60, at 964 (Austin Flannery ed., 1975), *quoted in* COMPENDIUM OF THE SOCIAL DOCTRINE, *supra* note 55, ¶¶ 557–58, at 242–43 (2004). *See* PIUS XI, DIVINI ILLIUS MAGISTRI ¶¶ 6–7, at 2 (1929) (asserting that sound Christian education is a remedy for men's tendency to become attached to material things).

discussed, it would be the purview of the DOE (a higher authority) to delineate some standardization of membership qualifications or general quality control. Importantly, this power does not usurp that of the body politic but merely ensures that it can function more efficiently with better members.[157] Such a standardization mechanism should protect against internal corruption, as well as any preference for specific schools or communities within a district. The specific way in which the body politic ought to decide on policy or present ideas to the State need not be decided by this mechanism; the key is only that the act of comprehensive community engagement is made evident in its final decision. The body politic is not consultative but integral in nature to the whole regulatory schema.

Through their recommendations and requests, the state can better appreciate various needs for funding such as school restructuring, staffing shortages, and resource inadequacy. At the very least, the body politic holds sway over investment strategies by painting an accurate district-wide portrait of the education landscape for the state education departments. Conversely, they serve the vital role of acting as a check on state-level funding to ensure against bias or manipulation, such as that at issue in *Abbott*, of numerical formulas to disregard the needs of one district in favor of another.[158] Like in the case with the diocese of Sioux City, and contemplated at length in the annals of canon law, communities composed of families, students, and active leaders, are afforded co-determinative authority to change course and position the next generation, for which they have an incomparable vested interest, towards success.[159]

IV. *GRAVISSIMUM EDUCATIONIS* AS INSPIRATION FOR AN AMERICAN RIGHT TO EDUCATION

Still, the American system of education cannot alone be solved simply by an overhaul of governance structures. The body politic, emphasizing

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[157] Such oversight is an example of the way the principle of subsidiarity envisions the higher order "support[ing]" the lower order and "help[ing] to co-ordinate its activity" in the service of the "common good." CATECHISM OF THE CATHOLIC CHURCH, *supra* note 55, ¶ 1883, at 460.

[158] *See* Abbott *ex rel.* Abbott v. Burke, 748 A.2d 82, 84–85, 102 (N.J. 2000) (showing that state-level funding resulted in inequitable results for individual school districts that did not receive the same quality of education as others that were favored), *modified in part sub nom.*, Abbott v. Burke, 852 A.2d 185 (N.J. 2004), *and modified judgment sub nom.*, Abbott v. Burke, 857 A.2d 173 (N.J. 2004).

[159] This is something like the decentralized nature of educational governance in European countries. *See* Alina Dzhurylo, *Decentralization in Education: European Policies and Practices*, 2 EDUC.: MODERN DISCOURSES 29–37 (2019) (discussing the decentralized status of education in most European countries). Decentralization, and its implication for educational efficiency and comprehensive solutions to equity problems, is a topic I hope to explore in another article.

community engagement in district school resource allocation, is essential to create an equitable system built on a principle of uniform educational adequacy. But, in the end, one must stop putting bandages on knife-wounds; America needs a formalized right to education. This section is a nod (and only a nod) to this larger conversation taking place in courts and in the academy.[160] Having borrowed from the realm of Christian education in support of a community engagement component to district school funding, it is necessary, however perfunctorily, to discuss how the Church's *Gravissimum Educationis* might inform substantive matters upon which an American right to education might be built.

Courts, since *Brown*, have stated the importance of education to American unity and society, clamoring, to the point of deafness, about the question of who can be "expected to succeed in life if he is denied the opportunity of an education?"[161] Despite the truth of the pronouncements, there is no real force behind what is being said, nor a mapped-out plan for ensuring the goal is met. In short, education rights in America are nothing but "extemporary arbitrary decrees."[162] Certainly, this is not because the formalization lacks precedent; indeed, 174 countries are known to cite education in their constitutions.[163] Even further, Article 26 of the Universal Declaration of Human Rights formally links education with the goals of fully developing the human personality; strengthening human rights; promoting racial, religious, national understanding, and tolerance;

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[160] *See, e.g.*, Black, *supra* note 10, at 1061 (making an originalist argument for a fundamental right to education).

[161] Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954); Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 108–11 (2008) ("The Supreme Court has thus far rejected the notion of a right to public education."); *see also, e.g.*, Plyler v. Doe, 457 U.S. 202, 221 (1982) ("[E]ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of us all."); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring) ("Americans regard the public schools as a most vital institution for the preservation of a democratic system of government."); Ambach v. Norwick, 441 U.S. 68, 76–77 (1979) ("The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions."); Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) ([S]ome degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. Further, education prepares individuals to be self-reliant and self-sufficient participants in society. We accept these propositions.").

[162] It was John Locke who distinguished between "established standing laws, promulgated and known to the People" and "extemporary arbitrary decrees" by court or crown; he cited that the latter is sudden, unrestrained and valueless "without having any measures set down which may guide and justify their actions." JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 71, 73 (C.B. McPherson ed., Hackett Publ. Co., Inc. 1980) (1690).

[163] Stephen Lurie, *Why Doesn't the Constitution Guarantee the Right to Education?*, ATL. (Oct. 16, 2013), https://www.theatlantic.com/education/archive/2013/10/why-doesnt-the-constitution-guarantee-the-right-to-education/280583/.

and maintaining peace.[164] In America, one can narrowly get by without mentioning education as a lynchpin in the mission to uphold democratic principles.[165]

All this to say that the framework upon which a fundamental right to education could be based and formally articulated exists; the period we find ourselves in today, moreover, marred by increasing political turmoil, demands urgent action. And just as importantly, children are ready to take the mantle if they are provided the skills to do so. Consider the student-plaintiffs in *A.C. v. Raimondo* from inner-city Providence public schools, who brought their school district to federal court over their failure to provide an adequate civics education.[166] There is truth in their argument that they have a fundamental right to "an education that is adequate to prepare them to function productively as civic participants capable of voting, serving on a jury, understanding economic, social, and political systems sufficiently to make informed choices, and to participate effectively in civic activities."[167] And, indeed, *Gravissimum Educationis* can lend another voice in support of their contentions.

The conciliar document propounds three important features that should be considered as essential to any articulated right to education, aside from being "inalienable," an education should: (1) train the student to "take their part in life of society,"[168] (2) ensure the student is prepared with tools to engage in "dialogue with others and should willingly devote themselves to the promotion of the common good,"[169] and (3) ensure that the state be enjoined to guarantee, at base, "that all citizens have access to an adequate education and are prepared for the proper exercise of their civic rights and duties."[170]

Notably, these provisions are not unlike those principles contemplated in Article 26 of the Universal Declaration of Human Rights. Yet, one may ask why the Church's views on education should be

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[164] *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) ("Everyone has the right to education. . . . Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.").

[165] A.C. v. Raimondo, 494 F. Supp. 3d 170, 181 (D.R.I. 2020) ("This is what it all comes down to: we may choose to survive as a country by respecting our Constitution, the laws and norms of political and civic behavior, *and* by educating our children on civics, the rule of law, and what it really means to be an American, and what America means. Or, we may ignore these things at our and their peril.").

[166] *Id.* at 174 ("Several Rhode Island public school students . . . alleg[e] violations of their constitutional rights because the State . . . is not providing them with an adequate civics education.").

[167] *Id.* at 174.

[168] GRAVISSIMUM EDUCATIONIS, *supra* note 9, ¶ 1, at 726.

[169] *Id.*

[170] *Id.* ¶ 6, at 731.

considered relevant to the American conversation? It is relevant for two reasons. The first is simplest: the goals of the Church and those of the federal government regarding education, as obviated in their laws and activities, are similar and so can appropriately be analogized. The Church, in CIC-1983, contemplates that schools ought to be adequately funded,[171] cater to diverse and modern student learning styles,[172] deal in moral and practical studies,[173] be staffed by capable and invested teachers,[174] and propagate the tenets of the institution it serves.[175] While education in the United States is primarily a the responsibility of the states, an examination of the grant-scheme of the DOE reveals similar interests at work on the federal level.[176] With the objective of "ensuring access to equal educational opportunity" and "promote improvements in the quality and usefulness of education,"[177] the DOE, in 2022, was set to issue grants for the following: the support of effective instruction, career and technical education, educational innovation and research, and American History and Civics Education.[178] Taking these observations in stride, the Church becomes more than a distant apparatus for the benefit of the Christian faithful, but a relatable protective figure, like the DOE, with a vested interest in the development of the next generation.

The second reason for considering the Church is abstract. It has to do with the Church's unique position at the intersection of practical reason and theological reflection, and its policy of supporting laws that speak to the "very dignity of the human person."[179] Rev. John J. Coughlin, Professor at New York University School of Law, reflects as follows:

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[171] *See* 1983 CODE c.800, § 2 ("The Christian faithful are to foster Catholic schools by supporting their establishment and their maintenance in proportion to their resources.").

[172] *See* 1983 CODE c.804, § 1 ("Catholic religious formation and education which are imparted in any schools whatsoever as well as that acquired through the various media of social communications are subject to the authority of the Church.").

[173] *See* 1983 CODE c.802 (giving the diocesan bishop the responsibility of establishing schools, including professional and technical schools, that are "imbued with the Christian spirit").

[174] *See* 1983 CODE c.804, § 2 (calling for religion teachers to be "outstanding for their correct doctrine, their witness of Christian living, and their pedagogical skill," whether they teach in Catholic or non-Catholic schools; c.806, § 2 ("The directors of Catholic schools . . . are to see to it that the instruction given in them is at least as academically distinguished as that given in the other schools of the region.").

[175] *See* 1983 CODE c.803, § 2 (directing Catholic schools and teachers to base their teaching on Catholic doctrine).

[176] *An Overview of the U.S. Department of Education*, U.S. DEP'T OF EDUC. (Sept. 2010), https://www2.ed.gov/about/overview/focus/what.html.

[177] *Id.*

[178] U.S. DEP'T OF EDUC., *supra* note 151, at 11–12, 20–21, 33.

[179] DIGNITATIS HUMANAE (1965), *reprinted in* VATICAN COUNCIL II: THE CONCILIAR AND POSTCONCILIAR DOCUMENTS ¶ 2, at 800 (Austin Flannery ed., Liturgical Press new rev. ed. 2014) (1975).

> [The Church and its law are a] symbol constitut[ing] an indissoluble unity of an outward, external language and an inner meaning or *intellectus*. . . . [The law of the Church] manifests an . . . *intellectus*, which corresponds to the capacity of the intellect to know natural and theological truth. . . . Eviscerated of its inner meaning, legal language loses its symbolic function. It is reduced to the dry bones of historical circumstance absent transcendent value. Without its ground in the *truth about the human person*, law runs the risk of denying the full possibilities of human intellect.[180]

Intellectus—the inner meaning within law—is hardly raised in a typical legal analysis. But the assertion of the fundamentality of a right to education is grounded in an ineffable, immutable "truth about the human person" and condition.[181] For an institution preoccupied with reconciling transcendent truth with order for the Christian faithful, the Church is well-placed to speak to what ought to be naturally and inalienably included in a system of order. In other words, the fact that so much ink is spilled on a detailed education right, codified in Canon Law, lends credibility to the notion that an ordered society is not sustainable without that right. Rev. Coughlin continues, "[t]he immutable principles give law the force to bind. No mere positive law or human custom may serve as the source of this inner force."[182] The "immutable principles" are usually overlooked in administrative law but, in this case, must drive the push for education based on the knowledge that the need to learn is a human transcendent truth.[183] By voicing the opinion of the Church and its holy position in support of an education right, suddenly the American conversation is elevated out of policy and into necessity. Commensurately, omission of this right in the secular context becomes an urgent issue.

The language of *Gravissimum Educationis* states that students should be trained to "take their part in the life of society" and promote the "common good," and education should involve preparation for the "proper exercise of . . . civic rights."[184] All three of these components, when applied to the American system, are intertwined: there is a practical element to a right to education that must guarantee students are prepared to succeed, at base, at subsisting economically and socially. This necessarily involves civic and cultural literacy education, a realization that was litigated in the First Circuit.[185] If one is open to taking wisdom from the Church, then it is clear and supported that a requirement for civic and cultural literacy

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[180] Coughlin, *supra* note 66, at 24 (third emphasis added) (footnotes omitted).

[181] *Id.*

[182] *Id.* at 27; *see*, *e.g.*, James V. Mullaney, *The Natural Law, the Family and Education*, 24 FORDHAM L. REV. 102, 103, 105 (1955).

[183] *See* ARISTOTLE, METAPHYSICS bk. A, ch. 1, 980a, at 12 (Hippocrates G. Apostle trans., Ind. U. Press 1966) (c. 384 B.C.) ("All men by nature desire understanding.").

[184] GRAVISSIMUM EDUCATIONIS, *supra* note 9, ¶ 1, at 727, ¶ 6, at 731.

[185] A.C. *ex rel.* Waithe v. McKee, 23 F.4th 37, 41 (1st Cir. 2022).

education should be articulated in any conceivable American right to education.

The judge of the District Court in *A.C. v. Raimondo* averred that "survival of our democracy . . . will not happen just because we want it to; we will have to work for it."[186] Education is our way of doing so:

> This is what it all comes down to: we may choose to survive as a country by respecting our Constitution, the laws and norms of political and civic behavior, *and* by educating our children on civics, the rule of law, and what it really means to be an American, and what America means. Or, we may ignore these things at our and their peril.[187]

Following the Church's lead in Canon 794, § 1,[188] it is, in a "unique way,"[189] up to governmental institutions, from the Supreme Court to Congress to the DOE, to help its citizens reach the fullness of American life. At base, fullness can only be achieved by preparing the masses to uphold and understand basic tenets of democracy including how to serve on a jury, how to engage in protest and political discourse, and how to vote. For the American, the availability of these rights speaks to the very dignity of the citizen, and, indeed, it is upon these rights that the survival of American democracy is contingent.[190]

CONCLUSION

The Church places the ultimate importance on education, as a right and an obligation. By way of codifying in Canon Law a methodology for realizing this right, the institution empowered the Christian faithful to help realize a grander vision of education characterized by an interplay between the Church, community, parents, and students. Involving those that are most closely invested in schools on matters of governance may

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[186] A.C. v. Raimondo, 494 F. Supp. 3d 170, 178 (D.R.I. 2020).

[187] *Id.* at 181.

[188] 1983 CODE c.794, §1 ("The duty and right of educating belongs in a unique way to the Church which has been divinely entrusted with the mission to assist men and women so that they can arrive at the fullness of the Christian life.").

[189] *Id.*

[190] *See*, *e.g.*, ARISTOTLE, POLITICS, ch. 4, 1291b, at 110 (C.D.C. Reeve trans., Hackett Publ'g Co. 1998) (c. 384 B.C.) ("For if indeed freedom and equality are most of all present in a democracy, as some people suppose, this would be most true in the constitution in which everyone participates in the most similar way."); Ernest Abisellan, *Fostering Democracy Through Law and Civic Education*, FLA. B. J., Jan. 2000, at 59 ("Civic education is understood to play an important role in the development of the political culture required for the establishment, maintenance, and improvement of democratic institutions. Civic education provides individuals with the knowledge, skills, and dispositions required to participate as informed and responsible citizens in a democracy."); Marvin E. Aspen, *Jurors Play a Crucial Role in the Operation of Democracy in our Nation*, CIVIL JURY PROJECT N.Y. SCHOOL LAW (2023), https://civiljuryproject.law.nyu.edu/jurors-play-a-crucial-role-in-the-operation-of-democracy-in-our-nation/ ("[T]he right to a trial by jury of one's peers is the hallmark of our judicial system and an essential feature of our democracy as whole.").

inspire a needed shift in attitudes towards community involvement in education. The assembly of a body politic whose purview is to help inform state resource allocation with on-the-ground information about schools and communities will help ensure fiscal equity and, hopefully, narrow the achievement gap in a system whose existing funding schemas are demonstrably problematic. Community engagement can reshape districts in fundamental ways. For better or worse, the COVID-19 pandemic has resulted in initiatives that bring these hypothetical shifts closer to fruition. The inspiringly positive response to the ESSER "stakeholder consultation" requirement underscores the benefits of community input in education matters.

Of course, the administrative remedy is no substitute for an outlined constitutional right to education. In articulating the importance of education in *Gravissimum Educationis*, the Church provides a strong defense to the urgency and importance of education to the collective future. It is a right that goes to the very heart of preserving human dignity. One finds many similarities between the Church's educational priorities and those of the United States. Yet, there is a long way to go in achieving these priorities, let alone, a fundamental constitutional right. Educational uniformity in America must ensure that the next generation is able to actively participate and contribute to society. As the student-plaintiffs in *A.C. v. Raimondo* emphasized, the next generation is ready to receive such an education so that they might take ownership of democracy. The time is now, and American legal institutions must hear the call.

PERSONAL FOUL – ENCROACHMENT: HOW *KENNEDY V. BREMERTON SCHOOL DISTRICT* BLURS THE LINE BETWEEN GOVERNMENT ENDORSEMENT OF RELIGION AND PRIVATE RELIGIOUS EXPRESSION

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INTRODUCTION

In 1892, future Supreme Court Justice Oliver Wendell Holmes, then serving on the Massachusetts Supreme Court, wrote in *McAuliffe v. Mayor of New Bedford* that public employees agreed to suspend their constitutional right to freedom of speech by accepting work with the government.[1] In essence, Holmes believed that an employee waived his or her constitutional rights through contract. The "right-privilege" distinction he created established that citizens have a constitutional *right* to freedom of speech, but only a *privilege* to accept public employment.[2] Under this theory, resolving constitutional challenges from public employees is simple: the employee's claim would always fail because she sacrificed her *rights* for the *privilege* of employment.

For decades, this "unchallenged dogma" resulted in the dismissal of public employees' First Amendment claims because limitations on speech were considered mere conditions placed upon their employment.[3] However, the tide began to turn in the 1950s as states began requiring public employees, and particularly teachers, to swear oaths of loyalty in order to continue employment.[4] In *Wieman v. Updegraff*, the Supreme Court held that constitutional protection extends to government employees, who could not be excluded from public work on the basis of an arbitrary or discriminatory statute.[5] A decade later in *Sherbert v. Verner*,[6] the Court, addressing both freedom of expression and free exercise of religion, unequivocally dissolved the right-privilege dichotomy, stating, "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."[7]

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1 29 N.E. 517, 517–18 (Mass. 1892).

2 Rodney A. Smolla, *Preserving the Bill of Rights in the Modern Administrative-Industrial State*, 31 WM. & MARY L. REV. 321, 325–26 (1990) (quoting William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1439 (1968)).

3 Connick v. Myers, 461 U.S. 138, 143 (1983); *see* Adler v. Bd. of Educ., 342 U.S. 485, 492 (1952); Garner v. Bd. of Pub. Works, 341 U.S. 716, 721 (1951); United Pub. Workers v. Mitchell, 330 U.S. 75, 103 (1947).

4 *See, e.g.*, Wieman v. Updegraff, 344 U.S. 183, 184–85 (1952) (challenging an Oklahoma statute requiring public employees to take an oath).

5 *Id.* at 192.

6 374 U.S. 398 (1963).

7 *Id.* at 404; *see also* Keyishian v. Bd. of Regents, 385 U.S. 589, 605–06, 609–10 (1967) (rejecting the "right-privilege" dichotomy and holding that state statute or regulations requiring public employees to publicly renounce Communism were unconstitutional).

Today, over twenty-one million Americans are employed by either federal, state, or local governments.[8] Time and time again, the Supreme Court has held that the government cannot barter employment for the inalienable rights of its citizens.[9] Because freedom of speech is considered the "indispensable condition" of every other freedom, the Court has grown increasingly protective of public-employee speech on a matter of public concern.[10] This is not to say that the government is prohibited from acting as any other employer would in regulating the conduct of its employees. However, since the government is not a private actor, the Supreme Court, in *Pickering v. Board of Education* and *Garcetti v. Ceballos*, laid out a balancing test to safeguard the rights of public employees while ensuring the government's ability to operate effectively.[11]

Staying true to tradition, judicial balancing tests like those established in *Pickering* and *Garcetti* provide little guidance when complicated cases with competing constitutional issues arise.[12] Take, for example, the case of Joseph Kennedy. Kennedy was a football coach at Bremerton High School in Washington, a public high school.[13] Coach Kennedy, a devout Christian, made a commitment to God to give thanks through prayer following each football game.[14] For eight years, Coach Kennedy would wait until the game had ended and others began leaving the field before he would kneel in silent prayer for no more than fifteen to thirty seconds.[15] Bremerton School District ("BSD") discovered Coach Kennedy's private religious expression and, fearing that some hypothetical person would think the school was endorsing whatever message Coach Kennedy privately and silently espoused during his brief

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[8] *Occupational Employment and Wage Statistics: May 2021 National Occupational Employment and Wage Estimates by Ownership*, U.S. BUREAU LAB. STATS., https://www.bls.gov/oes/current/999001.htm (Mar. 31, 2022).

[9] *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410, 419 (2006) ("The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens."); Connick v. Myers, 461 U.S. 138, 147 (1983) ("Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government . . . .").

[10] Palko v. Connecticut, 302 U.S. 319, 326–27 (1937); *see, e.g.*, Pickering v. Bd. of Educ., 391 U.S. 563, 572–73 (1968).

[11] *Pickering*, 391 U.S. at 568 (balancing the citizen's interest "in commenting upon matters of public concern" and the government's interest in efficient public service); *Garcetti*, 547 U.S. at 423 ("When an employee speaks as a citizen addressing a matter of public concern, the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences.").

[12] *See* MARTIN SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 96 (1966

[13] Brief for Petitioner at 4, *Kennedy* v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022) (No. 21-418).

[14] *Id.*

[15] *Id.* at 4–5.

post-game kneeling, imposed far-reaching "guidelines" proscribing all "demonstrative religious activity" that was "readily observable to . . . students and the attending public."[16] Unwilling to yield in his commitment to God, Coach Kennedy once again knelt following a game.[17] BSD suspended and later refused to rehire Coach Kennedy.[18]

This case brings into focus several opposing constitutional issues. On the one hand, Coach Kennedy, though a public employee, is nevertheless a citizen with First Amendment rights.[19] On the other hand, BSD certainly has an interest in regulating its employees in order to ensure the efficient conduct of business.[20] Additionally, Coach Kennedy's right to the free exercise of religion appears to conflict with BSD's fear of violating the Establishment Clause.[21] The case of Coach Kennedy highlights a critical question in constitutional law: when individual liberties conflict with the interests of the government, which should prevail?

Is it right to say that the individual's rights of free speech and free exercise must yield to the government's interest in obeying the Establishment Clause? Is private religious expression even attributable to the school district? Does the government place an unconstitutional condition on public employment by prohibiting such speech? Finally, how do *Pickering* and *Garcetti* apply to religious speech within the public-school context?

This case has been winding its way through the courts since 2016 and was heard by the United States Supreme Court in 2022.[22] While the high Court's opinion is critically important and will hopefully provide clarity for these important questions, this Article primarily focuses on the lower court opinions. Both the district court's and the Ninth Circuit's opinions demonstrated either a critical misunderstanding or simple disregard of the role the Religion Clauses fill in public life and of First Amendment precedent itself.[23] Unfortunately, this is not an isolated example.[24] This Article follows Coach Kennedy from the football field all the way through

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[16] *Id.* at 11 (quoting Joint Appendix at 94, *Kennedy*, 142 S. Ct. 2407 (No. 21-418)).

[17] *Id.* at 12.

[18] *Id.* at 12–13.

[19] *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410, 417 (2006) ("The Court has made clear that public employees do not surrender all their First Amendment rights by reason of their employment.").

[20] *Id.* at 418 ("Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services.").

[21] *See* Dallin H. Oaks, *Separation, Accommodation and the Future of Church and State*, 35 DEPAUL L. REV. 1, 2 (1985); Locke v. Davey, 540 U.S. 712, 718 (2004).

[22] Kennedy v. Bremerton Sch. Dist., 443 F. Supp. 3d 1223 (W.D. Wash. 2020), *aff'd*, 991 F.3d 1004 (9th Cir. 2021), *cert. granted*, 142 S. Ct. 857 (2022) (mem.), *and rev'd*, 142 S. Ct. 2407 (2022), *and vacated and remanded*, 43 F.4th 1020 (9th Cir. 2022).

[23] *See infra* Part II.

[24] *See infra* note 65 and accompanying text.

the Ninth Circuit to highlight how religion and religious Americans are often treated by public institutions. It is important to analyze how religious expression began as a protected class that was constitutionally set apart only to be ostracized in modern society with the courts' stamps of approval.

Part I begins with an originalist approach to understanding the Establishment Clause and then traces the Court's modern interpretation. Next, it outlines the Court's balancing approach to public employees' freedom of speech, followed by a summary of the Free Exercise Clause. Part I concludes with an overview of Coach Kennedy's case. Part II reveals how the district court and Ninth Circuit ignored and misapplied the First Amendment's Religion Clauses as well as Supreme Court precedent interpreting them. A government entity cannot categorically ban all "demonstrative religious expression" by employees without violating the employees' constitutional rights. This argument is grounded in each of the clauses delineated in Part I. First, allowing a categorical prohibition on religious expression would permit the state to infringe an employee's freedom of speech. Second, the Establishment Clause does not require personal demonstrative expression by public employees to be suppressed. Finally, private speech that endorses religion, even when made by a public employee, is protected by the Free Exercise Clause.

I. BACKGROUND

A. Establishment Clause Doctrine

Chief Justice Rehnquist once wrote, "It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history . . . ."[25] Yet the Court's Establishment Clause jurisprudence, like the house built on the sand,[26] is supported only by a false supposition about the Clause's original understanding. In order to build an argument on the rock,[27] this Article will first examine the original public meaning of the Establishment Clause, discuss the origins of Thomas Jefferson's "wall of separation," and then trace the wall's metamorphosis into constitutional doctrine.

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[25] Wallace v. Jaffree, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting).

[26] The Bible analogizes a "foolish man" to one "who built his house on sand," observing that when "[t]he rain came down, the streams rose, and the winds blew and beat against that house" that "it fell with a great crash." *Matthew* 7:26–27 (New International).

[27] The Bible analogizes a "wise man" to one who "built his house on the rock," observing that when "[t]he rain came down, the streams rose, and the winds blew and beat against that house yet it did not fall because it had its foundations on the rock." *Matthew* 7:24–25 (New International).

1. The Original Understanding of the Establishment Clause

In the years leading up to the American Revolution, many colonies had established religions, which would receive direct support through taxation.[28] Members of non-establishment religions, often called religious dissenters, resented the compulsory taxation to support the established religion as well as the penalties they faced for their alternative religious practices.[29] Following the American Revolution, religious establishments halted direct punishments on religious dissenters, leaving only legal privileges, such as financial support to clergy of established religions.[30] In the years leading to the ratification of the Bill of Rights, religious dissenters led a concerted effort to abandon what remained of establishments, yet almost none advocated for a "separation" of church and state.[31] There was virtually universal agreement that religion, particularly religious morality, was essential to a republican government.[32]

Recognizing the role of religion in government, the religious dissenters never intended to prevent religious influence on government or public life in general.[33] Instead, they intended to preclude government control over religion.[34] This is demonstrated by the two primary demands

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[28] LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 1–5, 8–9 (1986); CHESTER JAMES ANTIEAU ET AL., FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES 20–21 (1964).

[29] LEVY, *supra* note 28, at 2, 4; *see* ANTIEAU ET AL., *supra* note 28, at 21 ("That dissenters from the Established Church should resent such exclusions and preferences was a frequent phenomenon in the eighteenth-century colonial society which was developing a system of democratic government.").

[30] PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 89–90 (2002).

[31] *Id.* at 19.

[32] *See id.* at 73 ("[D]issenters did not question the necessary connection between religion and government."); ANTIEAU ET AL., *supra* note 28, at 187–88 (suggesting that the framers did not advocate removing religious influence from government but instead believed that religion was a positive influence on government).

[33] *Cf.* Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 693 (1992) (observing how, in the years prior to the ratification of the First Amendment, legislative accommodations were frequently made to religions and religious practices by the colonies, states, and the Continental Congress, and noting there is no evidence that these accommodations were seen as illegitimate).

[34] HAMBURGER, *supra* note 30, at 94; *see* Patrick M. Garry, *The Institutional Side of Religious Liberty: A New Model of the Establishment Clause*, 2004 UTAH L. REV. 1155, 1161 (2004) (noting that George Washington believed "that religion and morality were inseparable from good government, and that no true patriot . . . would attempt to weaken the relationship between political prosperity and the influence of religion and morality" (quoting David Barton, *The Image and the Reality: Thomas Jefferson and the First Amendment*, 17 NOTRE DAME J.L. ETHICS & PUB. POL'Y 399, 428 (2003))); ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 293 (J.P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1835) (observing how Americans considered religion "necessary to the maintenance of republican institutions").

asserted by religious dissenters. First, they insisted on equal rights to curb laws that discriminated on the basis of religion.[35] Second, they demanded limits on the authority of the federal government to legislate on religious matters.[36]

James Madison's original proposal of the Religion Clauses read, "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."[37] After the language was altered to read "no religion shall be established by law," Representative Peter Sylvester articulated his concern that this version might completely eradicate religion.[38] However, Madison construed the language to mean that "Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."[39] The influence of the religious dissenters' crusade for religious liberty and equality can be seen through these debates—it is clear that the primary concern was not religious influence in public life but government control over religion.[40] More specifically, the concern was the establishment of a national religion because of the detrimental effect that it would have on religious liberty and equality.[41]

The language "wall of separation between church and state" was notably absent from the debate and ratification of the First Amendment.[42] This language made its debut over a decade later in a letter written by President Thomas Jefferson to the Danbury Baptists.[43] However, the

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[35] HAMBURGER, *supra* note 30, at 94.

[36] *Id*.

[37] 1 ANNALS OF CONG. 451 (1789) (Joseph Gales ed., 1834).

[38] *Id*. at 757.

[39] *Id*. at 758.

[40] *See, e.g.*, *id.* at 757 ("[Mr. Gerry] said it would read better if it was, that no religious doctrine shall be established by law."); *id.* at 758 ("[Mr. Huntington] said that he feared . . . that the words might be taken in such latitude as to be extremely hurtful to the cause of religion.").

[41] Historical establishments required religious orthodoxy and financial support for the established religion under threat of penalty. *See* Lee v. Weisman, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting) ("The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*."). Thus, the civil disabilities the dissenters faced under establishments were the primary evil the Establishment Clause aimed to redress. *See* LEVY, *supra* note 28, at 3–4; *Lee*, 505 U.S. at 641 (Scalia, J., dissenting). Furthermore, the Establishment Clause was viewed as a way to strengthen and protect religious institutional liberty by prohibiting the government from supporting only a particular sect. *See* Michael W. McConnell, *Why Is Religious Liberty the "First Freedom"?*, 21 CARDOZO L. REV. 1243, 1254–55, 1257 (2000).

[42] *See generally* 1 ANNALS OF CONG. 440–948 (Joseph Gales ed., 1834) (demonstrating that there is no record of the phrase "separation of church and state" ever being used or discussed during the debates regarding the First Amendment).

[43] James Hutson, *'A Wall of Separation': FBI Helps Restore Jefferson's Obliterated Draft*, 57 LIBR. CONG. INFO. BULL. 136, 137, 139 (1998).

words "separation of church and state" are susceptible to misinterpretation if the context in which they were written is disregarded. In the bitter campaign of 1800, Federalist opponents attacked Jefferson, claiming he lacked religious convictions.[44] The rancorous attacks on Jefferson were so powerful that housewives in New England began burying their family Bibles following Jefferson's election out of fear they would be confiscated.[45] Jefferson, who remained silent during the election, wrote a letter to the Danbury Baptists in order to rebut the attacks and reassure the minority religious community of his dedication to religious liberty.[46] Thus, Jefferson's letter was a political statement rather than a theoretical interpretation of the First Amendment.[47]

With this context in mind, it is important to note two key distinctions between the language used by Jefferson and the language found in the First Amendment. First, "church" and "religion" are not synonyms. To Jefferson, the word "church" was narrow, referring only to ecclesiastical institutions.[48] Religion, as used in the First Amendment, refers broadly to all religious beliefs.[49] Second, "separation" and "establishment" have vastly different connotations, and understanding the difference is critical.[50] The Establishment Clause was intended to enforce limitations on the federal government's ability to legislate over religion, but it imposed no reciprocal restrictions on religion.[51] In other words, the Framers "believed in dividing church from state, not God from state."[52]

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[44] *See* DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 18 (2002).

[45] *Id.* at 18–19; *see also* TIMOTHY DWIGHT, THE DUTY OF AMERICANS, AT THE PRESENT CRISIS (1798), *reprinted in* POLITICAL SERMONS OF THE AMERICAN FOUNDING ERA 1363, 1382 (Ellis Sandoz ed., 1991) (cautioning that "we may see the Bible cast into a bonfire" under Jefferson's administration).

[46] Hutson, *supra* note 43, at 136, 138; Dreisbach, *supra* note 44, at 17; DREISBACH, *supra* note 44, at 17.

[47] Hutson, *supra* note 43, at 163 ("[I]t was meant to be a political manifesto, nothing more.").

[48] DREISBACH, *supra* note 44, at 51.

[49] *See* McConnell, *supra* note 33, at 718 (noting that the First Amendment's Free Exercise Clause applies to "beliefs and practices of any religion").

[50] *See* DREISBACH, *supra* note 44, at 51 ("Jefferson's metaphor subtly reframed the First Amendment in terms of separation between church and state, rather than nonestablishment (or disestablishment). These terms were not interchangeable in the religious dissenters' lexicon." (footnotes omitted)).

[51] *See* LEVY, *supra* note 28, at 89 (arguing that the purpose of the Establishment Clause was to restrict the federal government's ability to legislate on matters of religion); ANTIEAU ET AL., *supra* note 28, at 187–88 (recognizing the Framers' general belief that governments were tasked with promoting public morality and that religion was integral to this task).

[52] Stephen L. Carter, *Reflections on the Separation of Church and State*, 44 ARIZ. L. REV. 293, 294 (2002); *see also* ANTIEAU ET AL., *supra* note 28, at 188 (explaining that there was a "consensus that the government should be concerned with the promotion of public morality").

Unlike the purpose of the First Amendment, Jefferson's wall of separation between church and state is not so limited. It has been (and continues to be) interpreted as a bilateral restraint on both religion and government.[53]

Jefferson's rhetorical construction of the First Amendment as a "wall" was intended primarily as a federalism argument.[54] Jefferson's wall placed the federal government on one side and religion and state governments on the other side.[55] In other words, religion was a matter to be legislated (or not) by the states. While Jefferson believed that proclamations of prayer and thanksgiving should be left to state governments rather than the national government, he was not entirely opposed to the idea of using federal funds to aid religious institutions.[56] For example, while in office, Jefferson approved the use of federal funds for supporting Christian missionaries and building churches.[57]

Thus, using Jefferson's wall of separation as the basis of modern Establishment Clause jurisprudence is fundamentally at odds with his actual intent in writing the letter and the purpose of the First Amendment. Instead, the "wall" was merely a political statement and an illustration of Jefferson's dedication to federalist principles regarding the proper role of religion in government.

2. Modern Establishment Clause Jurisprudence

The wall was largely forgotten until it was unearthed as dicta in *Reynolds v. United States*, which stated that it was "an authoritative declaration of the scope and effect of the [First] [A]mendment thus secured."[58] The wall collected dust for another seven decades before it was rediscovered in *Everson v. Board of Education* by Justice Black, who declared that the "wall [of separation] between church and state . . . must be kept high and impregnable."[59] Under the Doctrine of Incorporation, the

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[53] DREISBACH, *supra* note 44, at 52.

[54] *Id*. at 50.

[55] Daniel L. Dreisbach, *The Mythical "Wall of Separation": How a Misused Metaphor Changed Church–State Law, Policy, and Discourse*, 6 FIRST PRINCIPLES 2–3 (2006).

[56] DREISBACH, *supra* note 44, at 57–60; Dreisbach, *supra* note 55, at 2 ("Jefferson pursued policies incompatible with the 'high and impregnable' wall the modern Supreme Court has erroneously attributed to him.").

[57] Dreisbach, *supra* note 55, at 2.

[58] 98 U.S. 145, 164 (1878); Dreisbach, *supra* note 55, at 3. However, not all Justices have agreed. For example, Justice Reed later wrote, "A rule of law should not be drawn from a figure of speech." Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 247 (1948) (Reed, J., dissenting) (distinguishing between Jefferson's statement and Jefferson's application of his statement).

[59] 330 U.S. 1, 18 (1947); Dreisbach, *supra* note 55, at 3–4. Yet, Justice Black's history is often forgotten. Prior to his ascension to the Court, Justice Black was a Kladd, a leadership position in the Ku Klux Klan. *See* HAMBURGER, *supra* note 30, at 422–26. It was his job to lead new members in the recitation of the Klansman's oath of allegiance, whereby they pledged their commitment to "white supremacy," "separation of church and state," and to

Bill of Rights is applied against the States through the Due Process Clause of the Fourteenth Amendment only when it protects a "fundamental liberty interest."[60] Therefore, to apply the Establishment Clause against the States under the Fourteenth Amendment, the Supreme Court would need to explain how the Establishment Clause protected a fundamental liberty interest. However, Justice Black boldly incorporated the Establishment Clause without any explanation or analysis.[61]

Justice Black's misunderstanding (or perhaps intentional misreading) of Jefferson's letter is the foundation upon which modern Establishment Clause jurisprudence is built despite the stark differences between the former and the latter.[62] Justice Black's wall separates religion from *all* civil government, whether federal, state, or local.[63] Jefferson's wall was supposed to exclude the federal government from the relationship between religion and state governments.[64] Nevertheless, the Supreme Court has willingly and unyieldingly embraced Justice Black's wall despite its extreme departure from the original public meaning of the Establishment Clause.[65] More importantly, the Supreme Court has been so successful in convincing the American people its interpretation of the First Amendment is correct that as many as 70% of Americans believe the

"free public schools." *Id.* at 426, 462. In *Everson*, Justice Black surreptitiously transformed the meaning of the Establishment Clause by utilizing the "fig leaf of Jefferson's letter." *Id.* at 483.

[60] Richard F. Duncan, *Just Another Brick in the Wall: The Establishment Clause as a Heckler's Veto*, 18 TEX. REV. L. & POL. 255, 269–71 (2014); *see also Everson*, 330 U.S. at 8 (observing that the First Amendment's dictates apply to the States). Professor Richard Duncan argues that under the Doctrine of Incorporation, a provision of the Bill of Rights is only applicable to the States if it protects a "fundamental liberty interest." Duncan, *supra*. Thus, there should only be an Establishment Clause violation if the State deprivation of an individual's liberty amounts to a religious establishment. *Id*. at 288. However, the Court has turned this principle on its head, instead employing the Establishment Clause to inhibit rather than protect liberty. *Id*.

[61] *See Everson*, 330 U.S. at 8, 16–18 (analyzing whether a New Jersey law was valid under the First Amendment without discussing a fundamental liberty interest).

[62] Dreisbach, *supra* note 55, at 4.

[63] *Id.*

[64] *Id.* at 2–4.

[65] Since the Court began moving in the direction of a strict separationist interpretation of the Establishment Clause, there has been an outgrowth of Establishment Clause litigation, particularly in the school context. *See, e.g.*, Settle v. Dickson Cnty. Sch. Bd., 53 F.3d 152, 153–54 (6th Cir. 1995) (concerning a prohibition of a student in Tennessee writing an English paper on the life of Jesus Christ); C.H. v. Oliva, 990 F. Supp. 341, 353–54 (D.N.J. 1997) (examining the removal of a kindergartner's drawing of Jesus from a display of student artwork); Nichol v. Arin Intermediate Unit 28, 268 F. Supp. 2d 536, 541 (W.D. Pa. 2003) (discussing the suspension of a teacher's assistant in Pennsylvania for wearing a cross necklace); Roberts v. Madigan, 921 F.2d 1047, 1049–50 (10th Cir. 1990) (concerning the compulsion a fifth-grade teacher to remove all religious literature from his classroom and keep his personal Bible hidden from the view of students).

First Amendment actually mandates a wall of separation between church and state.[66]

Since the voyage from Jefferson's wall to Justice Black's wall, the Supreme Court adopted and applied a number of tests in order to determine the validity of a statute or government act, three of which are relevant here. First, the *Lemon* Test, which asked (1) whether the government action had a secular purpose; (2) whether its principal or primary effect advanced or inhibited religion; and (3) whether the action fostered an excessive entanglement with religion.[67]

Second, the so-called "endorsement test" asks "whether the government's actual purpose is to endorse or disapprove of religion."[68] While this test does not prohibit government from acknowledging religion, it does prevent the government from placing its "power, prestige[,] and financial support" behind a particular religion or religious belief.[69] However, it is important to make clear that the endorsement inquiry does not take into account the perceptions of certain individuals or a misperception of endorsement.[70] Instead, the endorsement test takes the viewpoint of an objective observer familiar with the history and context of the government practice to determine whether a message of endorsement is conveyed.[71]

Third, the so-called "coercion test" asks whether the statute or policy in question places subtle and indirect public and peer pressure on dissenters.[72] Often used in the school context, courts focus on whether a "reasonable dissenter" is put in the position of either participating or protesting.[73] According to the Court, the state is not permitted to use "social pressure to enforce orthodoxy."[74] To determine whether the government acts contrary to this rule, the Court has laid out three factors or circumstances that primarily influence the social coercion test. First,

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[66] *Separation of Church and State*, GEO. WASH. INST. FOR RELIGIOUS FREEDOM, http://www.gwirf.org/separation-of-church-and-state/ (last visited Jan. 25, 2023).

[67] Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971), *overruled by* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022).

[68] Wallace v. Jaffree, 472 U.S. 38, 56 (1985) (quoting Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)); *see also id.* at 68–70 (O'Connor, J., concurring in judgment) (explaining that the first inquiry of the *Lemon* test is the endorsement test). The relevant inquiry is "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools." Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000) (quoting *Wallace*, 472 U.S. at 76 (O'Connor, J., concurring in judgment)).

[69] Engel v. Vitale, 370 U.S. 421, 430–31 (1962).

[70] *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 119 (2001) (rejecting the argument that religious activity can be prohibited simply because young children might perceive the activity as endorsement).

[71] *Id.*

[72] *See* Lee v. Weisman, 505 U.S. 577, 592–93 (1992).

[73] *See, e.g.*, *id.* at 593, 595–96; *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 312.

[74] *Lee*, 505 U.S. at 594.

coercion is strongest when the religious activity takes place immediately before or during an important school event.[75] Second, students are more susceptible to social coercion if a religious ceremony is formal, public, and led by school officials.[76] Third, pervasive school involvement with the content and presentation of the religious activity is more likely to bear the imprimatur of the state.[77] It is important to clarify that the coercion test applies only to government speech and therefore cannot be used to restrict an individual's right to engage in private religious speech even in public school.[78]

B. The Role of Freedom of Speech as Applied to Public Employees

The Supreme Court has repeatedly warned that governmental employers may not condition public employment on the renunciation of constitutional rights, thus upholding the "Unconstitutional Conditions Doctrine."[79] However, the Court has also recognized that the government, when in the role of employer, must have the ability to ensure the efficient operation of the workplace.[80] Other goals of a government employer include maintaining discipline and promoting integrity while discharging official duties.[81] In *Pickering v. Board of Education* and its progeny, the Court developed a two-prong test to balance these competing concerns.[82] The Court first asks "whether the employee spoke as a citizen on a matter

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[75] *See id.* at 597 (distinguishing circumstances where adults would be free to exit important school events from those where students would not be free to leave).

[76] *See id.* at 597–98 (recognizing that students are more susceptible than adults to social coercion when there are religious exercises at formal school events).

[77] *See id.* at 597 (noting that the school's inclusion of religious practices in the program heightens the atmosphere of state-imposed religious practices).

[78] *Santa Fe*, 530 U.S. at 290 ("[N]othing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday.").

[79] *E.g.*, Scott R. Bauries, *The Logic of Speech and Religion Rights in the Public Workplace*, 19 MARQ. BENEFITS & SOC. WELFARE L. REV. 137, 145–46 (2018) ("[T]he unconstitutional conditions doctrine . . . holds that, just as the government cannot compel any private individual to relinquish his or her constitutional rights directly, it cannot do the same indirectly by conditioning an important government benefit—including public employment—on the relinquishing of those same rights."); *see also, e.g.*, Lane v. Franks, 573 U.S. 228, 236 (2014) (holding that public employers may not require employees to relinquish constitutional rights as a condition of employment); Garcetti v. Ceballos, 547 U.S. 410, 419 (2006) ("The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens.").

[80] Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

[81] Richard H. Hiers, *First Amendment Speech Rights of Government Employees: Trends and Problems in Supreme Court and Fifth Circuit Decisions*, 45 SW. L.J. 741, 763–64 (1991).

[82] 391 U.S. at 568; *e.g.*, Connick v. Myers, 461 U.S. 138, 146–48 (1983); *Garcetti*, 547 U.S. at 417–19; *Lane*, 573 U.S. at 236–37.

of public concern."[83] Notice that this inquiry includes two related questions. First, is the employee speaking as a citizen?[84] And second, is the speech on a matter of public concern?[85] The line between speech as a citizen and speech as an employee is critical to the analysis. If it is speech as a citizen, the possibility of First Amendment protection arises.[86] However, if it is considered speech as an employee, then the government employer in a real sense "owns" that speech, which eliminates constitutional protection.[87]

Whether the speech relates to a matter of public concern is determined by reviewing the "content, form, and context" of the speech.[88] Speech involves a matter of public concern if it relates to a "political, social, or other concern" of the community or is a "subject of legitimate news interest."[89] Furthermore, courts interpreting *Pickering* have held that speech concerning religion is unquestionably of fundamental public concern.[90] If the speech is not made as a citizen on a matter of public concern, then there is no possibility of a First Amendment claim.[91]

The speech at issue in *Pickering* was a letter penned by a public-school teacher to the editor of a local newspaper criticizing the school board's allocation of funds.[92] The Court determined that this was speech as a citizen on a matter of public concern.[93] The school district's distribution of funds was clearly a matter in which the public was interested, and Pickering, as a public-school teacher, was uniquely qualified to speak on this matter.[94] Thus, the rights of the teacher as a citizen to speak on a matter of public concern were then balanced against the state's interest in efficiently performing public services.[95]

In *Pickering*, the Court looked to whether the speech at issue "impeded the teacher's proper performance of his daily duties in the classroom or . . . interfered with the regular operation of the school[] generally."[96] As neither of these concerns applied in *Pickering*, the school

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[83] *Garcetti*, 547 U.S. at 418.

[84] *See id.*

[85] *See id.*

[86] *Id.*

[87] *See id.* (stating that the government has broad discretion to restrict speech made in the course of employment that has the potential to affect its operations).

[88] Connick v. Myers, 461 U.S. 138, 147–48 (1983).

[89] Snyder v. Phelps, 562 U.S. 443, 453 (2011) (first quoting *Connick*, 461 U.S. at 146; then quoting City of San Diego v. Roe, 543 U.S. 77, 83–84 (2004)).

[90] *E.g.*, Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 966 (9th Cir. 2011).

[91] *See id.* (observing that the inquiry ends if speech is made as a teacher rather than as a citizen).

[92] Pickering v. Bd. of Educ., 391 U.S. 563, 566 (1968).

[93] *Id.* at 571.

[94] *Id.* at 571–72.

[95] *Id.* at 568.

[96] *Id.* at 572–73.

district was not able to establish an adequate justification for his disparate treatment.[97]

In *Garcetti v. Ceballos*, the Court clarified the *Pickering* balancing test is a two-step inquiry.[98] First, the court must determine whether the employee spoke as a citizen on a matter of public concern.[99] If the employee did speak as a citizen on a matter of public concern, then the possibility of a First Amendment claim develops.[100] The burden then shifts to the government, which must have "an adequate justification for treating the employee differently from any other member of the general public."[101] In order for the state to have an adequate justification to limit the employee's speech, the restriction must be aimed at speech which impacted the efficient operations of the state entity at issue.[102]

Then, the Court further restricted the First Amendment rights of public employees by adding a threshold inquiry to the *Pickering* test. Before any *Pickering* balancing should be undertaken, the first determination is whether the speech was made *pursuant to* the employee's official job duties.[103] This means that expressions made at the office or related to the speaker's work but not pursuant to the speaker's official job duties are protected under the First Amendment.[104] For example, the speech at issue in *Garcetti* was a memorandum written by Mr. Ceballos in his capacity as a calendar deputy.[105] He was speaking as a prosecutor fulfilling his job responsibilities, not as a citizen speaking on a matter of public concern.[106] Because the speech was considered an "official communication[]" made pursuant to his job, it failed the threshold requirement, leaving Mr. Ceballos without First Amendment protection.[107]

Next, the Supreme Court, realizing the broad interpretation being given to *Garcetti* in some circuits, granted certiorari in *Lane v. Franks*.[108] Lane testified under oath about information he learned in his capacity as

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97 *Id.*

98 Garcetti v. Ceballos, 547 U.S. 410, 418 (2006).

99 *Id.*

100 *Id.*

101 *Id.*

102 *Id.*

103 *Id.* at 421.

104 *Id.* at 420–21.

105 *Id.* at 421–22 ("The significant point is that the memo was written pursuant to Ceballos'[s] official duties. Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen.").

106 *Id.* at 421.

107 *Id.* at 422–23.

108 571 U.S. 1161 (2014) (granting certiorari); *see also* 573 U.S. 228, 246 (2014) (noting certiorari was granted to resolve a circuit split).

a government employee and was later fired.[109] Lane sued, claiming the termination was retaliation against his testimony and therefore violative of his First Amendment rights.[110] Both the district court and the Eleventh Circuit relied heavily on *Garcetti* to rule against Lane.[111] The Eleventh Circuit, in finding that Lane spoke as an employee and not a citizen, stated, "Even if an employee was not required to make the speech as part of his official duties, he enjoys no First Amendment protection if his speech 'owes its existence to [the] employee's professional responsibilities' . . . ."[112] While the Eleventh Circuit was referencing the "owes its existence to" dicta from *Garcetti*, the Supreme Court emphatically rejected this interpretation by stating that citizen speech is not converted into government speech merely because it relates to information learned of in the course of employment.[113] Instead, the Court clarified that the *Garcetti* inquiry is "whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties."[114] Distinguishing between the memorandum in *Garcetti* and the testimony in *Lane*, the Court held that Lane's speech was entitled to First Amendment protection.[115] Thus, *Lane* illuminates the threshold requirement from *Garcetti*. It is not enough that the speech at issue is made while at work or that the subject matter of the speech relates to the employee's work. In order for a government employer to restrict an employee's speech, the speech must be *required by* the employee's job duties and be made pursuant to those duties.

Garcetti has become known as the "kiss of death for many First Amendment cases."[116] There are two incredibly vague facets of the Court's public employee speech jurisprudence, both of which have led to divergent interpretations in the lower courts. First, federal courts have wrestled with the definition of "official duties."[117] Some have described *Garcetti*'s threshold inquiry as a "bright-line rule," yet this question is often

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[109] *Lane*, 573 U.S. at 232–33.

[110] *Id.* at 234.

[111] Lane v. Cent. Ala. Cmty. Coll., No. CV-11-BE-0883-M, 2012 WL 5289412, at *10 (N.D. Ala. Oct. 18, 2012); Lane v. Cent. Ala. Cmty. Coll., 523 F. App'x 709, 711 (11th Cir. 2013).

[112] *Lane*, 523 F. App'x at 711 (alteration in original) (quoting Abdur-Rahman v. Walker, 567 F.3d 1278, 1283 (11th Cir. 2009)).

[113] *Lane*, 573 U.S. at 235, 239–40; Garcetti v. Ceballos, 547 U.S. 410, 421–22 (2006).

[114] *Lane*, 573 U.S. at 240.

[115] *Id.* at 239, 242.

[116] David L. Hudson, Jr., Garcetti*'s Palpable Effect on Public-Employee Speech,* FREEDOM F. INST. (May 29, 2007), https://www.freedomforuminstitute.org/2007/05/29/garcettis-palpable-effect-on-public-employee-speech/.

[117] *See, e.g.*, Jason Zenor, *This Is Just Not Working for Us: Why After Ten Years on the Job– It Is Time to Fire* Garcetti, 19 RICH. J.L. & PUB. INT. 101, 114–17 (2016) (observing how lower courts have taken unclear and varying interpretations of what constitutes speech made pursuant to official duties).

contested because there is no clear test to determine the scope of an employee's job duties.[118] The tendency of the circuit courts is to engage in a painstaking, fact-sensitive inquest into whether the employee's speech was made pursuant to official duties.[119] Courts have often relied on sweeping definitions of an employee's job description, which allows this factor to become dispositive of the entire case.[120] Furthermore, an emphasis on small elements, such as whether the employee was in uniform, has led to an oversimplification of the analysis even though this is unsupported by *Garcetti*.[121] Once again, in the case of Mr. Ceballos, the Court emphasized that speech related to government work *does not* in and of itself indicate that the speech was made pursuant to official duties.[122] For example, speaking while in uniform, without more, will not itself support the conclusion that the speech was made pursuant to official job duties.[123] To interpret *Garcetti* as a significant expansion of governmental control over employee speech is simply off the mark.[124] Even though the Court attempted to limit the outer bounds of acceptable government job descriptions, it still fell short of promulgating a judicially manageable standard. The admonition against "excessively broad" job descriptions provides no benchmark for determining when one is merely "broad" as opposed to "excessively broad."[125] Simply put, the lack of a clear yardstick allows for manipulation and abuse.

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[118] *Id.* at 104 (stating that job duties are vaguely defined, making it more difficult for public employees to discern whether their speech is protected).

[119] *See*, *e.g.*, Foley v. Town of Randolph, 598 F.3d 1, 7 (1st Cir. 2010) (relying on the speech's context to determine whether the employee's speech was pursuant to official duties even though he was not required to speak); Williams v. Dall. Indep. Sch. Dist., 480 F.3d 689, 693–94 (5th Cir. 2007) (relying on specific facts to infer that the employee's memoranda were written in the course of performing his job even though he was not required to write them).

[120] *See, e.g.*, *Foley*, 598 F.3d at 6–7 (noting that an employee's job description does not preclude the existence of other official duties); *Williams*, 480 F.3d at 694 (holding that speech "in the course of performing" a job, even if not required by the job, is unprotected).

[121] *See Foley*, 598 F.3d at 8–10 (holding that Foley's speech on issues of public concern constituted official communication because he would be perceived as speaking in his official role as chief of the fire department while on duty, in uniform, and at the scene of a fire); Zenor, *supra* note 117, at 114–15 (stating that courts will rarely find free speech protection if the speech is even slightly connected to the employee's job duties).

[122] Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) ("The controlling factor in Ceballos'[s] case is that his expressions were made pursuant to his duties as a calendar deputy.").

[123] *Foley*, 598 F.3d at 7 n.9 (noting that factors such as an employee being in uniform or on duty are not dispositive, but they are relevant to the evaluation of whether the speech was made pursuant to official duties).

[124] *See* Zenor, *supra* note 117, at 104 (arguing that the nebulous definition of "job duties" has allowed lower courts to broaden this exception to speech that otherwise would be protected as speech in the public interest, thereby permitting the government to have more control over its employees' speech).

[125] *See Garcetti*, 547 U.S. at 424 (rejecting the idea that "employers can restrict employees' rights by creating excessively broad job descriptions" without defining what is "excessively broad" and merely noting that "[t]he proper inquiry is a practical one").

Second, there is no precise definition of "public concern."[126] Similarly, the lack of a distinct standard encourages subjective and arbitrary determinations leading to capricious outcomes.[127] The Court's definition of speech relating to matters of public concern has shifted depending on the context, leading to increased confusion among lower courts.[128] For example, speech about governmental affairs is traditionally considered a "matter of public concern";[129] however, in *Connick v. Myers*, the Court held that speech of this nature was merely an internal office matter.[130] In the defamation context, the Court explicitly rejected the public concern test, stating that it would "occasion the additional difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of 'general or public interest' and which do not."[131] Since *Connick*, lower courts have been increasingly deferential to the government's depiction of its employees' speech.[132] This allows the government as an employer to put a thumb on the scale by characterizing the speech at issue as internal instead of a matter of public concern. Moreover, the public concern test diffuses "majoritarian values" into the analysis by looking to what the public views to be a popular issue.[133] This is antithetical to the First Amendment's underlying values, which protect the minority's speech from suppression by the majority.[134]

C. The Forgotten Free Exercise Clause

When the Religion Clauses of the First Amendment are discussed, whether in the law or in modern political life, the Establishment Clause almost always overwhelms the Free Exercise Clause.[135] Yet for the Framers, the primary concern and focus was the free exercise of

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[126] R. George Wright, *Speech on Matters of Public Interest and Concern*, 37 DEPAUL L. REV. 27, 28 (1987) (quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 786 (1985) (Brennan, J., dissenting)) (observing there is no clear definition of "matter[] of public concern").

[127] *Id.* at 29.

[128] *See* Toni M. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 1, 29–30, 31 n.128 (1987) (noting the lower courts' confusion resulting from the Supreme Court's inconsistency in determining whether speech is a matter of public concern).

[129] *See* Mills v. Alabama, 384 U.S. 214, 218 (1966) ("[T]here is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.").

[130] 461 U.S. 138, 148–49 (1983).

[131] Gertz v. Robert Welch, Inc., 418 U.S. 323, 345–46 (1974).

[132] Massaro, *supra* note 128, at 20–21, 20 n.95.

[133] *Id.* at 31.

[134] *See* Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

[135] Garry, *supra* note 34, at 1164–65 ("Over the past decade and a half, the Establishment Clause has been the focal point of First Amendment jurisprudence.").

religion.[136] The Establishment Clause, in its subservient position, was intended to be merely another check against government infringement upon the natural right of religious liberty.[137] The Free Exercise Clause was intended to protect minorities against repression by the majority and provide a safeguard against governmental proscription or prescription of religious practice.[138] In early colonial America, religious liberty was discussed in terms of "toleration" of minority religions, a mere gift from the mainstream to those with alternative beliefs.[139] Next, tolerance progressed to "freedom of conscience," whereby religious beliefs were protected but religious practice could be restricted.[140] Finally, in the First Amendment, the most sweeping conception of religious liberty was ratified—"free exercise," which shielded both beliefs and actions.[141] While earlier state constitutions created limits on the free exercise of religion, the First Amendment used all-encompassing language.[142]

Despite the importance of the Free Exercise Clause to the Framers, the Court has largely ignored or diminished its protections.[143] While there has been expansive development of free speech rights in the context of government employment,[144] free exercise rights have often been reviewed within the framework of unemployment compensation. In *Sherbert v. Verner*, the Court reviewed the denial of unemployment compensation to a Seventh Day Adventist who was fired for her refusal to work on Saturday, which she considered the Sabbath.[145] The Court held that Sherbert could not be denied unemployment compensation because she was fired for the free exercise of her religion.[146] However, the Court's holding was only applicable in the unemployment context because

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[136] *Id.* at 1163.

[137] *See id.* ("The absence of an established church was just one aspect of achieving a freedom of religion.").

[138] *Id.* at 1166.

[139] SANFORD H. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA 8–9 (1902) (observing that "toleration" denotes a gift from a superior to a lessor and that colonial America had varied forms of tolerance before enshrining religious liberty).

[140] Tracey Levy, *Rediscovering Rights: State Courts Reconsider the Free Exercise Clauses of Their Own Constitutions in the Wake of* Employment Division v. Smith, 67 TEMP. L. REV. 1017, 1027 (1994).

[141] Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 856–57 (1986); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1459 (1990) (noting that early American dictionaries included "action" in the definition of "exercise").

[142] *See* McConnell, *supra* note 141, at 1490, 1499.

[143] *See* Garry, *supra* note 34, at 1167–69 (explaining how the Supreme Court has consistently sidelined the Free Exercise Clause in favor of the Establishment Clause).

[144] *See* discussion *supra* Section I.B (discussing the major public employee free speech cases).

[145] 374 U.S. 398, 399–401 (1963).

[146] *Id.* at 410.

Sherbert was not a government employee.[147] *Sherbert* was subsequently applied in *Thomas v. Review Board of the Indiana Employment Security Division*[148] and *Hobbie v. Unemployment Appeals Commission of Florida*[149] to reverse denials of unemployment compensation in situations where the employee was fired due to deeply held religious beliefs.[150]

Only three years later, in *Employment Division, Department of Human Resources of Oregon v. Smith*, the Court abruptly reversed course.[151] The Court announced that a neutral, generally applicable law, such as the ban on peyote use at issue in *Smith*, could be applied to deny unemployment benefits despite its burden on a person's free exercise of religion.[152] If a law is both neutral and generally applicable, then the burden on a person's exercise of their religion need not be justified by a compelling governmental interest.[153] Later, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the Court created an exception to the rule delineated in *Smith*.[154] If a law fails to satisfy the requirements of *Smith*, *i.e.*, neutrality and general applicability, then the law must satisfy strict scrutiny, which requires a compelling governmental interest and narrow tailoring.[155] *Lukumi* also reaffirmed that the Free Exercise Clause applies "if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."[156] However, the Court has yet to hear a case involving the Free Exercise Clause's application in the context of government employment.

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147 *See id.* at 399 n.1, 410 (noting the employee's private-sector employment at a textile mill and limiting the holding to the constitutionality of eligibility provisions for unemployment compensation).

148 450 U.S. 707 (1981).

149 480 U.S. 136 (1987).

150 *Thomas*, 450 U.S. at 720; *Hobbie*, 480 U.S. at 144.

151 494 U.S. 872, 884–85 (1990) (holding that the *Sherbert* test would no longer be used for most free exercise claims).

152 *Id.* at 874, 878–79, 890.

153 *Id.* at 884–85. In the aftermath of *Smith*, the responsibility for protecting religious freedom was shifted to the political branches, and Congress specifically responded by passing the Religious Freedom Restoration Act of 1993. Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488 (codified as amended at 42 U.S.C. §§ 2000bb–2000bb-4), *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

154 508 U.S. 520, 531–32 (1993).

155 *Id.*

156 *Id.* at 532; *see also* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1881 (2021) (applying strict scrutiny when the Court determined that a city ordinance was not generally applicable).

D. The First Amendment Rights of Public-School Teachers

1. *Kennedy v. Bremerton School District*

Joseph Kennedy worked for BSD as the head football coach for the junior varsity team and as an assistant coach for the varsity team.[157] As a Christian with deeply held religious beliefs, Coach Kennedy made a commitment to God to kneel and pray to give thanks at the end of each game.[158] His prayer occurred after the two teams met to shake hands and players were either leaving the field or engaged in other post-game traditions.[159] Coach Kennedy's prayers on the fifty-yard line lasted approximately fifteen-to-thirty seconds.[160]

BSD conceded that Coach Kennedy never coerced, encouraged, or required any student to participate in his prayers and abided by District policy not to intentionally involve students.[161] Despite the fact that no student, parent, or member of the community complained about Coach Kennedy's prayers, after seven years of silent prayers BSD implemented a new, expansive policy.[162] This directive prohibited on-duty employees from engaging in religious activity unless it was "non-demonstrative."[163] The stated reason for initiating this sweeping policy was "to avoid the perception of endorsement."[164] After Coach Kennedy once again offered his silent prayer following a game, he was put on paid administrative leave.[165] Coach Kennedy's request for a religious accommodation under Title VII of the Civil Rights Act of 1964 was denied because his "overtly religious conduct" was prohibited by the Establishment Clause.[166] In November 2015, BSD retaliated again by giving Coach Kennedy his first poor performance evaluation, which recommended he not be rehired because he failed to follow the District's guidelines regarding religious expression and failing to supervise athletes during his thirty-second prayers.[167]

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157 Brief for Petitioner, *supra* note 13.

158 *Id.*

159 *Id.*; Joint Appendix at 182, *Kennedy* v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022) (No. 21-418).

160 Brief for Petitioner, *supra* note 13, at 5 ("Those prayers typically lasted 'thirty seconds' or less.").

161 *Id.* at 5–7 (noting that the school policy only prohibited school staff from encouraging or discouraging prayer rather than prohibiting staff from engaging in personal religious expression and that the district admitted that Kennedy had not "actively encouraged, or required, participation" in prayer).

162 *Id.* at 6–7.

163 *Id.* at 7.

164 *Id.* (quoting Petitioner's Appendix at 6, *Kennedy*, 142 S. Ct. 2407 (No. 21-418)).

165 *Id.* at 12.

166 *Id.* at 9, 11 (quoting Joint Appendix, *supra* note 16, at 93).

167 *Id.* at 13.

2. The Ninth Circuit's Categorical Ban on "Demonstrative Expression" by Teachers When in View of Students

Following BSD's retaliation, Coach Kennedy filed a motion for a preliminary injunction, arguing that the ban on all "demonstrative religious activity" violated the First Amendment.[168] The district court held that Coach Kennedy spoke on a matter of public concern and his speech was a substantial or motivating factor in the adverse employment actions against him, which would not have been taken absent the protected speech.[169] However, the court found that he was still speaking as a public employee and not a citizen, finding his status as a coach "determinative."[170] Furthermore, the court also believed that BSD had an adequate justification for taking adverse employment actions: the Establishment Clause.[171] The court stated that "those things . . . . [cannot] be happening on public property in this climate under the law."[172]

The Ninth Circuit affirmed the district court's opinion.[173] The Ninth Circuit agreed that Kennedy spoke as a public employee and not a private citizen.[174] The court held that Coach Kennedy's brief silent prayer was ordinarily within the scope of his job duties because his job included "modeling good behavior . . . in the presence of students and spectators."[175] The Ninth Circuit found it essential to the question of whether Coach Kennedy's prayer was an official job duty that the expression occurred in a prominent position on public property, while wearing a Bremerton High School shirt, and while on-duty as a supervisor.[176] Thus, any "demonstrative communication" observable by others fell "within the compass of his professional obligations."[177]

Instead of following *Garcetti*'s holding, which asks whether the speech was made pursuant to official job duties, the Ninth Circuit plucked the same dicta expressly rejected in *Lane* to canonize a new test. The court

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[168] Plaintiff's Motion for Preliminary Injunction & Supporting Memorandum of Law at 1–2, Kennedy v. Bremerton Sch. Dist., 443 F. Supp. 3d 1223 (W.D. Wash. 2020) (No. 16-cv-05694) (quoting Complaint Appendix at 24, *Kennedy*, 443 F. Supp. 3d 1223 (No. 16-cv-05694)).

[169] Transcript of Preliminary Injunction Hearing at 43, *Kennedy*, 443 F. Supp. 3d 1223 (No. 16-cv-05694).

[170] *Id.* at 43–44.

[171] *See id.* (implying that Kennedy violated the Establishment Clause by leading the prayer session while visually associated with the school); *see also* Kennedy v. Bremerton Sch. Dist. (*Kennedy I*), 869 F.3d 813, 821 (9th Cir. 2017) (summarizing the District Court's holding as an Establishment Clause issue).

[172] Transcript of Preliminary Injunction Hearing, *supra* note 169, at 44.

[173] *Kennedy I*, 869 F.3d at 815, 831.

[174] *Id.* at 825.

[175] *Id.* at 826. The logical conclusion of the Ninth Circuit's reasoning is that Coach Kennedy was incapable of "modeling good behavior" due to this quick prayer.

[176] *Id.* at 827.

[177] *Id.* at 826.

revived the "owes its existence to" language: "Kennedy's 'speech "owes its existence" to his position as a teacher[,] [so he] spoke as a public employee, not as a citizen, and our inquiry is at an end.'"[178] The court found it conclusive that Coach Kennedy prayed on the fifty-yard line because the speech "could not physically have been engaged in by Kennedy if he were not a coach. Kennedy's speech therefore occurred only because of his position with [BSD]."[179]

However, the court did opine that Coach Kennedy could have prayed "non-demonstratively" or while alone in his office or other secluded locations.[180] Finally, while the court never reached the Establishment Clause issue, it seemed to apply the Establishment Clause's endorsement test to the question of whether a prayer is within a coach's official job duties, stating,

> [W]here . . . a teacher speaks in a school event in the presence of students in a capacity one might reasonably view as official, we have rejected the proposition that a teacher speaks as a citizen simply because the content of his speech veers beyond the topic of curricular instruction, and instead relates to religion.[181]

In other words, Coach Kennedy's fleeting religious expression was employee speech and not citizen speech because a reasonable observer might view it as government speech.

Coach Kennedy sought certiorari, which the Supreme Court denied.[182] Justice Samuel Alito, concurring in the denial of certiorari, explained, "[T]he Ninth Circuit's understanding of the free speech rights of public school teachers is troubling and may justify review in the future."[183] However, the important constitutional issue could not be reached "until the factual question of the likely reason for the school district's conduct is resolved."[184]

On remand, the district court unambiguously answered Justice Alito's question, observing that "the risk of constitutional liability associated with Kennedy's religious conduct was the 'sole reason' the District ultimately suspended him."[185] This decision was compelled by BSD's assertion that its "course of action in this matter has been driven solely by concern that [Kennedy's] conduct might violate the

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[178] *Id.* at 827 (quoting Johnson v. Poway Unified Sch. Dist., 658 F.3d 954, 966 (9th Cir. 2011)).

[179] *Id.*

[180] *Id.* at 829.

[181] *Id.* at 822, 830.

[182] Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634 (2019).

[183] *Id.* at 636 (Alito, J., concurring).

[184] *Id.*

[185] *Kennedy* v. Bremerton Sch. Dist., 443 F. Supp. 3d 1223, 1231–32 (W.D. Wash. 2020), *aff'd*, 991 F.3d 1004 (9th Cir. 2021), *rev'd*, 142 S. Ct. 2407 (2022).

constitutional rights of students and other community members, thereby subjecting the District to significant potential liability."[186]

The district court went on to hold that Kennedy's "prominent, habitual prayer [was] not the kind of private speech that is beyond school control" and that BSD's interest in "avoiding an Establishment Clause violation" was sufficient justification for suppressing Kennedy's religious exercise.[187] As for Kennedy's Free Exercise claim, the court held even if BSD did not act in a "neutral or generally applicable" manner, it had a compelling interest in avoiding an Establishment Clause violation.[188]

The Ninth Circuit again affirmed.[189] The court described Kennedy as being "clothed with the mantle of one who imparts knowledge and wisdom," which rendered his "expression on the field—a location that he only had access to because of his employment—during a time when he was generally tasked with communicating with students, . . . speech as a government employee."[190] The Ninth Circuit finally concluded that even if Kennedy spoke as a private citizen, BSD had an adequate justification to prohibit his speech under the Establishment Clause.[191] The court opined, "[A]n objective observer, familiar with the history of Kennedy's on-field religious activity, coupled with his pugilistic efforts to generate publicity in order to gain approval of those on-field religious activities, would view BSD's allowance of that activity as 'stamped with [its] seal of approval.'"[192]

Coach Kennedy again petitioned for certiorari, which was granted by the Supreme Court on January 21, 2022.[193]

II. ANALYSIS

Just because citizens accept employment with a government agency does not mean they renounce their constitutional rights, particularly First Amendment rights, which are the "indispensable condition[] of nearly every other form of freedom."[194] However, the government, just like any employer, must have the ability to control the speech it commissions—in

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[186] Brief for Petitioner, *supra* note 13, at 16 (alteration in original) (quoting Joint Appendix, *supra* note 16, at 138).

[187] *Kennedy*, 443 F. Supp. 3d at 1235, 1237.

[188] *Id.* at 1240. The court also held BSD's policy was narrowly tailored. *Id.*

[189] Kennedy v. Bremerton Sch. Dist. (*Kennedy II*), 991 F.3d 1004, 1010, 1023 (9th Cir. 2021), *rev'd*, 142 S. Ct. 2407 (2022).

[190] *Id.* at 1015.

[191] *Id.* at 1016–17, 1019.

[192] *Id.* at 1017 (quoting Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000)).

[193] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 857 (2022) (mem.).

[194] Palko v. Connecticut, 302 U.S. 319, 326–27 (1937); *see Kennedy* v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2423 (2022) (citing Tinker v. Des Moines Indep. City Sch. Dist., 393 U.S. 503, 506 (1969)) (noting that teachers cannot be forced to give up their First Amendment rights in order to pursue public employment).

other words, government speech.[195] But how does one determine what speech is private, protected speech and what speech is unprotected government speech? And how do the "special characteristics of the school environment" impact this demarcation?[196]

Having outlined the current jurisprudence of each relevant clause of the First Amendment and the facts of Coach Kennedy's case, this Article will dissect where the Ninth Circuit went awry in its analysis of each clause. To begin, Bremerton's categorical ban on all "demonstrative expression" violates the First Amendment, despite the Ninth Circuit's approval. By transforming all speech, or "demonstrative expression," by employees into government speech, the Ninth Circuit has effectively eliminated any First Amendment protection for speech uttered at work. Second, the sole justification for restricting Coach Kennedy's silent religious expression was fear of an Establishment Clause violation.[197] However, based on both the original public meaning and the modern interpretation, the Establishment Clause does not require personal demonstrative religious expression to be suppressed, even in public schools. Finally, there is a "crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[198] Coach Kennedy's expression is clearly private religious speech, and it is protected under the Free Exercise Clause.

A. Categorical Ban on Demonstrative Expression Violates a Teacher's Right to Freedom of Speech

1. Teachers Don't Forfeit All First Amendment Rights at the "Schoolhouse Gate"

There may still be tension between the First Amendment rights of teachers and the control of their speech required by the state. However, there is a long line of cases affirming that the Bill of Rights applies with equal force in the school context. In *West Virginia State Board of Education v. Barnette*, Justice Jackson eloquently argued,

> The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and

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[195] *See* Pickering v. Bd. of Ed., 391 U.S. 563, 568 (1968); Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541–42 (2001).

[196] *Tinker*, 393 U.S. at 506.

[197] *See* Brief for Petitioner, *supra* note 13, at 16; *Kennedy II*, 991 F.3d 1004, 1010, 1020, 1022–23 (9th Cir. 2021).

[198] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 302 (2000) (quoting Bd. of Ed. v. Mergens, 496 U.S. 226, 250 (1990) (opinion of O'Connor, J.)).

> highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights.[199]

In 1969, *Tinker v. Des Moines Independent Community School District* reaffirmed that teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[200]

Yet, according to the Ninth Circuit, teachers must indeed renounce their freedom of speech at the schoolhouse gate.[201] All teacher expression is subject to government control once the teacher enters school property and can be seen by students. Under the Ninth Circuit's approach, a wide array of religious expressions would be subject to government regulation. For example, the government could prohibit a teacher from performing the sign of the cross on her lunch break, wearing a hijab during class, and even kneeling after a football game to say a fifteen-to-thirty second silent prayer.

The Ninth Circuit's halfhearted attempt to distinguish Coach Kennedy's prayer from a teacher "bowing her head in silent prayer before a meal in the school cafeteria" fell flat.[202] Apparently, Coach Kennedy's expression was "of a wholly different character" because he

> insisted that his speech occur while players stood next to him, fans watched from the stands, and he stood at the center of the football field. Moreover, Kennedy repeatedly acknowledged that—and behaved as if—he was a mentor, motivational speaker, and role model to students *specifically at the conclusion of a game*.[203]

However, what if a teacher, who also viewed himself as a role model and mentor, "insisted" on praying before his meal while students stood next to him, students watched from the tables, and he stood at the center of the cafeteria? How is this expression any different in kind from Coach Kennedy's? If the Ninth Circuit's broad interpretation of government speech is correct, then the First Amendment provides only symbolic protection for teachers while on school property. Such a broad interpretation is not only constitutionally infirm, but it also violates the principles set forth by the Supreme Court in *Barnette* and *Tinker*.[204]

Like any employer, schools are entitled to some control over the speech of their employees, particularly the speech which the school

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[199] 319 U.S. 624, 637 (1943).

[200] 393 U.S. at 506.

[201] *See Kennedy II*, 991 F.3d 1004, 1014–15 (9th Cir. 2021) (holding that Kennedy's prayers were government speech because of his position and visibility to students and the public).

[202] *Id.* at 1015–16.

[203] *Id*. at 1015.

[204] *See Barnette*, 319 U.S. at 637–39, 641 (acknowledging the First Amendment offers its protections in the school context); Tinker, 393 U.S. at 505–06 (noting that teachers and students still enjoy First Amendment rights).

commissions. It is well established that "[e]xpression is a teacher's stock in trade, the commodity she sells to her employer in exchange for a salary."[205] Thus, a school is well within its right to control the subjects on which the teacher may present to the class.[206] If a teacher exceeded or contradicted his or her scope of authority by, for example, teaching students that the South won the Civil War, the school may discipline the teacher without infringing on the teacher's First Amendment rights. Particularly when a teacher is before a captive audience of students, the school can restrict her speech to the chosen curriculum.[207] However, not all speech by a teacher on school property constitutes "curricular" speech. Where speech is non-curricular, it enjoys First Amendment protection, even when it occurs at school in view of students.[208]

The test created by the Ninth Circuit in *Kennedy I* for determining whether speech is government speech or private speech is actually rooted in Establishment Clause concerns. *Garcetti* instructed courts to determine whether the speech was made pursuant to official job duties.[209] The Ninth Circuit's test looked at whether the "teacher speaks at a school event in the presence of students in a capacity one might *reasonably view* as official."[210] In other words, would a reasonable observer view the teacher's speech as government speech? This test imitates the language of the endorsement test, which asks whether a reasonable or objective observer would perceive an endorsement of religion.[211] The clear influence of Establishment Clause doctrine is telling. Without explicitly employing the Establishment Clause to restrict Coach Kennedy's speech, the Ninth Circuit has transposed the endorsement test into *Garcetti's* official duties test. However, these two tests are not equivalent. While in this context the endorsement test would look objectively at the teacher's official job duties,[212] the Ninth Circuit looks to the subjective perceptions of others.[213] The endorsement test creates a clear demarcation between official speech

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[205] Mayer v. Monroe Cnty. Cmty. Sch. Corp., 474 F.3d 477, 479 (7th Cir. 2007).

[206] *See* Palmer v. Bd. of Educ., 603 F.2d 1271, 1273 (7th Cir. 1979) ("[T]he First Amendment [is] not a teacher['s] license for uncontrolled expression [in] variance with established curricular content.").

[207] *Mayer*, 474 F.3d at 480 ("[T]he First Amendment does not entitle primary and secondary teachers, when conducting the education of captive audiences, to cover topics, or advocate viewpoints that depart from the curriculum adopted by the school system.").

[208] Boring v. Buncombe Cnty. Bd. of Educ., 136 F.3d 364, 373 (4th Cir. 1998).

[209] *See* Garcetti v. Ceballos, 547 U.S. 410, 424–25 (2006) (defining the scope of an employee's official duties as a practical inquiry).

[210] *Kennedy I*, 869 F.3d 813, 830 (9th Cir. 2017) (emphasis added).

[211] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000).

[212] *Cf.* Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring) ("[T]he reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears.").

[213] *Kennedy I*, 869 F.3d at 827, 830.

and private speech, while the Ninth Circuit relies on an individual's observation to determine if the speech is official, allowing an endless expansion of what is considered government speech.[214]

The court doubled down on this incorrect conclusion in *Kennedy II,* holding that its prior conclusion regarding the public nature of Kennedy's speech was correct.[215] This time, the court relied on the assertion that "expression was Kennedy's stock in trade" to categorically subsume all his speech as government speech.[216] An unyielding focus on the location of the speech—"that [Kennedy] only had access to [the field] because of his employment"—and the time of the speech—"when he was generally tasked with communicating with students"—is misplaced.[217] If the time and location of the expression were determinative, all speech around the watercooler while "on duty" would be converted into government speech capable of being suppressed at will.

The Supreme Court's *Pickering*/*Garcetti* analysis, while not completely protective of speech, provides a much clearer and more precise framework to determine whether a teacher's speech is protected. By asking whether the speech was made pursuant to official job duties or as a citizen speaking on matters of public concern, the test clearly focuses on distinguishing public speech from private speech. Furthermore, this test is consistent with *Tinker* because it provides protection for a teacher's expression as a citizen, even on school property. However, the Ninth Circuit's endlessly malleable rule permits school officials to violate a teacher's freedom of speech merely because an observer might perceive it as official or because it occurred on school grounds.

2. The Categorical Approach Would Permit Government Officials to Engage in Wholesale Viewpoint Discrimination

The Ninth Circuit, through this categorical approach, allows school officials to determine what speech is private, and therefore entitled to protection, and what expression is converted into government speech, and therefore not entitled to protection. By transforming all "demonstrative communication as a role model" into Kennedy's official "job dut[y],"[218] the

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[214] *Compare Capitol Square*, 515 U.S. at 764–65 (opinion of Scalia, J.) (quoting Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990)) (noting "government speech endorsing religion" is not protected and "private speech endorsing religion" is protected), *with Kennedy I*, 869 F.3d at 827 (including in its framework whether observers viewed teachers' actions as official), *id.* at 832–35 (Smith, J., concurring) (looking at a student's perception of a teacher's speech), *and Capitol Square*, 515 U.S. at 780 (O'Connor, J., concurring) ("There is always *someone* who . . . reasonably might perceive a particular action as an endorsement of religion.").

[215] *Kennedy II*, 991 F.3d 1004, 1016 (9th Cir. 2021).

[216] *Id.* at 1015 (quoting *Kennedy I*, 869 F.3d at 826) ("Thus, his expression on the field . . . was speech as a government employee.").

[217] *Id.*

[218] *Id.* at 1016.

Ninth Circuit wrote a blank check allowing wholesale viewpoint discrimination. To establish whether speech is made pursuant to official job duties, a school official looks at whether the expression could be reasonably perceived as official or if the employee was perceived as a role model.[219] Thus, a school officer can perceive Christian expression as official, and therefore unprotected, while also perceiving Muslim expression as unofficial, and therefore protected. Similarly, the school could simultaneously view Coach Kennedy kneeling to pray as official, and thus unprotected, and consider another coach kneeling during the National Anthem as unofficial, and therefore protected. This authorizes any government supervisor to suppress expression, not because it interferes with the function of the agency, but simply out of disagreement with the expressed viewpoint.[220]

In fact, there has already been viewpoint discrimination at Bremerton High School. Coach Kennedy was suspended and subsequently not rehired due to his fifteen-to-thirty second silent prayer.[221] However, BSD permitted another religiously observant coach to engage in a Buddhist chant following games.[222] So, "either, [BSD] views Buddhism more favorably than Christianity, or . . . it views audible Buddhist expression as somehow less demonstrably religious than silent Christian prayer."[223] This is clear viewpoint discrimination.[224] BSD is making a value judgment about which religious speech is acceptable and which is not, a clear violation of the Court's free speech precedent.[225] *Tinker* made clear that "state-operated schools may not be enclaves of

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[219] *See id.* at 1015–17.

[220] This logical outgrowth of the Ninth Circuit's holding contravenes established, viewpoint-discrimination principles, which state, "[T]he First Amendment forbids the government [from] regulat[ing] speech in ways that favor some viewpoints or ideas at the expense of others." Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984).

[221] *E.g.*, *Kennedy I*, 869 F.3d 813, 816, 819–20 (9th Cir. 2017).

[222] Brief of *Amicus Curiae* Robert Cleckler Bowden in Support of Petitioner at 8, Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634 (2019) (No. 18-12).

[223] *Id*.

[224] *See, e.g.*, Bd. of Regents v. Southworth, 529 U.S. 217, 235 (2000) ("The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views."); Child Evangelism Fellowship of Md., Inc. v. Montgomery Cnty. Pub. Schs., 457 F.3d 376, 384 (4th Cir. 2006) ("[V]iewpoint neutrality requires not just that a government refrain from explicit viewpoint discrimination, but also that it provide adequate safeguards to *protect* against the improper exclusion of viewpoints.").

[225] *See Southworth*, 529 U.S. at 221, 235 (suggesting it would be a "violation of the viewpoint neutrality principle" for a university to support some groups and not others depending on a majority vote of the student body). This is also a violation of the Establishment Clause because BSD is choosing to promote or "endorse" one person's religion while restricting another person's religion. The Court's Establishment Clause jurisprudence is clear that the government cannot promote one religious sect over another. *E.g.,* Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947).

totalitarianism,"[226] yet the Ninth Circuit's rule permits school officials to have complete control over any employee's speech, no matter how private. The First Amendment's primary goal is to promote "a robust exchange of ideas,"[227] and this purpose is even more evident in schools training tomorrow's leaders. Exposing children to individuals with a wide range of beliefs, cultures, and viewpoints is required in order to shape citizens who can interact with a wide swath of people in the public square.[228]

3. The Ninth Circuit's Overly Broad Reading of *Garcetti* Has Been Explicitly Rejected by the Supreme Court

The Supreme Court, in *Garcetti* and subsequently in *Lane*, clearly mandated that courts should look to whether an employee's speech is made pursuant to official job duties.[229] Yet, the Ninth Circuit expanded this careful inquiry in *Kennedy I* and again in *Kennedy II*, by asserting that the previous analysis was correct, when it plucked the dicta "owes its existence to" out of *Garcetti* to create what amounts to a but-for test.[230] In other words, the employee would not be able to engage in the expression *but for* the information learned from government employment, so the employee's speech owes its existence to the government and is therefore state speech. Or the employee would not be able to engage in the speech *but for* the fact that it occurred on government property and is therefore state speech. Instead of an analysis focused on the employee's "official duties," the Ninth Circuit's overly broad test looks to whether the speech is at all related to government employment in terms of time or location.[231]

Not only is this an unprincipled reading of *Garcetti*, but it was explicitly rejected in *Lane*. The Eleventh Circuit similarly read *Garcetti* as creating a but-for test, holding that Lane's testimony was unprotected because Lane learned of the subject matter of his testimony through his employment.[232] The Supreme Court rejected this test by stating the Eleventh Circuit interpreted *Garcetti* far too broadly.[233] If all speech that owes its existence to the job was state speech, that would conflict with *Garcetti's* decree that "[t]he First Amendment protects some expressions

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[226] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969).

[227] *See id*. at 512 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

[228] *See Keyishian*, 385 U.S. at 603 (highlighting the value of a "marketplace of ideas" to develop a child's maturity and understanding). As Professor Richard Duncan argues, "Rather than a religiously naked public culture, the public square should be clothed in a coat of many colors representing the rich heterogeneity of the local community." Duncan, *supra* note 60, at 290.

[229] Garcetti v. Ceballos, 547 U.S. 410, 413, 421 (2006); Lane v. Franks, 573 U.S. 228, 237–38 (2014).

[230] *Kennedy I*, 869 F.3d 813, 823, 829 (9th Cir. 2017) (quoting *Garcetti*, 547 U.S. at 421); *Kennedy II*, 991 F.3d 1004, 1015 (2021).

[231] *Kennedy II*, 991 F.3d at 1015.

[232] Lane v. Cent. Ala. Cmty. Coll., 523 F. App'x. 709, 711–12 (11th Cir. 2013).

[233] *Lane*, 573 U.S. at 239.

related to the speaker's job."[234] While other circuits took the Court's holding in *Lane* to heart,[235] the Ninth Circuit reaffirmed its pre-*Lane* holding, arguing that Coach Kennedy's expression was unprotected because all of a teacher's speech "in the general presence of students . . . owes its existence to their position as a teacher."[236] The Ninth Circuit, realizing that a silent prayer is not an official job duty, replaced *Garcetti's* narrow inquiry with an expansive but-for test, which draws within its ambit all expression even tangentially related to the speaker's work.

However, speech is not "public" simply because it relates to the employee's work or is made at work. As *Lane* reaffirmed, the fact that a citizen's expression concerns information acquired in the course of public employment does not automatically transform that speech into public speech.[237] The fact that an expression occurs at work is also not dispositive.[238] Furthermore, government employers are not permitted to create sweeping job descriptions to avoid First Amendment protection.[239] Under *Garcetti* and *Lane*, the inquiry is simple: if the speech is outside the scope of official job duties, then it is speech as a citizen which should be analyzed under the First Amendment.

What speech is considered "pursuant to official job duties"? As Professor Scott Bauries and Patrick Schach observe, "[T]he meaning most [obedient] to the Court's reasoning is 'as required by.'"[240] The Court meticulously distinguished the speech at issue in *Garcetti* from *Pickering* and *Givhan v. Western Line Consolidated School District*.[241] In *Pickering*, the employee spoke about his work and identified himself as a teacher, but the speech, a letter to a newspaper, was not required by his job.[242] Similarly, in *Givhan*, the employee spoke about her workplace while at work; yet again, the speech was not required for her employment.[243] What differentiated Mr. Ceballos in *Garcetti*, was the fact that the speech at issue, a memo, was a required contractual duty.[244] In other words, Mr.

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[234] *Garcetti*, 547 U.S. at 421.

[235] *See* Rayborn v. Bossier Par. Sch. Bd., 881 F.3d 409, 418 (5th Cir. 2018) ("The test is not whether she was required to engage in the speech, but rather whether she made the speech 'pursuant to [her] "official responsibilities"' and whether that speech is 'ordinarily with the scope of [her] duties.'" (alterations in original) (quoting *Lane*, 573 U.S. at 239–40)).

[236] *Kennedy I*, 869 F.3d 813, 823–25, 827 (9th Cir. 2017) (finding support for its analytical framework in a pre-*Lane* case from the Ninth Circuit).

[237] *Lane*, 573 U.S. at 239–40.

[238] *Garcetti*, 547 U.S. at 420.

[239] *Id.* at 424.

[240] Scott R. Bauries & Patrick Schach, *Coloring Outside the Lines:* Garcetti v. Ceballos *in the Federal Appellate Courts,* 262 WEST'S EDUC. L. REP. 357, 370 (2011).

[241] *Id.* at 369–70.

[242] *See* Pickering v. Bd. of Educ., 391 U.S. 563, 572–74, app. at 576 (1968).

[243] *See* Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 412–15 (1979).

[244] *Garcetti*, 547 U.S. at 421.

Ceballos was punished for speech that he was contractually required to engage in.

The Ninth Circuit substituted its own doctrine to stray from Supreme Court precedent. First, the Ninth Circuit expanded Coach Kennedy's official job duties to include all "demonstrative communication as a role model for players."[245] Second, the court improperly focused on Coach Kennedy's status as a coach.[246] Both the district court and the Ninth Circuit repeatedly emphasized that Coach Kennedy was still "on the job" and that his expression occurred at the fifty-yard line on public property while wearing school-logoed attire.[247]

However, the importance placed on these facts demonstrates the fundamental misunderstanding of the relevant test. These facts establish that Coach Kennedy was "temporally and physically 'on the job,'" but they do not address whether the speech itself was within the scope of his official job duties.[248] The lower courts viewed Coach Kennedy's status as a coach and physical location on the football field as outcome determinative.[249] Because he was in his role as a government employee and located on government property, they held the speech must be owned by the state.[250] But this is directly divergent from the Supreme Court's admonition that not all speech uttered at work is automatically state speech.[251] Nothing within Coach Kennedy's job duties required him to pause and pray at midfield following a game,[252] so the expression was not made pursuant to an official job duty.

One could argue that Coach Kennedy was abdicating other official job duties while he knelt for his fifteen-to-thirty-second prayer, such as supervising students. However, his religious expression was fleeting. Furthermore, it occurred after the teams met to shake hands and when parents and members of the community joined players on the field to offer congratulations and socialize.[253] If a coach is not permitted to pause from

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[245] *Kennedy II*, 991 F.3d 1004, 1016 (9th Cir. 2021).

[246] *See* Brief of Appellant at 22–24, *Kennedy I*, 869 F.3d 813 (9th Cir. 2017) (No. 16-35801). *Compare Kennedy II*, 991 F.3d at 1015–16 (relying on Kennedy's status as a coach to deny First Amendment protection for his speech), *with Garcetti*, 547 U.S. at 421 (holding that speech is regulable only when made "pursuant to . . . official duties").

[247] Transcript of Preliminary Injunction Hearing, *supra* note 169, at 43–44; *Kennedy I*, 869 F.3d at 829–30 (noting Kennedy cannot "claim the First Amendment's protections" in these circumstances).

[248] Brief of Appellant, *supra* note 246, at 22–23.

[249] Transcript of Preliminary Injunction Hearing, *supra* note 169, at 43–44; *Kennedy I*, 869 F.3d at 827, 830–31.

[250] *See* Transcript of Preliminary Injunction Hearing, *supra* note 169, at 43–44; *Kennedy I*, 869 F.3d at 827, 830.

[251] *See* Brief of Appellant, *supra* note 246, at 20–21 (referencing the Supreme Court cases *Lane v. Franks* and *United States v. Garcetti*); *Garcetti*, 547 U.S. at 420–21 ("Employees in some cases may receive First Amendment protection for expressions made at work.").

[252] Brief of Appellant, *supra* note 246, at 25.

[253] Brief for Petitioner, *supra* note 13.

his duties to offer a fifteen-second prayer, then he should also not be permitted to stop and socialize with members of the community.

In summary, Coach Kennedy did not forfeit his constitutional rights when he accepted a job at Bremerton High School and the state cannot condition his employment on the abdication of his rights. The Ninth Circuit, in order to restrict Coach Kennedy's private religious expression, created an endlessly broad categorical approach allowing the state to control all "demonstrative expression" as state speech. This permits wholesale viewpoint discrimination by school officials, who can limit the expression of viewpoints they disagree with. Finally, the transformation of *Garcetti*'s threshold inquiry into a but-for test usurps any role for the First Amendment when a speaker is working for the government.

B. The Establishment Clause Does Not Require Personal Demonstrative Religious Expression by Public Employees to be Suppressed

1. An Actual Establishment Clause Violation, Not Mere Fear of a Violation, Is Required to Provide an "Adequate Justification" to Restrict Speech

Coach Kennedy's private religious expression was not made pursuant to his official job duties, thereby passing the threshold inquiry from *Garcetti*. Even the Ninth Circuit held that religious speech is inherently speech on a matter of public concern, which was also uncontested.[254] Thus, the burden shifted to the State to provide an "adequate justification" for treating Coach Kennedy differently than members of the general public.[255] In order to have an adequate justification, the restriction on speech must be aimed at speech which affects the efficient operations of the state agency at issue.[256] For example, in *Pickering*, the Court looked to whether the speech at issue "impeded the teacher's proper performance of his daily duties in the classroom or . . . interfered with the regular operation of the school generally."[257] Finding neither present, the Court held that the balancing weighed in favor of the employee's speech.[258] In conducting this balancing, courts have also considered whether the speech "impairs discipline by superiors or . . . has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary."[259] However, in Coach Kennedy's case, BSD did not even attempt to argue that his speech impairs discipline or has a detrimental impact on working

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[254] *Kennedy I*, 869 F.3d at 822, 824.
[255] *Id.* at 822.
[256] *See id.* at 822–23.
[257] Pickering v. Bd. of Educ., 391 U.S. 563, 572–73 (1968).
[258] *Id.* at 573.
[259] Rankin v. McPherson, 483 U.S. 378, 388 (1987).

relationships. These arguments would fail because there was never a single complaint about Coach Kennedy's "demonstrative religious expression" and BSD was not even aware of it for over seven years.[260]

When he was placed on administrative leave, the sole reason given by BSD was Coach Kennedy's "overt, public and demonstrative religious conduct while still on duty as an assistant coach," specifically "kneeling on the field and praying immediately following the games," which BSD asserted was prohibited by the Establishment Clause.[261] When Coach Kennedy was later given his first poor evaluation and the athletic director advised against his rehiring, the stated reason was failing "to follow district policy" regarding religious expression and "fail[ing] to supervise student-athletes after games."[262] However, through three months of discussions, letters, and a public Q&A document, BSD never seemed to mention that Coach Kennedy was failing to supervise students, and instead it relied solely on the Establishment Clause as its adequate justification.[263]

However, in *Rosenberger v. Rector and Visitors of the University of Virginia*, the Court made it clear that there must be a *plausible* fear that the speech in question would be attributed to the state.[264] In other words, the state cannot suppress constitutionally protected speech merely because it fears an Establishment Clause violation—only an actual violation is sufficient.[265] Thus, the relevant question is whether an objective observer acquainted with the context and history would perceive Coach Kennedy's brief silent prayer as "a state endorsement of prayer in public schools."[266] It is important to approach this analysis from a truly objective position because "the endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from . . . discomfort."[267] The state is not permitted to wield the Establishment Clause as a heckler's veto in order to suppress private

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[260] Brief for Petitioner, *supra* note 13, at 5–6.

[261] *Id.* at 12–13 (quoting Joint Appendix at 102, *supra* note 16, at 102); *Kennedy* v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2439 (2022) (Sotomayor, J., dissenting).

[262] *Kennedy I*, 869 F.3d 813, 820 (9th Cir. 2017).

[263] Brief of Appellant, *supra* note 246, at 32 & n.12; *see* Brief for Petitioner, *supra* note 13, at 6–8.

[264] 515 U.S. 819, 841–42 (1995); *see also id.* at 839 ("More than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design.").

[265] *See* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 120 (2001). In order to justify a restriction on protected speech, the government must "demonstrate[] that the Establishment Clause would be violated" absent the restriction. Hills v. Scottsdale Unified Sch. Dist. No. 48, 329 F.3d 1044, 1053 (9th. Cir. 2003).

[266] *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000) (quoting Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring)).

[267] *See* Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 779 (1995) (O'Connor, J., concurring).

religious expression, particularly on the basis of a particular person's possible misperception of endorsement.[268] Furthermore, the Court stated that the "impressionability of students" is irrelevant to the Establishment Clause inquiry when the state is not actually advancing religion.[269] In fact, schools themselves have control over any possible misperceptions of students.[270] What are schools for if not to educate students about the First Amendment and the free speech rights of teachers as citizens?

The school merely permitting Coach Kennedy's silent fifteen-to-thirty-second prayer is not a violation of the Establishment Clause. Viewed from the perspective of the reasonable observer who was fully aware of the history surrounding Coach Kennedy's "demonstrative religious expression," and particularly BSD's attempts to distance itself from the expression, there was no state endorsement of religion at Bremerton High School. The prayer was brief and silent, and even BSD admitted that no students were pressured or encouraged to participate.[271] The context of the prayer likewise demonstrates the lack of a violation. Coach Kennedy prayed at a time when there was virtually unrestricted access to the field and students were participating in post-game traditions with the community.[272] There was no organized ceremony with a captive audience and preferential treatment was not given to Coach Kennedy, who was in fact treated unfavorably due to his religious expression.

Moreover, BSD's treatment of Coach Kennedy could be considered a violation of the Establishment Clause in another sense. The First Amendment has been interpreted to require neutrality, but not hostility, toward religion.[273] Justice Goldberg argued that a "brooding and pervasive devotion to the secular . . . [is] not only not compelled by the Constitution, but, it seems to me, [is] prohibited by it."[274] When a school begins to make determinations about religious speech, it "risk[s] fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the

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[268] *Good News Club*, 533 U.S. at 119. Offense at a person's religious exercise does not in and of itself demonstrate a violation of the Establishment Clause. In a highly diverse society, allowing a non-believer's offense to form the basis for a First Amendment violation would unconstitutionally chill both speech and free exercise. *See* Lee v. Weisman, 505 U.S. 577, 597–98 (1992) (explaining that the Court's jurisprudence accounts for pluralistic religious views, and it would be unconstitutional to exclude religion from public life even when some might deem the alleged speech or actions offensive).

[269] *Good News Club*, 533 U.S. at 116.

[270] *See* Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118, 9 F.3d 1295, 1300 (7th Cir. 1993) (explaining that schools can reduce misperceptions about school endorsements by educating the students about what is and is not an impermissible establishment of religion).

[271] *E.g.*, *Kennedy I*, 869 F.3d 815, 817–18 (9th Cir. 2017).

[272] Brief of Appellant, *supra* note 246, at 10, 36–37.

[273] Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1723–24 (2018); *see also* Engel v. Vitale, 370 U.S. 421, 443 (1962) (Douglas, J., concurring) ("The First Amendment leaves the Government in a position not of hostility to religion but of neutrality.").

[274] Sch. Dist. v. Schempp, 374 U.S. 203, 306 (1963) (Goldberg, J., concurring).

Establishment Clause requires."[275] Yet, the district court and the Ninth Circuit go farther by implying that a coach cannot serve as a role model if he is demonstrably religious. In *Kennedy I*, the court wrote that Kennedy's job "entailed both teaching and serving as a role model and moral exemplar. When acting in an official capacity in the presence of students and spectators, Kennedy was also responsible for communicating [BSD]'s perspective on appropriate behavior through the example set by his own conduct."[276] It seems that a brief, silent prayer of thanksgiving does not communicate "appropriate behavior" according to the government. This view could very well communicate the government's pervasive bias or "hostility to religion" to not just Coach Kennedy, but to religious students and members of the community who view prayer as an essential component of "moral exemplar."[277]

Merely accommodating religious speech by providing equal treatment to non-religious speech is far from a violation and is, in fact, required by the Establishment Clause. BSD's failure to treat Coach Kennedy's speech equally with other religious speech (another coach's Buddhist chant) and non-religious speech is a violation of the neutrality required by the Establishment Clause.[278] Additionally, the Establishment Clause cannot be employed as an "adequate justification" for suppressing Coach Kennedy's private religious expression.

2. Private Religious Demonstrative Expression Is Permitted Under the Original Public Meaning of the Establishment Clause and Distinguished from the Formal Religious Activity in *Lee* and *Santa Fe*

As discussed in Part I.A.1, the original meaning of the Establishment Clause was not to cleanse the public sphere of all religion.[279] The Framers understood the value of religion, which is why it is placed in a preferred

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[275] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 845–46 (1995).

[276] *Kennedy I*, 869 F.3d at 827.

[277] *See generally Kennedy I*, 869 F.3d at 825–26; Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2416 (2022) (noting how prayer had been a school tradition and how observers had reacted positively to Kennedy's prayers). Hostility also plays a role in analyzing a Free Exercise Clause claim. *See Masterpiece Cakeshop*, 138 S. Ct. at 1731–32 (discussing how both the State and the Court impermissibly communicated that some religious beliefs were disfavored).

[278] *See, e.g.*, Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 788 (1973) (explaining that the Supreme Court's cases require government neutrality toward religion). As Justice Antonin Scalia noted,"[A] State which discovers that its employees are inhibiting religion must take steps to prevent them from doing so, even though its purpose would clearly be to advance religion." Edwards v. Aguillard, 482 U.S. 578, 617 (1987) (Scalia, J., dissenting).

[279] *See* discussion *supra* Part I.A.1; *see also* Carter, *supra* note 52, at 294–98 (giving historical explanations for the Founder's understanding of the Establishment Clause as protecting religion from the state—not as excluding religion from public life).

position within the constitutional scheme.[280] As previously mentioned, the purposes of the Religion Clauses were: (1) to prevent the creation of a national religion, (2) to uphold federalism by protecting States' relationships with religion, and (3) to protect religious minorities.[281] The Framers would not have endorsed the modern view that the First Amendment creates "a wall of separation of church and state," which limits both the state and the church.[282] The Establishment Clause was not intended as a bilateral restriction, but a unilateral restriction on the federal government's ability to regulate the religion of states or private persons.[283]

Under the original public meaning, the Establishment Clause would have no power over private religious expression regardless of whether the person was a state employee. If the president, the Congress, and the governors were constitutionally permitted to proclaim public days of prayer and fasting,[284] then the Framers clearly never intended the clause to restrict a football coach's ability to engage in a brief personal prayer. Coach Kennedy's expression is actually protected under the original understanding of the Establishment Clause. He is, in essence, a minority wishing to engage in religious expression, and the (secular) majority is attempting to regulate his ability to do so.[285] This is exactly what the Establishment Clause was designed to inhibit: the government's ability to

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[280] Garry, *supra* note 34, at 1160–61.

[281] *See supra* notes 37, 64, 138 and accompanying text.

[282] Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947); *see* Carter, *supra* note 52, at 293–95 (noting that the Framers understood the Establishment Clause as preventing government interference in religion but not as limiting religion from influencing the government).

[283] *See* Garry, *supra* note 34, at 1166, 1170 (asserting that the Establishment Clause was intended as a restriction on the federal government's ability to interfere or regulate religion). It is important to distinguish between an establishment of religion, when the government uses its authority to support or mandate one religion, and accommodation of religion, when the government merely facilitates someone's personal religious practice. *Id.* at 1171–72. The Establishment Clause must be viewed as advancing religious liberty, not inhibiting it. *See id*. (explaining that the Establishment Clause does not allow the government to deny religious expression but requires the government to equally accommodate religion). Under this interpretation, governmental accommodation of religion is both permitted by the Establishment Clause and required by the Free Exercise Clause. *Id*.

[284] Wallace v. Jaffree, 472 U.S. 38, 101–02, 105, 113 (1985) (Rehnquist, J., dissenting); Dreisbach, *supra* note 55, at 3 (discussing how Thomas Jefferson, as Governor of Virginia, believed the States had the power to designate days for religious proclamations and that, in 1779, he instituted days of public thanksgiving and prayer).

[285] The Establishment Clause was intended as an instrument to protect the freedom to exercise one's religion, particularly from those who dissent from the majority view. Richard John Neuhaus, *A New Order of Religious Freedom*, 60 GEO. WASH. L. REV. 620, 627–29 (1992).

mandate how and when its citizens are permitted to pray.[286] This is no role for the government.

The Supreme Court has undoubtedly deviated from the original public meaning of the Establishment Clause. Yet, even under the Court's expansive view of the Establishment Clause's meaning, Coach Kennedy's private religious expression is still undoubtedly protected. *Santa Fe Independent School District v. Doe* upheld the distinction between state speech endorsing religion, which was forbidden, and private speech endorsing religion, which was permitted.[287] The resolution of Establishment Clause issues depends on the nature and context of the speech at issue, not the mere fact that it originated from a coach on school property.

Looking to *Lee v. Weisman* and *Santa Fe*, there were several factors that influenced the Court's determination that each prayer at issue violated the Establishment Clause. First, each prayer was incorporated into an important school event.[288] Second, each prayer was formal and public.[289] Third, there was pervasive school involvement with the content or presentation of each prayer.[290] None of these factors is present in the current case.[291] While Coach Kennedy's prayer occurred in public, it was not before a captive audience because students and members of the community were engaged in other activities. Furthermore, even though the prayer occurred on the football field, it was during a time when BSD admits it allowed unrestricted community access to the field.[292] There was a complete lack of school involvement in the content or presentation of Coach Kennedy's prayer. In fact, because BSD was not even aware of Kennedy's prayers for years, it strains credulity for it to argue they were

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[286] *See* Charles Adside, III, *The Establishment Clause Forbids Coercion, Not Cooperation, Between Church and State: How the Direct Coercion Test Should Replace the Lemon Test*, 95 N.D. L. REV. 533, 558–59 (2020) (showing that the Framers drafted the Establishment Clause to prevent the government from coercion concerning religion and to protect individuals' spiritual freedom).

[287] 530 U.S. 290, 302.

[288] 505 U.S. 577, 586 (1992); *Santa Fe*, 530 U.S. at 302–03.

[289] *Lee*, 505 U.S. at 586–87; *Santa Fe*, 530 U.S. at 307–08.

[290] *Lee*, 505 U.S. at 587–88; *Santa Fe*, 530 U.S. at 306.

[291] *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2424–25 (2022) (showing that in Coach Kennedy's case, his prayer was not incorporated *into* an important school event, his prayer was not formal and public, and that there was not pervasive school involvement with the content or presentation of his prayer). Professor Patrick Garry argues that state-organized prayer in schools, as was at issue in *Santa Fe* and *Lee*, should be constitutionally prohibited not because it is an "establishment of religion," but because it interferes with the free exercise rights of parents, who have the right to raise their children according to any creed without state intrusion. *See* Garry, *supra* note 34, at 1170. Under this theory, Coach Kennedy's prayer would also be beyond the scope of the Establishment Clause because it is a personal prayer and not a school-sponsored prayer.

[292] Brief of Appellant, *supra* note 246, at 36–37.

government speech requiring regulation.[293] In *Kennedy I*, the district court and the Ninth Circuit believed that Coach Kennedy's identifiability as a school employee through a school-logoed shirt was a critical reason to suppress his speech. However, if being identified as a state employee were enough to suppress a person's expression, then public employees would have no First Amendment rights. This is simply not the rule the Supreme Court has articulated.[294]

The Ninth's Circuit's ban on all "demonstrative religious activity" has lumped Coach Kennedy's private prayer in with the formal, school prayers at issue in *Lee* and *Santa Fe*. As the Ninth Circuit correctly stated in *Kennedy II*, "context matters" in Establishment Clause jurisprudence,[295] yet the rule announced simply prohibits any demonstrative religious expression in the presence of students. Yet, there is a significant difference between Coach Kennedy proselytizing in a classroom before a captive audience and him taking fifteen seconds to say a silent prayer. Under the Ninth Circuit's rule, a teacher who prays before his meal, wears a yarmulke, or participates in Ash Wednesday could be fired for "demonstrative religious expression." To permit a school to control all aspects of a teacher's religious expression, no matter how private, would require these public employees to choose between following school policy and violating the basic tenets of their faith. This is not a constitutionally permissible choice to foist upon teachers. Schools must accept the basic constitutional principle that they "do not endorse everything they fail to censor."[296]

C. Private Speech Endorsing Religion by Public Employees is Constitutionally Protected by the Free Exercise Clause

The Supreme Court has repeatedly affirmed the simple notion that "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[297] The Establishment Clause and the Free Exercise Clause were intended to work in tandem, with the former protecting against governmental *prescription* of religious exercise, and the later protecting

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[293] *Id.* at 36.

[294] *Id.* at 38; *see Santa Fe*, 530 U.S. at 308 (detailing the standard when reviewing state participation in religious activity, noting the question is whether an objective observer would view it as state endorsement of religion).

[295] *Kennedy II*, 991 F.3d 1004, 1017–18 (9th Cir. 2021).

[296] Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990) (opinion of O'Connor, J.).

[297] *Santa Fe*, 530 U.S. at 302 (quoting *Mergens*, 496 U.S. at 250 (opinion of O'Connor, J.)).

against governmental *proscription* of religious exercise.[298] Thus, both clauses safeguard religious liberty "from two different angles."[299] Religion, by the explicit text of the First Amendment, is provided a favored position in the constitutional scheme.[300] Instead, courts routinely treat the two clauses as though there is an internal conflict, with one requiring accommodation of religious exercise and the other stifling this exercise if it occurs in the public square.[301] While the Establishment Clause has become a sword to be used against religious expression, the Free Exercise Clause's protection was narrowed by the Court.[302]

There is no doubt that the right to pray is protected by the First Amendment.[303] This remains true even in public schools.[304] But under *Smith*, a government policy or law can permissibly burden a person's religious exercise as long as it is both neutral and generally applicable.[305] If it fails one of these two requirements, it must survive strict scrutiny according to *Lukumi*.[306] BSD admits that its ban on all "demonstrative religious expression," which the Ninth Circuit upheld twice, violates both prongs of the test in *Smith*.[307] First, it is not neutral toward religion. It permits any kind of "demonstrative expression" as long as it is not religious in nature. Thus, it inhibits religion specifically while promoting

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[298] Michael Stokes Paulsen, Lemon *Is Dead*, 43 CASE W. RSRV. L. REV. 795, 808 (1993). Another way to view the Religion Clauses is to ask who each is protecting. The Establishment Clause guards against governmental intrusion in religious institutions created by the people, and the Free Exercise Clause defends against governmental action interfering with an individual's religious exercise. Garry, *supra* note 34, at 1158–59.

[299] Paulsen, *supra* note 298, at 798.

[300] Garry, *supra* note 34, at 1172.

[301] *Id.* at 1157. The typical distinction is that "the Free Exercise Clause confers benefits on religion, while the Establishment Clause imposes burdens on religion." George W. Dent, Jr., *Of God and Caesar: The Free Exercise Rights of Public School Students*, 43 CASE W. RSRV. L. REV. 707, 720–21 (1993).

[302] Garry, *supra* note 34, at 1156–57 (discussing how the Free Exercise Clause's protection was narrowed after *Lemon*). The Establishment Clause has been called the "enemy of the free exercise of religion." Neuhaus, *supra* note 285, at 630.

[303] Sause v. Bauer, 138 S. Ct. 2561, 2562 (2018) (per curiam).

[304] Chandler v. Siegelman, 230 F.3d 1313, 1316–17 (11th Cir. 2000). Even though this speech occurs in school, it is still private speech. *Id.* at 1316. Merely tolerating private religious expression is not an unconstitutional endorsement. *Id.* at 1317.

[305] *See* Emp. Div. v. Smith, 494 U.S. 872, 886 & n.3 (1990) (asserting that the government can enforce generally applicable, neutral laws without a compelling government interest even if those laws burden religious practice).

[306] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531–32 (1993). There is an argument to be made that a religious employee would have two claims, both under the Free Speech Clause and under the Free Exercise Clause, while an employee who was not religious and suffered an adverse employment action due to expression would only have a claim under the Free Speech Clause. However, the Framers drafted the First Amendment to specifically place religious exercise in a preferred position by textually providing greater protection for religious practices than for any secular expression. Garry, *supra* note 34, at 1160.

[307] *Kennedy II*, 991 F.3d 1004, 1014, 1020–21 (9th Cir. 2021).

secular forms of expression. Second, the rule has not been generally applied. As mentioned previously, BSD admitted that the policy targeted Coach Kennedy and there was evidence it permitted another coach to lead a Buddhist chant, whereas Coach Kennedy suffered adverse employment actions due to his religious expression.

Because this policy fails both requirements of *Smith*, it must be justified by a compelling governmental interest and must be narrowly tailored to achieve that interest.[308] BSD's stated "compelling interest" for the policy is avoiding a possible Establishment Clause violation.[309] However, as this Article discussed, Coach Kennedy's private prayer did not violate the Establishment Clause, and therefore this was not a compelling interest.

Furthermore, even if it was a compelling interest, the policy is far from narrowly tailored. According to the Ninth Circuit, the policy was "narrowly tailored to the compelling state interest of avoiding a violation of the Establishment Clause" because "there was no other way to accomplish the state's compelling interest."[310] However, that is simply inaccurate. A policy banning all "demonstrative religious expression" is both pervasive and far-reaching. It is overinclusive as it prohibits all religious expression without taking into account the context or a determination as to whether it is private speech. On the other hand, it is also underinclusive as it permits any demonstrative expression that is not religious in nature.[311]

When government officials are permitted to adopt an ad hoc, discretionary system to make determinations about a citizen's religious liberty, the risk of discrimination and bias is heightened.[312] For example, in *Axson-Flynn v. Johnson*, there was a university policy which was both neutral and generally applicable; however, a Jewish student was granted a waiver due to his religion.[313] When Axson-Flynn similarly requested a waiver on religious grounds, she was given an ultimatum to "modify [her] values" or leave the program.[314] The court determined that a genuine issue of material fact was raised as to whether the university had "a

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[308] *Lukumi*, 508 U.S. at 531–32.

[309] *Kennedy II*, 991 F.3d at 1014, 1020 (stating that BSD's sole reason for firing Kennedy was avoiding the risk of a constitutional violation, which the Ninth Circuit held was a valid compelling interest).

[310] *Id.* at 1020.

[311] The neighboring school district permitted coaches to kneel during the National Anthem as a form of protest. Brief of *Amicus Curiae* Robert Cleckler Bowden in Support of Petitioner, *supra* note 222, at 9. This is a clear example of secular "demonstrative expression" that would be permitted under BSD's rule, while Coach Kennedy kneeling to pray was prohibited expression solely because it was religious in nature.

[312] Richard F. Duncan, *Free Exercise and Individualized Exemptions: Herein of* Smith*,* Sherbert*, Hogwarts, and Religious Liberty*, 83 NEB. L. REV. 1178, 1186–87 (2005).

[313] 356 F.3d 1277, 1282, 1298–99 (10th Cir. 2004).

[314] *Id.* at 1282.

discretionary system of making individualized case-by-case determinations regarding who should receive exemptions from curricular requirements."[315] The primary constitutional concern with individualized exemptions is a risk of minority religious beliefs or practices being suppressed due to the bias of government officials.[316]

In Coach Kennedy's case, another coach was in essence granted an "exemption" by leading students in a Buddhist chant without punishment or interference from BSD.[317] However, when Coach Kennedy requested a religious accommodation to say his personal, silent prayer through an individualized and discretionary process, his request was denied.[318] While this is only one example, it at least raises a constitutional concern of BSD employing an individualized case-by-case process whereby certain religious employees are permitted the freedom to live out their faith and others are not. If Coach Kennedy was able to find enough examples to demonstrate a pattern, for instance a teacher wearing a yarmulke while teaching or performing the sign of the cross prior to eating, this would take his case out of *Smith*.

Finally, the Ninth Circuit's reliance in *Kennedy I* on the BSD's offered "accommodation," mainly that Coach Kennedy could pray alone after everyone has left, is misplaced. As Justice Scalia's *Lee* dissent contended, religion is not, and has never been, a purely isolated practice that "can be indulged entirely in secret, like pornography, in the privacy of one's room."[319] Quite the opposite, almost all religions celebrate and practice public worship, which is evident through the enduring American tradition of praying during official ceremonies and at important moments.[320] BSD is not constitutionally permitted to proscribe Coach Kennedy from praying publicly upon the justification that he could exercise his First Amendment rights secretly and alone. The Free Exercise Clause does not allow "the State to confine religious speech to whispers or banish it to broom closets."[321] There is no longer "free exercise" if the government can dictate the time and place where personal prayer is tolerated. Private religious speech is constitutionally protected, even by a public employee in a public school.

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[315] *Id.* at 1299. The system does not need to be written as long as the plaintiff can "show a pattern of ad hoc discretionary decisions to a 'system.'" *Id.*

[316] Duncan, *supra* note 312, at 1202.

[317] Brief of *Amicus Curiae* Robert Cleckler Bowden in Support of Petitioner, *supra* note 222.

[318] Brief for Petitioner, *supra* note 13, at 8–11.

[319] Lee v. Weisman, 505 U.S. 577, 645 (1992) (Scalia, J., dissenting).

[320] *Id.*

[321] Chandler v. Siegelman, 230 F.3d 1313, 1316 (11th Cir. 2000). As the Court noted, "[O]ne is not to have the exercise of his liberty of expression . . . abridged on the plea that it may be exercised in some other place." Schneider v. State, 308 U.S. 147, 163 (1939).

CONCLUSION

In attempting to exclude all private "demonstrative religious expression" by public school employees, BSD has violated the Free Speech Clause, the Establishment Clause, and the Free Exercise Clause. While the First Amendment requires neutrality, BSD has been anything but neutral while singling out Coach Kennedy for his deeply held personal beliefs. Simply because Coach Kennedy offers a brief prayer of thanks while on school property and in the role of a coach does not automatically convert his private speech into state speech. Instead of merely educating students to alleviate any possible misperceptions, the Bremerton School District took the easy way out with a sweeping new policy banning not only Coach Kennedy's prayer but all "demonstrative religious expression."

In 2022, the Supreme Court stepped in after the Ninth Circuit's second bite at the apple concluded with the same wayward result.[322] The high Court chided BSD for creating its own "'vise between the Establishment Clause on one side and the Free Speech and Free Exercise Clause on the other,' plac[ing] itself in the middle, and then cho[osing] its preferred way out of its self-imposed trap."[323] "In place of *Lemon* and the endorsement test," the Court instructed that the Establishment Clause must be interpreted by "reference to historical practices and understandings," stressing "analysis focused on original meaning and history."[324] The Court unequivocally held that there was "no historically sound understanding of the Establishment Clause that begins to 'mak[e] it necessary for government to be hostile to religion' in this way."[325]

Justice Goldberg once wrote that "the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow."[326] Here, BSD, the district court, and the Ninth Circuit all jumped at a mere shadow and, in the process, violated Coach Kennedy's constitutional rights. In order to raise children who will thrive in a pluralistic society they should be exposed to teachers with diverse beliefs.[327] Instead, out of a misguided reverence to neutrality, BSD and

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[322] *See Kennedy* v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2419–20 (2022).

[323] *Id.* at 2427 (quoting Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 768 (1995)).

[324] *Id*. at 2428 (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)).

[325] *Id.* at 2431 (alteration in original) (quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952)).

[326] Sch. Dist. v. Schempp, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring).

[327] *See* Nicholas K. Tygesson, *Cracking Open the Classroom Door: Developing a First Amendment Standard for Curricular Speech*, 107 NW. U. L. REV. 1917, 1940–42 (2013). Even the Framers understood how indispensable education is. *Id*. Thomas Jefferson believed education was essential to forming a freethinking citizenry. *Id*. at 1941. Benjamin Franklin argued for the necessity of discussing "current controversies" in school. *Id*. And George Washington believed that it was required in order for Americans "to discern and provide against invasions of [their rights]." *Id*. (alteration in original).

the lower courts attempted to sanitize all religion from the public square. But "secularism is not neutrality."[328] This is not required or permitted by the First Amendment any more than teachers can be forced to "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[329]

[328] Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 163 (1992).

[329] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

RED FLAG LAWS, CIVILIAN FIREARMS OWNERSHIP AND MEASURES OF FREEDOM

Royce Barondes[*]

ABSTRACT

This Essay provides context for an assessment of a part of the recently-enacted Bipartisan Safer Communities Act[1]*—federal legislation funding state red flag procedures, which allow for seizures of firearms from persons who have not committed crimes.*

First, it assesses Maryland's experience during the first year of implementing these procedures. This Essay details computations, extrapolating from Maryland's first-year experience, showing that adoption of these statutes causes blameless persons to be subject to being killed by the government at a rate comparable to or in excess of the murder rate.

Second, this Essay identifies an overlooked impact of this federal legislation. The legislation's adoption will require courts to consider more favorably firearms rights reinstatement petitions filed by criminals with old convictions. That is because congressional adoption of this legislation is inconsistent with the strongest premise on which courts have heretofore rejected those claims—that courts are not competent to assess whether individuals have a heightened propensity to commit firearms crimes.

Third, politicians admit adoption of the federal statute was a response to calls to "just do something."[2] *As this Essay reveals, the resulting legislative spasm arose in the context of public discourse that selectively deemphasizes events highlighting the harms arising from adoption of red flag laws. Ultimately, of course, the constitutionality of the legislative response will be subject to judicial review. Yet, concerns that constitutional principles will yield to public pressure are as old as the country*

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[1] Bipartisan Safer Communities Act, Pub. L. No. 117-159, 136 Stat. 1313 (2022).

[2] Emily Cochrane & Zolan Kanno-Youngs, *Biden Signs Bipartisan Gun Bill Into Law, Ending Years of Stalemate*, N.Y. TIMES (June 25, 2022), https://www.nytimes.com/2022/06/25/us/politics/gun-control-bill-biden.html.

itself. James Madison, in fact, expressed some equivocation as to the desirability of a bill of rights on that basis.[3]

In a paragraph of McDonald v. City of Chicago[4] *that was referenced in* New York State Rifle & Pistol Ass'n v. Bruen,[5] *the Supreme Court noted an absence of authority in which the Court has "refrained from holding that a provision of the Bill of Rights is binding on the States on the ground that the right at issue has disputed public safety implications."*[6] *Indeed, living in a society that respects civil rights involves risks that are eliminated by a police state.*

Because federal funding of red flag laws has been triggered by selective public discourse, it is desirable to illuminate, as a counterweight, the salient benefits of the constitutional provision that has been duly adopted and ought to obtain. This Essay turns to one approach that may increase the salience of information relevant to contextualizing the judicial inquiry: that the benefits are capable of quantification. This Essay expands on the empirical evidence in law review literature finding a statistically significant relationship between civilian firearms ownership and indices of freedom—higher civilian firearms ownership in a country is associated with greater freedom.

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[3] Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* 5 THE WRITINGS OF JAMES MADISON, 1787–1790, 269, 271–72 (Gaillard Hunt ed., 1904).

[4] 561 U.S. 742 (2010).

[5] 142 S. Ct. 2111, 2126 n.3 (2022).

[6] *McDonald*, 561 U.S. at 783.

INTRODUCTION

Blackstone wrote, "[T]he law holds that it is better that ten guilty persons escape than that one innocent suffer."[7] Similar sentiments have been expressed by others, with different ratios, e.g., ninety-nine to one.[8] What, then, is the analogous ratio for accuracy in pre-crime[9] fortunetelling, where the stakes of an erroneous decision include death of the blameless?

Congress recently adopted legislation, the Bipartisan Safer Communities Act,[10] which would fund state implementation of statutes described as "red flag" laws.[11] That is a colloquial term for statutes that provide that a court may, on application, temporarily suspend a person's firearms rights, which typically is accompanied by confiscation after an ex parte process.[12] Adoption of these laws, and federal funding of them,

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[7] 2 WILLIAM BLACKSTONE, COMMENTARIES *358.

[8] Vidar Halvorsen, *Is It Better That Ten Guilty Persons Go Free than That One Innocent Person Be Convicted?*, 23 CRIM. JUST. ETHICS, Winter/Spring 2004, at 3, 3 (2004) (referencing ratios of ninety-nine to one or higher).

[9] David French references red flag statutes as implementation of a "pre-crime" measure. David French, *Red-Flag Laws—Yes, We Limit Liberty When There's Evidence of a Threat*, NAT'L REV. (Aug. 7, 2019, 2:50 PM), https://www.nationalreview.com/corner/red-flag-laws-yes-we-limit-liberty-when-theres-evidence-of-a-threat/.

[10] Bipartisan Safer Communities Act, Pub. L. No. 117-159, 136 Stat. 1313 (2022).

[11] *See id.* § 12003(a) (codified at 34 U.S.C. § 10152(a)(1)) (designating federal funding for the implementation of state crisis intervention programs, which are required to assure due process rights).

[12] Matthew Larosiere & Joseph G.S. Greenlee, *Red Flag Laws Raise Red Flags of Their Own*, 45 L. & PSYCH. REV. 155, 156 (2020–2021); *see also* Joseph Blocher & Jacob D. Charles, *Firearms, Extreme Risk, and Legal Design: "Red Flag" Laws and Due Process*, 106 VA. L. REV. 1285, 1296–97 (2020) (discussing the adoption of red flag laws which allow the issuing of ex parte orders to confiscate firearms without consent of the subject).

precisely present this issue. This Essay focuses on two aspects of the adoption of these laws:

First, do these statutes designate one for inclusion in a group subject to being killed by the government at a rate on par with the criminal murder rate? Extrapolating from Maryland's first-year experience: Being included in the set of persons designated by these procedures puts one in a group subject to being killed by the government at a rate twenty times greater than the country's annual criminal murder rate.

Second, is there not empirical evidence that illuminates whether freedom indeed comes at a cost and that bears on whether civilian firearms ownership is associated with increased freedom? If so—and that is the case—are not assessments of red flag laws that simply focus on a subset of the public safety implications fundamentally ill-structured?

This Essay expands on the existing empirical evidence, in the law review literature, on the relationship between indices of freedom and civilian firearms ownership in the following ways: The relationships hold and are statistically significant at the one-percent level (well above the customary threshold for a required level of significance), when one controls for variables previously omitted.

A noted scholar, Gary Kleck, has identified concerns with the reliability of the international firearms ownership data typically used in empirical research, the Small Arms Survey.[13] One concern is that the data are subject to adjustments that are not transparently detailed.[14] Gary Kleck proposes that, in empirical investigations examining international civilian firearms ownership rates, one should reference the fraction of a country's suicides that are committed with firearms, instead of the Small Arms Survey Data.[15] This Essay also uses a more intricate modeling technique, incorporating this statistic Gary Kleck proposes to use, to confirm that the observed relationship between freedom and firearms ownership is not a spurious artifact of the unspecified adjustments made in the Small Arms Survey by that survey's authors. That technique finds a positive relationship, statistically significant at the one-percent level, between the indices of freedom and the predicted value of registered civilian firearms.

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[13] Gary Kleck, The Small Arms Survey Estimates of National Civilian Firearms Ownership: An Assessment 1 (Mar. 24, 2022) (unpublished manuscript), https://ssrn.com/abstract=4065962.

[14] *See infra* notes 146–51 and accompanying text.

[15] *Id.* at 8, 10–11.

I. RED FLAG LAWS GENERALLY

A. Content of the Laws

Red flag statutes authorize a court to suspend, temporarily, an individual's firearms rights. There are a number of salient components as to which the statutes may vary. A number of the variations are discussed in detail in an excellent, recent article by David Kopel, who suggests a more accurate term would be "gun confiscation orders."[16] They may allow seizure before any contested proceeding.[17] The statutes vary as to who can initiate the proceedings. In some jurisdictions, participation of law enforcement is required, but not so in others.[18] The extent of any right of confrontation also varies. David Kopel notes that Colorado allows telephonic testimony in an ex parte proceeding where the petitioner's evidence in a follow-on proceeding is in writing and thus not subject to cross-examination.[19] Unsurprisingly, the extent to which these statutes comport with due process requirements is unsettled.[20]

B. Status of the Laws Following Bruen

New York State Rifle & Pistol Ass'n v. Bruen[21] reiterates that the scope of impingements on firearms rights allowed by the Second Amendment is linked to the types of restrictions that were contemplated at the time the relevant organic document was adopted, the Second Amendment or the Fourteenth Amendment.[22] The analysis articulated in *Bruen* focuses on the following:

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[16] David B. Kopel, *Red Flag Laws: Proceed with Caution*, 45 L. & PSYCH. REV. 39, 41 (2020–2021).

[17] *See, e.g.*, *id.* at 43 (discussing red flag laws in Indiana, which allow law enforcement officers to seize firearms before filing a petition to retain and giving notice to the owner); MD. CODE ANN., PUB. SAFETY § 5-603 (LexisNexis, LEXIS through 2022 Reg. Sess. of Gen. Assemb.) (allowing the seizure of firearms to take place prior to interim extreme risk protective order hearings).

[18] Discussion of assorted relevant statutes is contained in Kopel, *supra* note 16, at 60–61. These statutes are in flux, and no attempt is made in this Essay to endeavor to provide a catalogue of the landscape as of this precise moment in time.

[19] *See id.* at 70–71 (citing COLO. REV. STAT. § 13-145-105 (LEXIS through 2022 Reg. Sess.)).

[20] Caniglia v. Strom, 141 S. Ct. 1596, 1601 (2021) (Alito, J., concurring) ("This case also implicates another body of law that petitioner glossed over: the so-called 'red flag' laws that some States are now enacting. . . . Provisions of red flag laws may be challenged under the Fourth Amendment, and those cases may come before us. Our decision today does not address those issues.").

[21] 142 S. Ct. 2111 (2022).

[22] The Court notes existence of "an ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope (as well as the scope of the right against the Federal Government)." *Id.* at 2137–38. It concludes, "We need not address this

> [W]hen a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment. Likewise, if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional.[23]

Although *Bruen* does not directly address red flag laws, it does refer to the relevant historical analogy: surety statutes that did not wholly disarm a class of persons but, rather, would allow imposition of a surety requirement were a judicial proceeding to find that there was "reasonable cause to fear an injury, or breach of the peace."[24]

Commentators have asserted that the relevant analogy is instead to disarmament of Native Americans (as well as vague reference to those who had allegiance to the King).[25] This view is debunked by four considerations. First, *Bruen* references, as the relevant analogy for broad disarmament of groups of persons, those surety statutes[26] and an old English statute that allowed disarmament of persons whose conduct would "terrify" members of the public "with evil intent or malice."[27] That is the relevant precedent articulated by the Court—not disarmament of groups not fully benefitting from civil rights.

Second, the following discussion in *McDonald v. City of Chicago* rejects the view that firearms restrictions within the scope of restrictions imposed in the nineteenth century on the basis of race are permissible as long as the restrained persons are not classified on the basis of race:

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issue today because, as we explain below, the public understanding of the right to keep and bear arms in both 1791 and 1868 was, for all relevant purposes, the same with respect to public carry." *Id.* at 2138.

[23] *Id.* at 2131.

[24] *Id.* at 2148.

[25] *See* Dru Stevenson, *In Defense of Felon-in-Possession Laws*, 43 CARDOZO L. REV. 1573, 1586 (2022) ("One particularly compelling rebuttal to the historical pedigree argument is the forthcoming article by Joseph Blocher and Caitlan Carberry, who start with the well-documented fact that the founding generation often prohibited gun ownership for groups deemed 'dangerous' to society or the local community, some of whom (like Native Americans or political dissidents) would not be subject to such laws today."). One court described the targeted populations as "law-abiding slaves, free blacks, and Loyalists." Nat'l Rifle Ass'n of Am. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 700 F.3d 185, 200 (5th Cir. 2012) (citing ADAM WINKLER, GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA 103 (2011)).

[26] *Bruen*, 142 S. Ct. at 2148.

[27] *Id.* at 2140–41. The concurrence recites the slipshod, unreasoned *Heller* dicta concerning other longstanding restrictions. *Id.* at 2162 (Kavanaugh, J., concurring). But, of course, these red flag confiscation orders are not long-standing. Blocher and Charles assert the first was adopted in 1999. Blocher & Charles, *supra* note 12, at 1294–95; CONN. GEN. STAT. ANN. § 29-38c(a) (West, Westlaw through 2022 Reg. Sess.).

> [M]unicipal respondents contend that Congress, in the years immediately following the Civil War, merely sought to outlaw "discriminatory measures taken against freedmen, which it addressed by adopting a non-discrimination principle" and that even an outright ban on the possession of firearms was regarded as acceptable, "so long as it was not done in a discriminatory manner." They argue that Members of Congress overwhelmingly viewed § 1 of the Fourteenth Amendment "as an antidiscrimination rule," and they cite statements to the effect that the section would outlaw discriminatory measures. This argument is implausible.[28]

This discussion rejects the view that nineteenth century firearms restrictions imposed on the basis of race are valid as long as made broadly applicable.

Third, what is relevant is the Founding-Era treatment of persons who generally had civil rights, not Founding-Era restrictions on persons who were not conceptualized as being fully possessed of civil rights generally, whether as to bearing arms or voting or something else. Insofar as in the Founding Era persons who were not fully possessed of civil rights were deprived of one civil right, that does not mean the civil right was curtailed but, rather, that certain classes of persons did not fully benefit from civil rights. The *Bruen* opinion confirms this by referencing the historical understanding of the right to possess arms in public by "Persons of Quality."[29]

Fourth, in *Bruen* the Court makes an additional observation of particular relevance to this Essay. The opinion recognizes that an objective of the adoption of the Fourteenth Amendment and contemporaneous statutes was to eradicate the targeting of a group of persons who through disarmament were more generally deprived of civil rights.[30] That is, the Court references a historical justification of the right to bear arms that is centered on consideration of the consequential impact on civil rights generally.[31]

C. Absence of Efficacy

The Bipartisan Safer Communities Act expressly excludes a requirement for government-paid counsel as a requirement for federal

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[28] McDonald v. City of Chicago, 561 U.S. 742, 778 (2010) (first quoting Brief for Municipal Respondents at 7, *McDonald*, 561 U.S. 742 (No. 08-1521); and then quoting *id.* at 64).

[29] *Bruen*, 142 S. Ct. at 2142 (noting that Serjeant William Hawkins used this phrase to indicate that the public was free to bear arms, even in the face of the Statute of Northampton).

[30] *Id.* at 2150–51.

[31] *See id.* (discussing that a primary concern in enacting the Fourteenth Amendment was protecting the Second Amendment rights of the newly freed Americans); *see also infra* note 187.

funding.[32] *District of Columbia v. Heller* has confirmed that owning a firearm is a civil right secured by the Constitution.[33] So, adoption of red flag statutes subjects the indigent to the potential deprivation of an enumerated civil right, through judicial proceedings where they will not be represented by counsel.[34]

That circumstance may commend caution in adoption of these statutes. But there is more. Two months before enactment, a researcher who previously announced an agenda of specifying more groups to disarm—"The third thing I'd recommend is we expand the criteria we now use for denying the purchase and possession of firearms"[35]—co-authored a work examining whether these statutes decreased murder rates.[36] The research does *not* find evidence supporting the view that these statutes decrease murders:

> In this cross-sectional study, the gun violence restraining order law was *not* significantly associated with a reduction in firearm violence of any kind during its first 4 years of implementation, 2016 to 2019. . . . These results suggest that gun violence restraining order implementation did not reduce population-level rates of firearm violence in San Diego County, but future studies should investigate whether there were individual-level benefits to those directly affected.[37]

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[32] Those extreme risk protection order programs funded by the federal government must include "the right to be represented by counsel *at no expense to the government*." Bipartisan Safer Communities Act, Pub. L. No. 117-159, §§ 12003(a)(2)(I)(iv), (a)(2)(II), 136 Stat. 1313, 1326 (2022) (emphasis added) (codified at 34 U.S.C. § 10152(a)(1)).

[33] *See* 554 U.S. 570, 635 (2008).

[34] *See* Blocher & Charles, *supra* note 12, at 1289, 1308.

[35] Sasha Abramsky, *Wresting Gun Policy from the Hands of the Radical Fringe: A Q&A with Garen Wintemute*, NATION (Dec. 16, 2012), https://www.thenation.com/article/archive/wresting-gun-policy-hands-radical-fringe-qa-garen-wintemute/ [http://web.archive.org/web/20210616201629/https://www.thenation.com/article/archive/wresting-gun-policy-hands-radical-fringe-qa-garen-wintemute/].

[36] Veronica A. Pear et al., *Firearm Violence Following the Implementation of California's Gun Violence Restraining Order Law*, JAMA NETWORK OPEN (Apr. 5, 2022), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2790705 (including as a co-author Garen J. Wintemute of the Violence Prevention Research Program).

[37] *Id.* at 1 (emphasis added). *See also* Rachel Dalafave, *An Empirical Assessment of Homicide and Suicide Outcomes with Red Flag Laws*, 52 LOY. U. CHI. L.J. 867, 900 (2021) ("Red flag laws are not associated with statistically significant changes in homicides rates."); John R. Lott, Jr. & Carlisle E. Moody, Do Red Flag Laws Save Lives or Reduce Crime? 4 (Dec. 28, 2018) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3316573 ("Red flag laws had no significant effect on murder, suicide, the number of people killed in mass public shootings, robbery, aggravated assault, or burglary. There is some evidence that rape rates rise."); Kopel, *supra* note 16, at 51 (noting that the first red flag law dates back to 1999 but "[n]o research has found any statistically significant reduction in crime—including mass shooting fatalities—from confiscation laws.").

D. Unexpected Implications of Federal Imprimatur on Red Flag Laws

Another implication of the federal funding of these state statutes urges caution—the way their adoption ought to influence judicial treatment of firearms reinstatement petitions, by persons with prior criminal convictions. Federal law generally prohibits firearms possession by persons who have committed state misdemeanors punishable by more than two years of imprisonment or felonies, among others.[38] The ban is permanent, unless the wrongdoer's civil rights are restored by expungement of the crime or the like.[39] Federal statutes do not generally tether an ongoing disarmament to current dangerousness.[40] An illustration of a disqualifying conviction from 2016 is provided by *United States v. Phillips*,[41] where the prior conviction of "misprision of felony", according to the briefing, comprised the appellant's "fail[ing] to report the sale of drugs by a person who was selling marijuana."[42]

To date, courts have generally declined to entertain the substance of individualized constitutional challenges to these restrictions, summarily rejecting them. There are two primary principles on which courts found this conclusion. One is an assertion that courts, as institutions, are unable to identify accurately whether a person has a heightened propensity to violence. In *Binderup v. Attorney General*, a Federal appellate court justified rejecting constitutional challenges in these words: "[T]he Supreme Court and our Court have recognized in the Second Amendment context that the Judicial Branch is not 'institutionally equipped' to conduct 'a neutral, wide-ranging investigation' into post-conviction

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[38] 18 U.S.C. §§ 921(a)(20), 922(g)(1); *see, e.g.*, 18 U.S.C. § 922(g)(6)–(7) (listing those dishonorably discharged from the military and those who renounce U.S. citizenship as additional categories of people prohibited from possessing a firearm).

[39] *See* 18 U.S.C. § 921(a)(20) (providing that expungement, pardon, or the restoration of rights are the only methods to restore firearm possession). Recently signed legislation in some cases limits the ban arising from a misdemeanor crime of domestic violence to five years where the relationship was a "dating relationship." Bipartisan Safer Communities Act, Pub. L. No. 117-159, § 12005(c)(2)(C), 136 Stat. 1313, 1332–33 (2022) (codified at 18 U.S.C. § 921(a)(33)). The drafting raises issues concerning its precise import that are beyond the scope of this work.

[40] *See* Royce de R. Barondes, *The Odious Intellectual Company of Authority Restricting Second Amendment Rights to the "Virtuous"*, 25 TEX. REV. L. & POL. 245, 247, 256–57 (2021) (explaining that violent propensity is not required to disarm a firearm owner); BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NCJ 226846**,** FELONY SENTENCES IN STATE COURTS*,* 2006 – STATISTICAL TABLES 1, 5 (2010), https://bjs.ojp.gov/content/pub/pdf/fssc06st.pdf#page=34 (demonstrating in Table 1.2.1 that only about 18% of state court felony convictions arise from violent crime, although the firearm prohibition applies universally).

[41] 827 F.3d 1171, 1173–74 (9th Cir. 2016).

[42] Appellant's Opening Brief at 18–19, *Phillips*, 827 F.3d 1171 (Nos. 14-10448, 14-10449) (stating Phillips "failed to report the sale of drugs by a person who was selling marijuana to Mr. Phillips.").

assertions of rehabilitation or to predict whether particular offenders are likely to commit violent crimes in the future."[43]

Because Congress has implicitly concluded courts are competent in this arena by explicitly funding judicial procedures that require an evaluation of violent propensity,[44] courts will no longer be able to abnegate a duty to weigh individual claims seeking reinstatement of firearms rights. Firearms bans arising from stale crimes can no longer be validated merely by pointing to an institutional inability to make those assessments.

The second principle which courts have relied upon is suspect to the core. This approach is founded on the notion that a person who previously has been convicted of a serious crime is no longer "virtuous."[45] That approach to construing constitutional rights has been thoroughly discredited when presented outside the context of firearms law. "In modern constitutional law, rights are not selectively doled out by legislatures to those whom elected officials deem to be sufficiently virtuous or worthy."[46]

In sum, legislative efforts to fund these red flag laws may have unintended consequences. In courts that proceed forthrightly, applying the principles articulated in their opinions, federal funding of implementation of red flag procedures necessitates more favorable consideration of petitions, by those with prior criminal convictions, for reinstatement of firearms rights.

II. LESS PROMINENT COSTS OF RED FLAG LAWS

A. Red Flag Laws Causing Government Victimization

Maryland adopted a red flag law that became effective on October 1, 2018.[47] A news story reports 114 petitions were initiated in the first

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[43] Binderup v. Att'y Gen. U.S., 836 F.3d 336, 350 (3d Cir. 2016) (quoting United States v. Bean, 537 U.S. 71, 77 (2002)).

[44] *See* Bipartisan Safer Communities Act, Pub. L. No. 117-159, § 12003(a)(2)(I)(vi), 136 Stat. 1313, 1325–26 (2022) (codified at 34 U.S.C. § 10152(a)(1)) (allocating funds for the implementation of state court extreme protection risk order programs); Anita Bernstein, *Implied Reverse Preemption*, 74 BROOK. L. REV. 669, 683 (2009) (stating that Congress implies rejection through withholding funds, so courts must consider what message Congress sends by funding judicial activity).

[45] *See, e.g.*, Medina v. Whitaker, 913 F.3d 152, 159 (D.C. Cir. 2019) (stating, "A number of other circuits have . . . concluded that history and tradition support the disarmament of those who were not (or could not be) virtuous members of the community," but noting "we need not accept this theory outright"). *See generally* Barondes, *supra* note 40, at 248 n.7 (collecting additional authority).

[46] Adam Winkler, Heller*'s Catch*-22, 56 UCLA L. REV. 1551, 1563 n.67 (2009).

[47] Public Safety–Extreme Risk Protective Orders, ch. 250, 2018 Md. Laws 1251, 1255, 1264–65, 1278–94 (codified as amended at MD. CODE ANN., PUB. SAFETY §§ 5-601 to -610 (LexisNexis, LEXIS through 2022 Reg. Sess. of Gen. Assemb.)); MD. CODE ANN., CTS. & JUD.

month.[48] On November 5, the thirty-sixth day of the statute's effectiveness, police officers killed Gary J. Willis while serving an order.[49]

These orders are often served without advance notice,[50] early in the morning: for example, the story about Willis reports that the officers were "called at 5:17 a.m." to his home.[51] David Kopel notes, "Colorado created a special exemption from its rules limiting no-knock raids, in order to allow confiscations to always be carried out by no-knock, without the statutory safeguards applicable to all other no-knock raids."[52]

As to service of warrants in general, i.e., not limited to those associated with red flag orders, law enforcement may select the late evening or early morning to enhance their safety. For example, in one case, the court notes:

> PSP [(the Pennsylvania State Police)] did not immediately execute the search warrant but, instead, continued to surveil the residence until approximately 10:00 or 10:30 p.m. and returned at approximately 3:00 or 3:30 a.m. on November 20, 2018 to continue their surveillance. PSP did not execute the search warrant until November 20 due to concerns for the safety of police officers executing the warrant and because PSP protocols call for the unit to execute warrants in the early morning hours.[53]

One can surely see why officers serving these orders might find it safer to serve them in the early morning hours. However, the process is not safe for targets of the petitions.

PROC. §§ 9-109(d)(9), 9-109.1(d)(8), 9-121(d)(8) (LexisNexis, LEXIS through 2022 Reg. Sess. of Gen. Assemb.).

[48] Theo Hayes & Kim Dacey, *Armed Man Shot by Anne Arundel County Police Dies*, WBALTV11 (Nov. 6, 2018, 5:56 PM), https://www.wbaltv.com/article/police-investigate-officer-involved-shooting-in-ferndale/24658392 [http://web.archive.org/web/20190507043055/https://www.wbaltv.com/article/police-investigate-officer-involved-shooting-in-ferndale/24658392].

[49] The shooting occurred on Monday, November 5, 2018. Alex Mann, *'You're Not Taking That!' Family Turmoil Preceded Fatal Police Shooting in Maryland's Only Red Flag Death*, CAP. GAZETTE (Oct. 1, 2019 5:00 AM), [https://web.archive.org/web/20191002044251/https://www.capitalgazette.com/news/ac-cn-red-flag-20191001-zjzsbra735eatkkm2qmobz5z4a-story.html].

[50] Kopel, *supra* note 16, at 80. Blocher and Charles assert that the elimination of ex parte orders would make the laws "ineffective or impractical." Blocher & Charles, *supra* note 12, at 1296–97.

[51] Hayes & Dacey, *supra* note 48. *See also* Kopel, *supra* note 16, at 55–56 (noting that Willis's "niece said that her late uncle 'like[d] to speak his mind,' but 'wouldn't hurt anybody'" and that the police "didn't need to do what they did").

[52] Kopel, *supra* note 16, at 51.

[53] United States v. Pryer, No. 4:19-CR-00085, 2020 WL 4819930, at *1 (M.D. Pa. Aug. 19, 2020). *See also* State v. Peters, 622 N.W.2d 918, 926 (Neb. 2001) ("[T]he affidavit provided information showing that the execution of the warrant at a time when surprise and speed could be accomplished, such as at night and without knocking, could serve to protect the safety of the officers involved. . . . Accordingly, we conclude that the interests of justice are best served by the authorization of nighttime service.").

Indeed, Maryland's experience, in the Willis red flag case, with the hazards associated with serving warrants on persons to seize their firearms did not yield changes assuring safety in seizing firearms. Only a few months after the Gary Willis event, Duncan Lemp—a software engineer—was shot and killed in an early morning execution of a warrant to seize firearms. A municipal report on the shooting reveals that Lemp was shot in his bedroom at around 4:30 a.m., following a "break and rake," in which one officer used a fireman's pike tool to break a bedroom window and, move aside blinds, with another armed officer then stepping to view inside the bedroom.[54] A news story reports, "Lemp's girlfriend, Kasey Robinson, and his parents have said the software engineer was asleep in his bedroom when police fired at him from outside the house in Potomac, Maryland, a suburb of Washington, D.C."[55]

In that case, the justification for seizure of firearms was not a red flag order. Rather, it was the subject's prior "criminal history as a juvenile."[56] The Duncan Lemp case illustrates one cannot presume Maryland to have used its failed experience with Gary Willis to eliminate the safety concerns arising from pre-dawn firearm seizures at citizens' houses.

It is somewhat disappointing to note the extent to which commentary addressing these statutes elides the details of the government killing targets of the orders. A Westlaw search for secondary sources since 2020, designed generally to identify discussion of red flag orders (albeit with some over-inclusion), identified 386 secondary source items,[57] only twenty-four percent of which reference "self-defense"[58] and only one percent of which reference Gary Willis.[59]

The following figure contextualizes the emphasis of the academic discourse by revealing levels of popular discourse on related subjects. It displays the relative public attention to the police shooting of Gary Willis compared to that of Michael Brown, as reported by Google Trends, over a

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[54] Montgomery Cnty. State Attorney's Off. Dep't, Report: In the Matter of the March 12, 2020 Police-Involved Shooting in Potomac, Maryland (2020), https://www.montgomerycountymd.gov/SAO/Resources/Files/REPORTMarch2020Event.pdf.

[55] Michael Kunzelman, *No Charges for Police in Death of "Boogaloo" Movement Martyr*, AP NEWS (Dec. 31, 2020), https://apnews.com/article/media-maryland-us-news-police-shootings-1182a35615898c1ed8d5ebdbfc6ad962.

[56] Press Release, Montgomery Cnty. Dep't of Police, Update: Officer-Involved Shooting in Potomac; Additional Information Released (Mar. 17, 2020), https://www2.montgomerycountymd.gov/mcgportalapps/Press_Detail_Pol.aspx?Item_ID=32049.

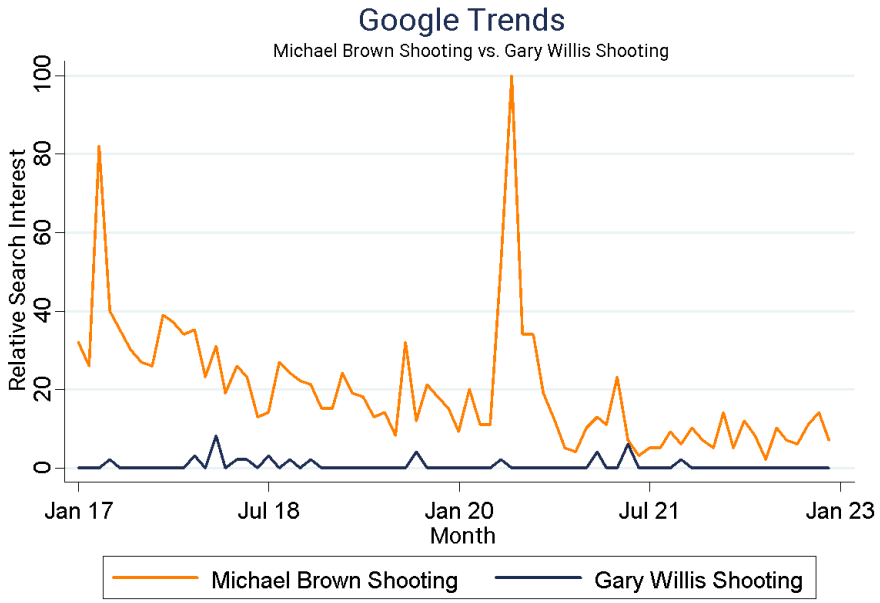
[57] Westlaw search: adv: ("red flag law" "extreme risk protection order") & DA(aft 12-31-2019) (visited Jan. 6, 2023) (reporting 386 results in Secondary Sources).

[58] Westlaw search: adv: ("red flag law" "extreme risk protection order") & DA(aft 12-31-2019) & ("self-defense" or "self defense" or "selfdefense") (visited Jan. 6, 2023) (reporting 94 results in Secondary Sources).

[59] Westlaw search: adv: ("red flag law" "extreme risk protection order") & DA(aft 12-31-2019) & (gary +3 willis) (visited Jan. 6, 2023) (reporting four results in Secondary Sources).

period of time where, as shown in Figure 2, coverage of the Michael Brown shooting had greatly subsided:

Figure 1

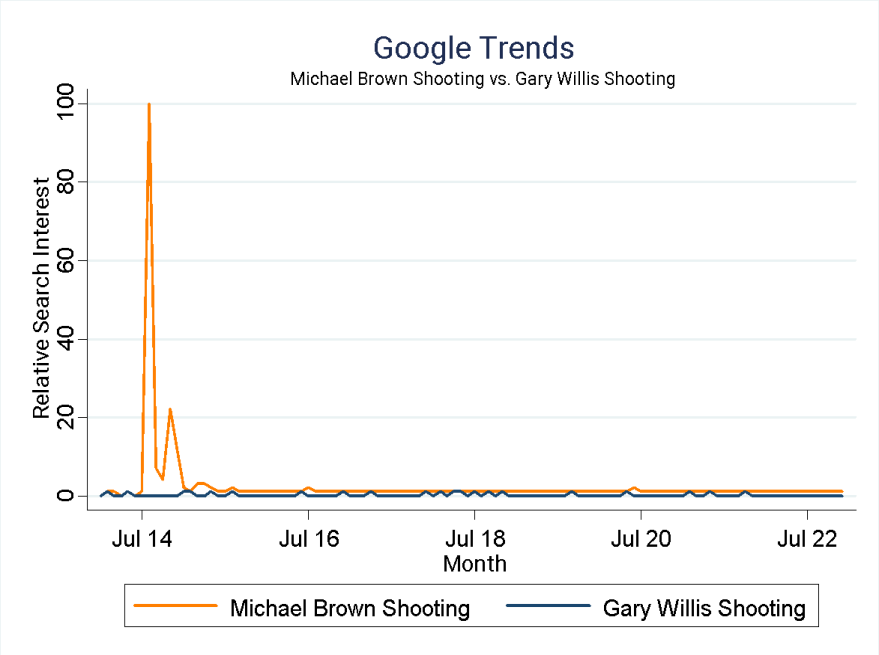


Note—Table comparing relative monthly interest in *Michael Brown shooting* and *Gary Willis shooting*, as reported by Google Trends internet search data, for 2017 through 2022.[60]

For the period of 2017 to 2022, the peak monthly value for *Gary Willis shooting* is 8, compared to 100 for *Michael Brown shooting*. This is, of course, after the peak in popular conversation concerning the Michael Brown shooting. The following figure shows the relative monthly search interest for *Michael Brown shooting* and *Gary Willis shooting* for 2014 through 2022.

[60] GOOGLE TRENDS, https://trends.google.com/trends/explore?date=2017-01-01%202022-12-31&geo=US&q=michael%20brown%20shooting,gary%20willis%20shooting (last visited Jan. 13, 2023).

Figure 2



Note—Table comparing monthly interest in *Michael Brown shooting* and *Gary Willis shooting* as reported by Google Trends internet search data, for 2014 through 2022.[61] Values reported by Google Trends as "<1" have been rounded up to 1.

The figures in the aggregate illustrate that relative to the Michael Brown shooting, the police shooting initiated by service of a red flag order received negligible public attention. Searches for the red flag shooting victim were an order of magnitude lower than the peak searches for the Michael Brown shooting in the year following the red flag shooting (Figure 1). And searches for the Michael Brown shooting at that time were almost two orders of magnitude lower than those for the Michael Brown shooting when it occurred. (Figure 2).

The lack of public attention to police shootings when red flag orders are served commends a review of the danger associated with serving those orders. Some relevant factors are the domestic murder rate and the anticipated rate at which the enforcement process will grossly err in an over-inclusive fashion—when the police will kill someone who would not

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[61] GOOGLE TRENDS, https://trends.google.com/trends/explore?date=2014-01-01%202022-12-31&geo=US&q=michael%20brown%20shooting,gary%20willis%20shooting (last visited Jan. 13, 2023).

have committed a violent crime using a firearm in the time period covered by the order.[62]

These red flag laws are only of use where the target has not committed some prior crime that by itself gives rise to a firearms ban. Where a disqualifying crime has been committed, there is no need to resort to a judicial determination that, for other reasons, a person should be disarmed. The federal prohibitions are extensive—they include state misdemeanors for which one may be incarcerated for more than two years and most felonies.[63] Also giving rise to prohibitions are convictions for misdemeanor crimes of domestic violence.[64] So too are "adjudicat[ions] as a mental defective or . . . commit[ments] to a mental institution."[65] States are free to expand on the list.[66] Urging adoption of red flag laws, then, is designed to enhance the circumstances that give rise to a prohibition other than the commission of listed criminal acts.

A predictive process for disarming persons who have not committed disqualifying crimes cannot be justified if it puts the government in the position of killing people, who would not commit a serious crime with a firearm during the period covered by the order, at a rate that even approaches the murder rate in the United States. How much it would need to be below the murder rate is, of course, a question of judgment. An appropriate starting point would be a factor of one-tenth or one-hundredth—one or two orders of magnitude below the murder rate.

The rate for murder and nonnegligent manslaughter in the United States was below 5 per 100,000 in 2013 and 2014, thereafter surging to 6.5 per 100,000.[67] Maryland courts granted 646 temporary ex parte

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[62] That is certainly not to say it would be satisfactory for the government to kill preemptively those who would commit violent crime in the future. The author is unaware of definitive research about the safety consequences of serving red flag protection orders. Some recent investigations fail to find a relationship between these laws and murder rates. *See supra* notes 36–37 and accompanying text.

[63] 18 U.S.C. §§ 921(a)(20), 922(g)(1).

[64] *Id.* § 921(a)(33), *amended by* Bipartisan Safer Communities Act, Pub. L. No. 117-159, § 12005(a), (c), 136 Stat. 1313, 1332–33 (2022); 18 U.S.C. § 922(g)(9). The presence of an outstanding domestic violence restraining order also creates a ban, which in that case is limited to the duration of the order's pendency. *Id.* § 922(g)(8).

[65] 18 U.S.C. § 922(g)(4). The term "[c]ommitted to a mental institution" excludes voluntary admissions and admissions for observation. 27 C.F.R. § 478.11 (2021), *amended by* Secure Gun Storage and Definition of "Antique Firearm," 87 Fed. Reg. 182 (Jan. 4, 2022).

[66] 18 U.S.C. § 927.

[67] *Crime Data Explorer*, FED. BUREAU INVESTIGATION, https://cde.ucr.cjis.gov/LATEST/webapp/#/pages/explorer/crime/crime-trend (last visited Jan. 20, 2023) (select "Homicide" in "Crime Select" to produce the same data) (reporting a rate of 6.5 homicides per 100,000 people across the U.S. in 2020). The term "homicide" as used in the statistics reported by the FBI consists of murder and nonnegligent manslaughter. *Id.* (select "Related offenses" under "About the Data") ("Violent crime is composed of four offenses: homicide (murder and nonnegligent manslaughter), rape, robbery, and aggravated assault.").

extreme risk protection orders in the first twelve months of the Act.[68] One subject being killed per 646 temporary ex parte orders in the first year translates to a rate of killing by the government of approximately 155 per 100,000.[69] Extrapolating this rate, based on the first-year experience: being included in the set of persons designated by these procedures puts one in a group subject to being killed by the government at a rate of over twenty times the annual murder rate in the country (6.5 per 100,000).[70]

It does not seem fair to disregard Maryland's experience in the first year as an unrepresentative, mere first-year phenomenon. Duncan Lemp was killed in the second year of the Maryland Act's effectiveness, suggesting that the killing of Gary Willis did not prompt a governmental reassessment that has now made firearm seizures safe.[71]

Let us then turn to how over-inclusive we expect a red flag process to be. What is relevant here is the standard for the initial issuance of an

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[68] *About District Court*, MD. CTS., https://mdcourts.gov/district/about#stats (Oct. 28, 2022) (showing that Maryland courts granted 646 temporary ex parte extreme risk order protections from October 1, 2018, to October 1, 2019).

[69] That is, one killing in 646 orders is 0.155%. That is a rate of 155 per 100,000.

Maryland has two short-term procedures for initiating a red flag order ex parte. It is to be filed with a District Court if open, or, if not, a District Court commissioner. MD. CODE ANN., PUB. SAFETY § 5-602 (West, through 2022 Reg. Sess. of Gen Assemb.). A hearing for a temporary extreme risk protective order may be ex parte. *Id.* §5-604(a). If the petition is successful, a subsequent hearing is generally to be held within seven days of order service, subject to extension for up to six months. *Id.* § 5-604(c).

If the process is initiated with a commissioner and it is successful, it results in issuance of an interim extreme risk protective order. *Id.* § 5-603(a). The process contemplates a very-short-term order. An issued order is required to state the date of a subsequent temporary extreme risk protective order hearing. *Id.* § 5-603(b). In general, the interim order lasts two business days, or until an earlier hearing on the temporary extreme risk protective order. *Id.* § 5-603(e).

Over the first twelve months, there were 606 interim orders and 646 temporary orders issued. *See About District Court*, *supra* note 68. That site indicates there were 965 "cases filed" in that period.

The relevant statistic for the purposes of this Essay is the number of unannounced firearms seizures. These statistics do not reveal the number of overlaps (cases where an interim order was followed by a temporary order), resulting, one would anticipate, in only one unannounced firearm seizures, whether before or after the temporary order. Of course, an order might not result in any seizure, e.g., where the subject has fled, or the subject is arrested for other criminal conduct before any home raid. Although these statistics do not reveal the precise number of unannounced firearms seizures, the number of temporary orders seems a reasonable estimate. One supposes it cannot exceed 965. Even if there had been 965 unannounced home seizures, that would equate to a rate of 104 per 100,000, 16 times a 6.5 per 100,000 murder rate.

[70] *See also Crime Data Explorer*, *supra* note 68 (citing the murder rate ranging from 4.5 to 6.5 per 100,000 people over 2011–2020).

[71] *See* Michael Ruiz, *Maryland Prosecutors Rule Out Charges Against Cops in Death of Boogaloo 'Martyr' Duncan Lemp*, FOX NEWS (Dec. 31, 2020, 4:31 PM), https://www.foxnews.com/us/maryland-charges-boogaloo-martyr-duncan-lemp (stating Lemp was killed March 12, 2020); 2018 Md. Laws Ch. 1251, § 3 (stating an Oct. 1, 2018 effective date).

order—which will often be in an ex parte proceeding.[72] That is because it is in response to the initial order that the arms will be seized.[73]

There will be orders issued for the wrong person,[74] on the basis of fallacious allegations (e.g., retaliatory petitions fomented by persona animus)[75] or for patently insufficient reasons, such as a social media post merely depicting evidence of exercise of a constitutional right.[76] The standard for issuance of an order may be a mere preponderance of the evidence, or even lower, including "reasonable cause."[77] It is claimed "the most common standard of proof for ex parte orders is reasonable, probable, or good cause of an imminent risk,"[78] with a clear minority requiring even a preponderance of the evidence and only one "clear and convincing" evidence.[79]

This typical standard does not express in quantitative terms the degree to which it validates over-inclusive issuance of orders. But by its express terms, it is more over-inclusive than a 51:49 standard of more likely than not. One should think an ex parte proceeding is likely to be well more over-inclusive than that. As an initial assessment, let us assume that three-quarters of the persons subjected to orders would not have committed a violent crime with a firearm.[80] A lower bound may be one-third: It has been reported that approximately one-third of the ex parte orders in Connecticut were not affirmed in a subsequent contested

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[72] *See* Larosiere & Greenlee, *supra* note 12, at 156 (noting that preliminary hearings under red flag laws are held without the gun owner present).

[73] *Id.*

[74] *See* Kopel, *supra* note 16, at 56 (noting that a red flag order was issued against the wrong Jon Carpenter in Florida).

[75] *Cf.* Sady Swanson, *Fort Collins Woman Found Guilty of Lying on Red Flag Petition Against CSU Police Officer*, COLORADOAN, https://www.coloradoan.com/story/news/2022/04/22/fort-collins-woman-who-filed-red-flag-petition-against-officer-convicted/7401449001/ (May 4, 2022, 3:14 PM) (addressing a woman who falsely stated in a red flag petition that she shared a child with a law enforcement officer who had fatally shot her son).

[76] *See* Kopel, *supra* note 16, at 56–57 (explaining that an order was issued against a man for his social media post about a homemade, apparently lawful AR-15 and his social media post criticizing anti-gun activists).

[77] *See id.* at 67–68 (quoting MASS. GEN. LAWS ANN. ch. 140, § 131T (West, Westlaw through ch. 125, 134, 136, 144–47, 149, 158, 174 2022 2d Ann. Sess.)) (comparing the standards of proof across various states, with reasonable doubt being the lowest articulated standard); VT. STAT. ANN. tit. 13, § 4054(b)(1) (LEXIS through 2021 Adj. Sess.) (creating a preponderance of the evidence standard for ex parte hearings).

[78] Blocher & Charles, *supra* note 12, at 1340.

[79] *Id.*

[80] *See generally* Alan M. Dershowitz, *A Yellow Light for Red-Flag Laws*, WALL ST. J., Aug. 7, 2019, at A15 ("Research shows that any group of people identified as future violent criminals will contain many more who won't be violent (false positives) than who will (true positives). More true positives mean more false ones. Such groupings also fail to identify many future violent criminals (false negatives).").

proceeding.[81] Or, the lower-bound may be one-half—the standard is lower than a preponderance of the evidence.

So, we can estimate the rate at which designation as being within the set of persons subject to red flag orders results targeting persons who would not commit violent firearms crimes in the period covered by red flag orders, extrapolating Maryland's experience, as follows: This designation results in an estimated rate of a blameless person being killed by the government as follows: Extrapolating Maryland's first-year experience, at a lower-bound of 52 per 100,000 designated for red flag targeting (one-third of 155 per 100,000[82]), with the estimated rate, derived from the nature of the standard of evidence, of about 116 per 100,000 designated (three-quarters of 155 per 100,000).

Even were the Willis event to be the only adverse result from the issuance of the orders in Maryland over the five-year period ending October 2023, that would still result in an estimated rate of wholly innocent persons being killed exceeding the annual murder rate. That is, the rates referenced in the prior paragraph exceed the annual murder rate by more than a factor of five.

Under none of these scenarios is the harm associated with killing innocents in serving red flag orders justifiable.[83] And it would seem such

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[81] David Kopel writes, "[a]bout a third of gun confiscation orders are wrongly issued against innocent people." *Red Flag Laws: Examining Guidelines for State Action: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. 5 (2019) (written testimony of David B. Kopel, Adjunct Scholar, Cato Inst.) (citing Michael A. Norko & Madelon Baranoski, *Gun Control Legislation in Connecticut: Effects on Persons with Mental Illness*, 46 CONN. L. REV. 1609, 1619 (2014)). Incompleteness of the relevant underlying records noted by Norko and Baranoski, Norco & Baranoski, *supra*, at 1619, introduces significant imprecision in the estimate.

Maryland's experience seems comparable. In the first 12 months, 646 temporary orders were issued and 425 final orders were issued. *See About District Court*, *supra* note 68 (showing that Maryland courts granted 646 temporary ex parte extreme risk order protections from October 1, 2018, to October 1, 2019). That is, the number of temporary orders was 66% of the final orders. Of course, a temporary order might not be followed by a final one for reasons other than the initial proceeding erred in its assessment, e.g., the subject might have passed away.

George Parker reviewed the results of red flag judicial proceedings in Marion County, Indiana. George F. Parker, *Circumstances and Outcomes of a Firearm Seizure Law: Marion County, Indiana, 2006–2013,* 33 BEHAVIORAL SCIS. & L. 308 (2015). The observations in his data set appear to involve court hearings following seizure of firearms. *E.g., id.* at 308 (stating "prosecutors filed petitions in court to retain weapons seized by police under this law" a number of times equal to the number of observations in his sample). The claims were dismissed 28.7% of the time. *Id.* at 314 tbl.1. Parker's work, then, provides an alternative source supporting an ultimate estimation of an error rate just below thirty percent.

However, Parker provides tabular information that is somewhat ambiguous in its presentation. His information also references 5.7% of the outcomes involving transfer of the arms, but the table does not clarify the extent to which these are included in dismissals. *Id.*

[82] *See supra* note 69.

[83] Of course, tallying all the benefits and consequences is complicated. As noted

below, surveys estimate annual defensive firearms use rates of up to 2.5 million. *See infra* note 85 and accompanying text. So, one endeavoring to justify red flag laws as enhancing safety would need to incorporate the consequences of the subjects being disarmed.

However, one might assert that the acceptable rate of innocent persons being killed in red flag orders is some multiple higher than those referenced above. An order following a firearms seizure may be renewed, resulting in a multi-year period in which a subject is disarmed. And, that view would continue, one ought to divide the above-referenced acceptable rates by the average duration, in years, of the orders staying in effect.

In some states, where the orders are not long-lasting, this would change little. A popular press report indicates Colorado's experience is that that the substantial majority do not last more than one year. As to the 146 orders issued in 2020 and 2021, "The orders are extended only in rare cases—they were requested 13 times, granted eight times. . . . The bottom line: After Wednesday, 116 of the 146 people who were ordered to give up their guns can legally get them." Zack Newman & Kevin Vaughan, *Gun Seizures More Likely Under Colorado's Red Flag if Law Enforcement Is Involved*, 9NEWS (May 25, 2022, 9:43 PM), https://www.9news.com/article/news/investigations/red-flag-law/73-bd22f338-2605-477f-a1f5-e8b5570f2534. So, the above estimate may be conservative, i.e., understate the risk of being killed by the police, annualized based on the ultimate duration of the order.

Perhaps the longest plausible estimate as to the average duration one might use, if one wished best to support the desirability of red flag laws, would be approximately ten years. One might arrive at that as follows.

Parker's work reveals that where hearings were held, five years after an initial deprivation, in approximately eighteen percent, the order was dismissed, with the subject entitled to return of his or her arms. In particular, there were 111 such hearings in 2007 through 2011, 27 (24.3%) of which were dismissed at the subsequent hearing. Parker, *supra* note 81, at 319–20. However, of those 27, the subject agreed to destruction of his or her firearms in four, and in three the subject agreed to transfer the weapons to another person. *Id.* at 320. Eliminating those seven proceedings yields 20 of the 111 proceedings in which the arms were returned, or 18%. In that study, the average of subjects was 42.6. *Id.* at 314 tbl.1. The clear majority of subjects were male (80.9%). *Id.* at 314 tbl.1.

Recent government statistics show a life expectancy of 32.7 years for a male of 45. Elizabeth Arias & Jiaquan Xu, *United States Life Tables, 2020*, NAT'L VITAL STAT. REPS., Aug. 8, 2022, at 2 tbl.A. Thus, on average, these cannot be sequentially renewed and, on average, last more than 32.7 years. Ten years seems like a suitable estimate of the average, in view 32.7 being the maximum possible average, and the fact that individuals become less dangerous as they age. *See Number of Murder Offenders in the United States in 2020, by Age*, STATISTA, www.statista.com/statistics/251884/murder-offenders-in-the-us-by-age/ (visited Jan. 6, 2023).

One might come to the ten-year estimate in the following way. These involve predictive assessments of criminality where, by definition, the individual has not been previously found guilty of any of the expansive list of crimes, including assorted nonviolent crimes and violent crimes not involving firearms, some involving weapons and some not, that give rise to a firearms prohibition.

Let us consider what it means for such an order to be extended to twenty years. At some time, the individual was predicted to have a propensity for violence using a firearm, that had not previously manifested in any criminal act that would result in criminalizing firearms possession—none of the violent crimes involving hands or weapons other than firearms, and none of the non-violent crimes. But someone asserts, at the time of the initial issuance, the individual changed, and had acquired a heightened, unacceptable level of propensity for violence using a firearm—the individual must be immediately disarmed.

Then, five years later, at a renewal, the renewal is only required where a crime giving rise to a firearms prohibition has not been committed. At that time, one might become suspicious as to the prediction. Why is it that five years have passed for this highly dangerous

person who has committed none of the much less serious crimes that give rise to a firearms prohibition?

The same line of thought might occur after ten years, on a second renewal request. One would become increasingly suspicious that the prediction was in error. By the third request for renewal, after fifteen years, the judiciary of which the request is sought ought to be thinking: Fool me once (initially), depriving a person of his constitutional rights, shame on you; fool me twice (at the five-year renewal), shame on me; fool me three times (at the ten-year renewal), extreme shame on me; and at the sought fifteen-year renewal—fifteen years of deprivation of a constitutional right unsupported by criminal conviction over fifteen years are enough.

If they all end after fifteen years, there is a ten-year weighted average if the number ending in the first and last five-year periods are the same. But, if a rough estimate is insufficient, one might contextualize the estimate with the following:

As noted above, *see supra* note 81, 28.7% of the initial claims were not dismissed. Let us take it that the same percentage of initial orders are not sought to be renewed every five years. That is, five years of experience of there not being a crime giving rise to a prohibition results in a similar likelihood that reassessment of the circumstances indicates that application for renewal is not warranted. That would mean that, after five years, of 100 orders initially issued, renewal would not be sought in 28.7 and it would be sought in the remainder, 71.3. Applying the rate that Parker found for rejection of applications of 18 percent would yield an estimate of:

For 100 orders issued, after five years, renewal is sought in 71.3 and that renewal request rejected in 18 percent (12.8) and accepted in 82 percent (58.5). So, of the 100 orders issued, only 58.5 would extend at least 10 years, with the remainder, 41.5 (*12.8 + 28.7*) lasting only 5 years.

If we take it that the same frequencies apply after 10 years, we would have:

Of the 58.5 orders issued that extended at least 10 years, renewal would be sought after 10 years in 71.3 percent, or 41.7, with renewal not sought in 16.8 (28.7%). Again, taking that sought renewals are rejected 18% of the time, this would result in (*41.7 x 82%*) 34.2 renewals, and 7.5 where renewal was sought but rejected. So, a total of 24.3 would end after 10 years (16.8 where renewal was not sought and 7.5 where renewal was sought but rejected).

If we take it that the same frequencies apply after 15 years, we would have, 34.2 orders that last at least 15 years, renewal would be sought in 71.3%, or 24.4, and not sought in 28.7% of the 34.2, 9.8. Of those 24.4 where renewal was sought, it would be denied in 18% of the times, or 4.4, and granted in 20.0. So, a total of 20.0 would last at least 20 years, with the orders ending in fifteen years for 14.2 of the original 100 orders (*9.8 + 4.4*).

So far, of 100 orders issued, we have 41.5 orders lasting 5 years, 24.3 orders lasting 10 years, and 14.2 lasting 15 years. For each five-year period, the number of orders ending in that period is approximately 58.5% of the number ending in the prior 5-year period. 24.3 is 58.6% of 41.5. 14.2 is 58.4% of 24.3. Subject to rounding, the ratio will be the same for successive five-year periods. Following that, we would get, a weighted average of approximately 11.7 years:

a dangerous process, which creates risk of serious physical injury to the innocent, would need evidence that it enhances safety beyond assisting in restraining suicide, which is lacking.[84]

B. No Governmental Obligation to Protect

Yet the physical danger to targets associated with these red flag proceedings is not limited to being shot in a pre-dawn police raid. Justice Alito has stated, "According to survey data, defensive firearm use occurs up to 2.5 million times per year."[85] The estimated annual defensive uses of firearms substantially exceed, by about a factor of ten, the annual rate of violent crime using firearms (and, of course, the much lower annual murder rate using firearms).[86]

	No. of 100	Term	Weighted Ave.
Lasting 5 years	41.5	5	2.1
Lasting 10 years	24.3	10	2.4
Lasting 15 years	14.2	15	2.1
Lasting 20 years	8.3	20	1.7
Lasting 25 years	4.9	25	1.2
Lasting 30 years	2.9	30	0.9
Lasting 32.7 years	3.9	32.7	1.3
Total	100		11.7

[84] *See supra* note 37 and accompanying text.

[85] N.Y. State Rifle & Pistol Ass' v. Bruen, 142 S. Ct. 2111, 2158–59 (2022) (Alito, J., concurring). *See also* INST. MED. & NAT'L RSCH. COUNCIL NAT'L ACAD.'S, PRIORITIES FOR RESEARCH TO REDUCE THE THREAT OF FIREARM-RELATED VIOLENCE 15 (Alan I. Leshner et al. eds., 2013) ("Defensive use of guns by crime victims is a common occurrence, although the exact number remains disputed. Almost all national survey estimates indicate that defensive gun uses by victims are at least as common as offensive uses by criminals, with estimates of annual uses ranging from about 500,000 to more than 3 million, in the context of about 300,000 violent crimes involving firearms in 2008." (citations omitted)).

[86] Federal data presented for 2020, under the heading "All Violent Crime Offense Characteristics," show a total of 179,867 violent crimes as involving firearms of some type. *Crime Data Explorer*, *supra* note 67. It may be that the way that the current interface presents the data results in it being incompletely presented. The tabular data for 2019 reveal firearms were used in the 279,414 violent crimes in 2019 (robbery and aggravated assault: 269,159, murder and non-negligent manslaughter, 10,258). FED. BUREAU INVESTIGATION, 2019 CRIME IN THE UNITED STATES: TABLE 19 [hereinafter TABLE 19], https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/table-19 (last visited Oct. 25, 2022); FED. BUREAU INVESTIGATION, 2019 CRIME IN THE UNITED STATES: TABLE 20, https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/table-20. The 2019 data do not reveal a frequency for rape using a firearm, TABLE 19, *supra*, but other sources indicate that would account for less than one percent of violent crimes with firearms. *Number of Forcible Rape and Sexual Assault Victims in the United States in 2020, by Weapon*

Additionally, disarmament of a target of a red flag proceeding is not accompanied by government taking actual responsibility for making up for the increased victimization risk arising from the target being disarmed. That the government is not responsible for the consequences of disarming someone, albeit outside the context of red flag laws, is illustrated by *Vaughn v. City of Chicago*.[87]

One Albert Vaughn went to the location of a group altercation to retrieve his younger brother.[88] He was armed with what was described by, and apparently perceived by, an officer who forced him to disarm as a stick.[89] It was alleged, by Vaughn's estate, that he was ordered by officers at gunpoint to drop the wood, which he did.[90] In particular, in deposition testimony, one Officer Cummings stated that Vaughn "was walking toward me, him and two other individuals, with sticks in their hands. I drew my weapon or ordered them to drop the sticks. They dropped the

Presence, STATISTA, https://www.statista.com/statistics/251931/usa--reported-forcible-rape-cases-by-weapon-presence/ (last visited Nov. 1, 2022) (showing 1,680 for 2020).

Blocher and Charles assert, "The interest in having one's firearms is significant, but the justification for delay and the confirmation of judicial authorization all point to the reasonableness of a short span of mere weeks before the final hearing." Blocher & Charles, *supra* note 12, at 1335. They do not contextualize this assertion by noting that firearms are used defensively at a rate ten times the frequency with which they are used to commit serious violent crimes. Although one might seek to frame the relevant numbers as to the innocent citizen's loss of self-defense, this Essay shall limit that style of quantitative framing to the risk of being killed during the confiscatory seizure.

[87] 181 F. Supp. 3d 570, 571, 574–75 (N.D. Ill. 2015) (granting summary judgment for the defendant-police officers on the grounds that Vaughn's substantive Due Process rights were not violated under the state-created danger doctrine when police disarmed him).

This case is merely illustrative of the authority bearing on lack of governmental accountability for failing to protect members of the pubic. *See, e.g.*, Town of Castle Rock v. Gonzales, 545 U.S. 748, 750–51, 768 (2005) (stating, "[w]e decide in this case whether an individual who has obtained a state-law restraining order has a constitutionally protected property interest in having the police enforce the restraining order when they have probable cause to believe it has been violated"; and holding, "[w]e conclude, therefore, that respondent did not, for purposes of the Due Process Clause, have a property interest in police enforcement of the restraining order against her husband"); L.S. *ex rel.* Hernandez v. Peterson, 982 F.3d 1323, 1330–31 (11th Cir. 2020); Riss v. City of New York, 240 N.E.2d 860, 860–61 (N.Y. 1968) (holding there was no municipal liability "for failure to provide special protection to a member of the public who was repeatedly threatened with personal harm and eventually suffered dire personal injuries for lack of such protection"; noting statutes had on occasion provided for "municipal liability for losses sustained as a result of riot"); Hartzler v. City of San Jose, 120 Cal. Rptr. 5, 8, 10 (Cal. Ct. App. 1975) (police not liable for refusal to come immediately to the home of a woman whose husband had called saying he was coming to kill her). *See generally* Leake v. Caine, 720 P.2d 152 (Colo. 1986), *abrogated in part by statute*, COLO. REV. STAT. § 24-10-106.5 (through Oct. 16, 2022, of 2d Reg. Sess).

[88] *Vaughn*, 181 F. Supp. 3d at 571.

[89] Vaughn v. City of Chicago, No. 14 C 47, 2014 WL 3865838, at *1 (N.D. Ill. Aug. 5, 2014).

[90] *Id.* at *1.

sticks and approached me."[91] Additionally, in response to a question, "And you drew your weapon. You told them to do what?", Officer Cummings stated, "To drop the sticks they had in their hand."[92]

The estate also alleged Vaughn was then approached by a person who had a bat and had been shouting obscenities at Vaughn.[93] Vaughn's estate further alleged,

> The defendant officers did not order the man to halt or drop the bat as he approached Vaughn. Instead, the officers simply watched as the man clubbed Vaughn in the head with the bat and then fled from the scene. Vaughn was transported to a local hospital where he was pronounced dead.[94]

On summary judgment, Vaughn's estate lost.[95] In reaching the conclusion, the court notes that the attack came "without warning" by one "hiding in a nearby house or behind an ambulance."[96] The court applied a standard of "whether Defendants failed to protect Albert in a way that shocks the conscience after disarming him in a dangerous environment."[97] In rejecting the claim, the court provided the following analogy: "Vaughn's claim boils down to Defendants' failure to assign a personal bodyguard for Albert . . . ."[98] Indeed, as *Vaughn* illustrates, government disarmament is not accompanied by accountability for causing the target to be defenseless.

C. Relationship Between Firearms Ownership and Freedom

Debate concerning firearms restrictions is often framed from the exclusive perspective of whether the particular enactment will or will not increase public safety. For example, Fagundes and Miller assert, "This Part explains why it is necessary to re-frame the Second Amendment's core value as safety, not self-defense simpliciter, and relates that purpose to the historical role of the city as supplier of armed internal security."[99] That framing contradicts one of the Second Amendment's underlying objectives—to promote freedom. Although some commentators are inclined to characterize dismissively the notion of firearms rights as

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[91] Deposition of Officer Robert E. Cummings at 35, *Vaughn*, 181 F. Supp. 3d 570 (No. 14 C 47) (deposition of Sept. 19, 2013, attached as Exhibit D to Defendants' Rule 56.1 statement of Undisputed Material Facts, *Vaughn*, 181 F. Supp. 3d 570 (No. 14 C 47)).

[92] *Vaughn*, 2014 WL 3865838, at *37. The court subsequently concluded that what were perceived by this officer as "sticks" were boards removed in haste from a porch, without dallying to remove the nails. *Vaughn*, 181 F. Supp. 3d at 571.

[93] *Vaughn*, 2014 WL 3865838, at *1.

[94] *Id.*

[95] *Vaughn*, 181 F. Supp. 3d at 576.

[96] *Id.* at 575.

[97] *Id.*

[98] *Id.*

[99] Dave Fagundes & Darrell A.H. Miller, *The City's Second Amendment*, 106 CORNELL L. REV. 677, 682 (2021).

furthering freedom,[100] there is wide evidence that one objective of passage of the Fourteenth Amendment was to prevent the deprivation of ordinary civil liberties effected by disarming persons.[101]

Sections A and B have identified components of safety that are often (but not universally[102]) de-emphasized in consideration of red flag confiscation orders.[103] But equally important, the focus proffered by Fagundes and Miller is, simply, rejected by both repeated reference in the Court's Second Amendment jurisprudence and ordinary American notions of civil rights.

The opinion in *District of Columbia v. Heller* itself rejected precisely this style of balancing:

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon.[104]

Subsequently, the primary opinion in *McDonald v. City of Chicago* noted,

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[100] *See, e.g.*, Timothy Zick, *Framing the Second Amendment: Gun Rights, Civil Rights and Civil Liberties*, 106 IOWA L. REV. 229, 281 (2020) (describing such conceptions as "narratives that construct realities" that "gun rights advocates have developed and deployed").

[101] *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2151 (2022) ("In the years before the 39th Congress proposed the Fourteenth Amendment . . . . [a]n assistant commissioner to the [Freedmen's] Bureau from Alabama similarly reported that men were 'robbing and disarming negroes upon the highway.'" (quoting H.R. EXEC. DOC. NO. 70, 39th Cong., 1st Sess., 297 (1866)).

[102] *See, e.g.*, Larosiere & Greenlee, *supra* note 12, at 165 (not sketching the magnitudes); Dennis P. Chapman, *Firearms Chimera: The Counter Productive Campaign to Ban the AR-15 Rifle*, 8 BELMONT L. REV. 191, 221–22 (2020) (quoting the local police chief's efforts to justify initiating the Willis seizure, which referenced uncertainty as to what would have happened but for the seizure, and noting a commentator's retort that Willis probably would have been alive).

[103] *See, e.g.*, Blocher & Charles, *supra* note 12, at 1309, 1312 (asserting, "the risk of false positives seems far outweighed by the risk of false negatives," cross-referencing a brief, unsupported discussion without attempting to calculate a rate of innocent death and any comparison of it to the criminal murder rate); Dalafave, *supra* note 37, at 897, 899 (finding a relationship between red flag laws and decreased suicide—but *not* a statistically significant relationship with homicide rates—and opining that firearms create "a negative externality for society," favorably commenting on statutes that "strike a balance" between the costs of restricting gun ownership and improper gun use); Caitlin M. Johnson, *Raising the Red Flag: Examining the Constitutionality of Extreme Risk Laws*, 2021 U. ILL. L. REV. 1515, 1531–32 (2021) (asserting "the collective rights of the public still outweigh the rights of the individual within his or her home"). These authors' reliance on a public safety rationale is in tension with *Heller* and *Bruen*.

[104] 554 U.S. 570, 634 (2008).

> The right to keep and bear arms, however, is not the only constitutional right that has controversial public safety implications. . . . Municipal respondents cite no case in which we have refrained from holding that a provision of the Bill of Rights is binding on the States on the ground that the right at issue has disputed public safety implications.[105]

Additionally, in *Bruen*, the Court rejects New York's attempt to posture the issue as involving a balancing of public safety concerns—a balancing whose outcome, if relevant, New York's briefing asserted the petitioners conceded.[106] New York articulated the following, unsuccessful argument:

> *Kachalsky* examined the "studies and data" New York introduced there, which "demonstrat[ed] that widespread access to handguns in public increases the likelihood that felonies will result in death and fundamentally alters the safety and character of public spaces."
>
> Research from before and after *Kachalsky* shows that jurisdictions that restrict public carry experience lower rates of gun-related homicides and other violent crimes than those that do not . . . .
>
> Petitioners do not address, much less attempt to refute, any of this research.[107]

The *Bruen* Court, however, rejects the validity of that characterization of the relevant issue. It quotes in part the above-quoted statement in *McDonald*[108] and notes, "Put simply, there is no historical basis for New York to effectively declare the island of Manhattan a 'sensitive place' simply because it is crowded and protected generally by the New York City Police Department."[109]

More generally, our Bill of Rights reflects the conclusion that there are some civil rights that must be preserved, even though their preservation decreases public safety or inhibits law enforcement. Maintaining a society not dominated by the intrusions of a police state necessitates their preservation.[110] By way of example, then-Judge

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[105] 561 U.S. 742, 783 (2010).

[106] N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2133–34 (2022).

[107] Brief for Respondents at 43–44, *Bruen,* 142 S. Ct. 2111 (No. 20-843) (alteration in original) (quoting Kachalsky v. Cnty. of Westchester, 701 F.3d 81, 99 (2d Cir. 2012), *abrogated by Bruen*, 142 S. Ct. 2111).

[108] *Bruen*, 142 S. Ct. at 2026 n.3 ("'The right to keep and bear arms . . . is not the only constitutional right that has controversial public safety implications.'" (alteration in original) (quoting *McDonald*, 561 U.S. at 783)).

[109] *Bruen*, 142 S. Ct. at 2134.

[110] By way of example, Justice Brandeis, supporting an exclusionary rule, famously dissented:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and

McConnell wrote: "Even people with prior convictions retain Fourth Amendment rights; they are not roving targets for warrantless searches."[111] One should think society would be manifestly less dangerous were any prior criminal conviction to result in permanent, complete forfeiture of freedom from unreasonable governmental searches.

A second illustration is the invalidation of former-Mayor Bloomberg's now-rejected approach to widespread frisking of individuals in certain locales.[112] Mayor Bloomberg touted the benefits of the now-rejected approach in these words: "There is no doubt that stops are a vitally important reason why so many fewer gun murders happen in New York than in other major cities—and why we are the safest big city in America."[113] Yet that alleged safety rationale does not validate the abrogation of a constitutionally-enumerated civil right.[114]

> satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect, that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.

Olmstead v. United States, 277 U.S. 438, 478–79 (1928) (Brandeis, J., dissenting), *overruled by* Katz v. United States, 389 U.S. 347 (1967).

To go back to the Founding Era, John Adams opined that "American independence was . . . born" with a famous speech of James Otis railing against the legality of writs of assistance. 2 JOHN STETSON BARRY, THE HISTORY OF MASSACHUSETTS 263, 266 (1856).

[111] United States v. Santos, 403 F.3d 1120, 1132 (10th Cir. 2005).

[112] *See* Floyd v. City of New York, 770 F.3d 1051, 1054 (2d Cir. 2014) (per curiam) (chronicling the elimination of New York City's discriminatory "stop-and-frisk" policy through the City's adoption of Judge Sheindlin's remedial order).

And we know that governmental tailoring of restrictions on firearms rights will also produce dubious distinctions; it already does. Felonies that do not give rise to a federal firearms prohibition include "Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices." 18 U.S.C. § 921(a)(20)(A). Federal law allows certain business criminals to keep their firearms, but not so for the less-well-heeled criminals. The history foreshadows problematic variations in the application of federally funded red flag laws.

[113] Michael Bloomberg, Mayor of N.Y.C., Address on Public Safety to NYPD Leadership (Apr. 30, 2013), https://www1.nyc.gov/office-of-the-mayor/news/151-13/mayor-bloomberg-delivers-address-public-safety-nypd-leadership.

[114] One supposes that then-Mayor Bloomberg did not advance public support for the procedure with the words, "'I think we disproportionately stop whites too much and minorities too little. It's exactly the reverse of what they say,' Bloomberg said on his weekly radio show, in response to the City Council passing two bills aimed at reining in the controversial policing tactic." Yoav Gonen, *Bloomberg: 'We Disproportionately Stop Whites Too Much and Minorities Too Little' in Stop-Frisk Checks*, N.Y. POST (June 28, 2013), https://nypost.com/2013/06/28/bloomberg-we-disproportionately-stop-whites-too-much-and-minorities-too-little-in-stop-frisk-checks/.

1. Prior Work by Kopel, Moody and Nemerov

In a 2008 article, David Kopel, Carlisle Moody, and Howard Nemerov illuminate statistical relationships between measures of freedom and firearm ownership.[115] The measures of freedom they used were:

- An annual rating provided by Freedom House (in which a lower figure is better);[116]
- An annual Corruption Perceptions Index published by Transparency International (in which a higher figure is better);[117]and
- An Index of Economic Freedom published by Heritage Foundation (in which a higher figure is better).[118]

Data for civilian firearms per capita were taken by Kopel, Moody, and Nemerov from the then-current edition of the Small Arms Survey.[119]

At that time, per capita firearms ownership data were available for only fifty-nine countries.[120] On dividing their data set of countries into quartiles, based on per capita civilian firearms ownership, they find countries in the quartile with the highest per capita firearm ownership have the best average measures of freedom.[121] However, for each of their measures, the relationship was not monotonically increasing or monotonically decreasing among the quartiles.[122]

They also report results of regressions estimating the relationship between measures of freedom (some rescaled so that higher values are better for each), as the dependent variables, and reported civilian firearms ownership as, apparently, the only independent variable.[123] They find a positive relationship.[124]

Availability of a larger data set and additional variables allows a more nuanced assessment of the nature of the relationships.[125] That is presented below.

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[115] David Kopel et al., *Is There a Relationship Between Guns and Freedom? Comparative Results from Fifty-Nine Nations*, 13 TEX. REV. L. & POL. 1, 3 (2008).

[116] *Id.* at 3–4.

[117] *Id.* at 3, 5.

[118] *Id.* at 3, 6.

[119] *Id.* at 3, 9 n.52, 10.

[120] *Id.* at 3.

[121] *Id.* at 17–18.

[122] *Id.* at 17. A "monotonic" relationship is one "having the property either of never increasing or of never decreasing as the values of the independent variable or the subscripts of the terms increase." *Monotonic*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/monotonically.

[123] *See* Kopel et al., *supra* note 115, at 7–8, 22, 23 (comparing gun ownership to Freedom from Corruption, Economic Freedom, and Economic Success as measured by World Bank's Purchasing Power Parity ("PPP") rather than the Freedom House rating).

[124] *Id.* at 22–23.

[125] *See infra* note 129.

2. This Essay's Contribution to the Empirical Literature

The article by Kopel, Moody, and Nemerov appears to not have gained traction in law review literature. A Westlaw search reveals four citations to it.[126] Only four articles in the "Secondary Sources" database in Westlaw reference Transparency's Corruption Perceptions Index and the phrase "second amendment", the Kopel, Moody and Nemerov article being the only one referencing firearms or guns.[127]

The currently available data allow for a richer and more compelling analysis. Data for civilian firearms ownership are now available for more countries, allowing for a more powerful analysis.[128] Additionally, this Essay incorporates other statistical information and brings to bear more sophisticated empirical techniques that become practicable because additional statistical information is available.

In particular, the larger sample size makes it practicable to control for regional variations, which allows for a more precise estimation.[129] Additionally, the currently available data allow an investigator to control for a country's rate of serious crime and the extent of law enforcement firearms possession in that country.

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[126] Westlaw search: adv: (kopel +20 "guns #and freedom") (last visited Nov. 4, 2022). The results are David B. Kopel, *The Right to Arms in the Living Constitution*, 2010 CARDOZO L. REV. DE NOVO 99 (2010); Christopher N.J. Roberts, *Standing Our Legal Ground: Reclaiming the Duties Within Second Amendment Rights Cases*, 47 ARIZ. ST. L.J. 235 (2015); John O. McGinnis, *Gun Rights Delayed Can Be Gun Rights Denied*, 2020 U. ILL. L. REV. ONLINE 302 (2020); and Philip M. Nichols, *The Psychic Costs of Violating Corruption Laws*, 45 VAND. J. TRANSNAT'L L. 145 (2012).

[127] Westlaw search: adv: (transparency /15 ("corruption perceptions" or cpi)) & "second amendment" (last visited Feb. 19, 2023) (identifying nine articles, including Kopel, et al., *supra* note 115); Westlaw search: adv: (transparency /15 ("corruption perceptions" or cpi)) & "second amendment" & (firearm or gun or pistol or rifle) (last visited Feb. 19, 2023) (identifying only one article, Kopel et al., *supra* note 115).

[128] *Compare Civilian Firearms Holdings, 2017*, SMALL ARMS SURVEY https://www.smallarmssurvey.org/sites/default/files/resources/SAS-BP-Civilian-held-firearms-annexe.pdf (last visited Nov. 23, 2022) (showing data for 230 countries and regions), *with* Kopel et al., *supra* note 115, at 9–10 (discussing an older version of the Small Arms Survey containing only fifty-six countries).

[129] The intuition that increasing the size of a sample can assist in identifying relationships may be illuminated by a simple illustration. If one wishes to assess whether a coin has been tampered-with to increase the likelihood that, when flipped, it comes-up heads, flipping the coin once is unlikely to reveal much of interest. But, if one flips it many times and it keeps coming-up heads, one will be increasingly convinced by the observations. *See generally* JEFFREY M. WOOLDRIDGE, INTRODUCTORY ECONOMETRICS: A MODERN APPROACH 648 (2d ed. 2003) (discussing the benefits of having a "richer" data set, stating "[E]conomists have been interested in whether taxes on cigarettes and alcohol reduce consumption . . . . As more years of data at the state level become available, a richer panel data set can be created, and this can help us better answer major policy questions."); *id.* at 649 ("Deciding on which kind of data to collect often depends on the nature of the analysis. . . . [W]e must ask whether we can obtain a rich enough data set to do a convincing ceteris paribus analysis.").

Lastly, as noted below, renowned scholar Gary Kleck has identified some concerns with the manner in which the Small Arms Survey compiles civilian firearms ownership information.[130] The problems appear to be particularly acute as to unregistered civilian firearms ownership.[131] He has recommended an alternative statistic that may be used to assess relative civilian firearms ownership: the fraction of suicides committed with firearms.[132] The investigation reported in this Essay uses that information as an alternative. Application of Gary Kleck's insight also allows one to consider alternative empirical techniques that may address bias introduced by adjustments made in the preparation of the reported Small Arms Survey data.

In sum, the analysis allowed by this additional data reveals compelling evidence of a positive relationship between civilian firearms possession and indicators of levels of freedom in a country.

III. DATA

The indices of freedom used in this Essay are:

- the Corruption Perceptions Index 2021, the most recent scores available in June 2022, published by Transparency International (one of the indices of freedom used by Kopel, Moody, and Nemerov);[133] and
- selected 2022 component scores published by The Heritage Foundation as part of its series on the Index of Economic Freedom—in particular, its Judicial Effectiveness[134] and Government Integrity[135] scores.[136]

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[130] *See* Kleck, *supra* note 13, at 7–8 (identifying fundamental problems with the process and measurements of the Small Arms Survey, such as its difficulty of replication).

[131] *See id.* at 2 (emphasizing the Small Arms Survey's estimate of unregistered civilian firearm possession equaling a dubious multiple of the registered possession figures).

[132] *Id.* at 10–11.

[133] *Corruption Perceptions Index 2021*, TRANSPARENCY INT'L, https://www.transparency.org/en/cpi/2021 (last visited Oct. 17, 2022); *see* Kopel et al., *supra* note 115, at 5.

[134] This index "is derived by averaging scores for the following three sub-factors, all of which are weighted equally:

- Judicial independence,
- Quality of the judicial process, and
- Perceptions of the quality of public services and the independence of the civil service."

TERRY MILLER ET AL., HERITAGE FOUND., 2022 INDEX OF ECONOMIC FREEDOM 456 (2022), https://www.heritage.org/index/pdf/2022/book/02_2022_IndexOfEconomicFreedom_METHODOLOGY.pdf.

[135] This variable "is derived by averaging scores for the following three sub-factors, all of which are weighted equally:

- Perceptions of corruption,
- Risk of bribery, and
- Control of corruption including 'capture' of the state by elites and private interests."

Id.

[136] *Id.* at 5–9.

As to the first-listed index, Philip Nichols has noted "legal scholars have comprehensively embraced the Corruption Perceptions Index."[137]

Firearms ownership information is taken from the Small Arms Survey as of the most recent year currently available, 2017.[138] The fraction of suicides where a firearm was an instrumentality are computed from the data reported by the Institute for Health Metrics and Evaluation ("IHME") for 2017.[139] The rates of selected serious crime, with one exception, represent the sum of the rates for serious assault, rape and robbery, as reported for 2017 by the United Nations Office on Drugs and Crime ("UNODC").[140] However, that source does not report information for China. The large population there commended the jurisdiction not be omitted, if feasible. Corresponding numbers for 2019 (the closest available year) for assault, rape, and robbery in China were taken from another source.[141] The geographic regions were taken from the Small Arms Survey.[142]

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[137] Nichols, *supra* note 126, at 201.

[138] *Civilian Firearms Holdings, 2017*, *supra* note 128; *Law Enforcement Firearms Holdings, 2017*, SMALL ARMS SURVEY (Mar. 29. 2020), https://www.smallarmssurvey.org/sites/default/files/resources/SAS-BP-Law-enforcement-firearms-annexe.pdf.

[139] *2019 Global Burden of Disease*, INST. FOR HEALTH METRICS & EVALUATION (2019) https://vizhub.healthdata.org/gbd-results/ (change the native search query by deleting the "Cause" search terms and typing in "firearm"; then from the dropdown, list check the box for "Self-harm by firearm"; and in the "Location" search box, select all countries and major regions (Africa, America, Asia, Europe, Oceania); then in the "Year" search box delete the native "2019" search term and scroll to click on the year "2017"; after clicking on "Search" both a Chart and Table reference will be available to see the specific data).

[140] *Violent & Sexual Crime*, U.N. OFF. DRUGS & CRIME, https://dataunodc.un.org/dp-crime-violent-offences (last visited June 22, 2022) (select the categories for "Robbery," "Serious Assault," and "Sexual Violence: Rape" and adjust the year slider to be for only "2017").

[141] China's rates were computed by taking the number of assaults, rapes, and robberies reported in *Statista* and comparing those numbers to China's 2019 population (1,407,745,000) as reported by The World Bank; 2019 was used as the UNODC did not report data for 2017—having a gap from 2016 through 2018 in its data. C. Textor, *Number of Assault, Rape, and Murder Cases Recorded in China from 2010 to 2020*, STATISTA (Nov. 29, 2021), https://www.statista.com/statistics/1248115/number-of-assault-rape-murder-crimes-in-china/ (subscription required to access data); C. Textor, *Number of Theft, Fraud, and Robbery Cases Recorded in China from 2010 to 2020 (in 1,000s)*, STATISTA (Nov. 29, 2021), https://www.statista.com/statistics/1248100/number-of-theft-fraud-robbery-crimes-in-china/ (subscription required to access data); *Population, Total – China*, WORLD BANK (2019), https://data.worldbank.org/indicator/SP.POP.TOTL?end=2021&locations=CN&most_recent_year_desc=false&start=2018 (showing China's population from 2018 to the most current year available).

[142] *See, e.g.*, *Civilian Firearms Holdings, 2017*, *supra* note 128 (listing major geographical regions—consisting of Asia, Europe, Africa, Oceania, and Americas—for each country included).

Summary statistics for the data are reported in Table 1, below.[143] The data in the table are divided into two parts. On the left are statistics for all countries used in any empirical analysis. On the right are statistics for countries used in the expanded analysis—one using more control variables. The available sample size decreases for that subsample, because the various supplemental sources omit information for some countries. The primary reason for omission of countries from the subsample is the failure of the United Nations to report the data for the referenced crimes. That is available for less than half of the countries in the full sample (86 out of 186).

However, the two samples—(i) the full sample and (ii) the subsample of countries where statistics for the enhanced analysis provided in this Essay are available—are relatively similar. The primary exception involves the regions of the included countries. The latter subsample omits countries from Oceania, which represent only a handful of observations in the full sample for substantially all of which the additional data are not available. Although countries from Africa represent twenty-nine percent of the full sample, they represent only four percent of the subsample.

There is a higher rate of average civilian firearms ownership in the subsample. That is not a concern for our purposes. Our investigation is designed to address the relationship between freedom and civilian firearms ownership, as applied to the United States. The United States is at the top along that dimension. A disproportionate filtering arising from limited data availability is of diminished concern where the limit disproportionately excludes observations most dissimilar to the observation of interest, the United States.

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[143] *See infra* Table 1. There were some inconsistencies in the way in which information was presented as to countries among the various databases. For example, some have combined data for the United Kingdom while others have separate data for Northern Ireland, Scotland, and England and Wales. *Compare Corruption Perceptions Index 2021*, *supra* note 133 (listing one score for the United Kingdom as a whole), *with Violent & Sexual Crime*, *supra* note 140 (listing a separate score for each country in the United Kingdom). And some countries were dropped as a result of inconsistency in naming that gave rise to uncertainty; for example, Northern Cyprus was separately identified in some databases but not others. *Compare Civilian Firearms Holdings, 2017*, *supra* note 128 (listing both "Cyprus, North" and "Cyprus, Rep. of"), *with Corruption Perceptions Index 2021*, *supra* note 133 (listing one score for Cyprus generally).

Table 1: Summary Statistics

	All Observations				Observations Used in Any Estimation Reported in Table 4			
	Mean	Min.	Max.	N	Mean	Min.	Max.	N.
Firearms civilian per cap (x 100)	9.72	0.00	120.50	186	14.19	0.00	120.50	75
Firearms civilian registered per cap (x 100)	4.45	0.00	27.84	122	5.80	0.01	27.84	75
Firearms civilian unregistered per cap (x 100)	7.01	0.02	120.15	122	8.40	0.02	120.15	75
Law enforcement firearms per cap (x 100)	0.46	0.01	3.56	184	0.59	0.06	1.74	75
Fraction of suicides where gun instrumentality (2017)	0.070	0.002	0.512	182	0.088	0.003	0.512	75
Heritage Judicial Effectiveness	50.31	3.90	98.00	176	63.05	11.80	98.00	75
Heritage Government Integrity	45.42	3.77	99.46	176	55.17	18.95	99.46	75
Transparency Corruption Perceptions Index	43.27	11.00	88.00	180	51.54	20.00	88.00	74
Rate of selected serious crime (x 100,000)	224.3	2.08	1254.4	86	231.3	9.25	1254.4	75
Africa	0.29	0.00	1.00	186	0.04	0.00	1.00	75
Americas	0.18	0.00	1.00	186	0.31	0.00	1.00	75
Asia	0.26	0.00	1.00	186	0.16	0.00	1.00	75
Europe	0.22	0.00	1.00	186	0.49	0.00	1.00	75
Oceania	0.05	0.00	1.00	186	0.00	0.00	0.00	75

Gary Kleck criticizes use of the Small Arms Survey data.[144] The Small Arms Survey attempts to capture both registered and unregistered firearms.[145] Gary Kleck notes that data compilation for some countries involves taking reported numbers of registered firearms and multiplying them by a factor that is the same for the covered countries,[146] and Gary Kleck further reports that "staff state that estimates for some nations

[144] Kleck, *supra* note 13, at 1.

[145] *Civilian Firearms Survey, 2017, supra* note 128.

[146] *See* Kleck, *supra* note 13, at 2 (noting a multiplication factor of 3.6 to estimate the total number of civilian-owned firearms "[f]or the minority of nations for which national governmental counts of registered guns are available").

'have been adjusted.'"[147] To presume the ratio of registered to unregistered firearms is consistent across countries is unfounded.[148]

The data for some countries are based on surveys.[149] However, Gary Kleck identifies a variety of ways in which the compilation of the survey information is problematic.[150] He notes, "Since most surveys do not ask how many guns were owned by each household or person, SAS staff arbitrarily assume that each gun-owning household contains exactly 1.5 guns . . . ."[151] He recommends consideration of the "percent of suicides committed with guns" as a proxy for relative civilian firearms ownership.[152] That percentage (restated as a fraction of one, i.e., percentage divided by 100), reported for 2017, is included in the summary statistics table (Table 1). The availability of this proxy statistic also allows for implementation of models that may mitigate concerns arising from undisclosed adjustments in the Small Arms Survey data.

IV. RESULTS AND ANALYSIS

A. A Simple Comparison of Quartiles

As an initial step, we examine whether a basic relationship reported by Kopel, Moody, and Nemerov still obtains: a generally increasing freedom associated with increased quartile of civilian firearms ownership. They found such a relationship, although it was not monotonically increasing. The relationship is monotonically increasing for two of the three freedom statistics: the Heritage Judicial Effectiveness and Heritage Government Integrity scores.

As to the third freedom statistic, Transparency's Corruption Perceptions Index, the middle two quartiles are very close to each other (40.841 and 41.511), albeit in an order reversed from the expectation. The variation between the means of the middle two quartiles—one being 98.4% of the other (40.841 is 98.4% of 41.511)—is smaller than that found by Kopel, Moody, and Nemerov (91.6%).[153]

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147 *Id.*

148 *Id.* at 3. Kleck also notes, "SAS staff also arbitrarily drop some registration figures based on their subjective judgment that they 'appeared suspiciously low.'" *Id.*

149 *Id.*

150 *See, e.g.*, *id.* at 4 (describing the surveys for half the countries covered by surveys as "necessarily a hodge-podge of mostly one-time surveys that were not standardized across countries," and stating the authors "do not claim that all surveys covered guns kept in vehicles, garages, sheds or other locations outside the home").

151 *Id.* at 3–4.

152 *Id.* at 8, 10–11.

153 The Corruption Perceptions Index for the year reported by Kopel, Moody, and Nemerov is on a different scale (0 to 10). *See* Kopel et al., *supra* note 115, at 17. And Kopel, Moody, and Nemerov report the quartiles in the opposite order—quartile 1 is the highest firearms ownership, as opposed to this Essay, which uses the default convention reported by

In sum, with a larger data set, the relationships revealed in the summary statistics become more clearly revealed. Greater civilian firearms ownership is more clearly linked to greater measures of freedom.

Table 2: Average Freedom Statistics Partitioned by Quartile of per Capita Civilian Firearms Ownership

	Firearms civilian per cap (x 100)	Heritage Judicial Effectiveness	Heritage Government Integrity	Transparency Corruption Perceptions Index
1	0.860	38.277	36.234	36.422
	48	48	48	45
2	3.529	43.240	40.170	41.511
	45	42	42	45
3	9.534	56.633	46.493	40.841
	47	42	42	44
4	25.207	64.145	59.439	54.000
	46	44	44	46
Total	9.719	50.309	45.423	43.267
	186	176	176	180

Note—Assorted mean freedom statistics partitioned by quartile, within the observations used, of Small Arms Survey civilian firearms ownership figures. Second column shows mean *civilian firearms per cap (x 100)* for the quartile. Number of country observations below the mean of the country statistic for each quartile. Each freedom statistic is defined so that a higher score is better (indicates more freedom).

B. Ordinary Least Squares Regressions

Our next step in confirming that this relationship still exists between freedom and civilian firearms ownership, as identified by Kopel, Moody, and Nemerov, involves identifying that basic relationship between civilian firearms ownership and measures of freedom—as they apparently did, without accounting for other variables.[154] That is presented in Table 3, Panel A, models 1, 3 and 5. Each shows there is a positive relationship between civilian firearms ownership and measure of freedom, that is

the Stata software used. In any case, the corresponding figures reported by Kopel, Moody and Nemerov are 4.75 for next-to lowest firearms ownership quartile, and 4.35 for the next-to-highest firearms ownership quartile. *Id.* (discussing quartile statistics of firearm ownership compared to liberty indices).

[154] *See* Kopel et al., *supra* note 115, at 22–23 (charting a relationship between firearm ownership and indices of freedom). *See generally id.* (limiting their analysis, of the smaller data set then available, to firearm ownership and the indices of freedom in their analysis).

statistically significant at the one percent level, a level that is sometimes summarily referenced as indicating a result is "highly significant."[155]

These simple models show that the per capital civilian firearms ownership on its own accounts for between eight and thirteen percent of the variation in freedom among the countries (R^2 ranging from 0.078 to 0.130).

Our first extension of the results found by Kopel, Moody, and Nemerov involves consideration of the alternative proxy for relative civilian firearms ownership suggested by Gary Kleck: the fraction of suicides where a firearm is the instrumentality.[156] In this simple regression, omitting other variables, there is a positive relationship between that proxy for relative civilian firearms ownership and freedom, which is statistically significant at the customarily employed five-percent confidence cut-off level as to one of the three measures of freedom: Judicial Effectiveness. It is statistically significant at the ten-percent level for the Government Integrity measure of freedom. So, one can reject the hypothesis that civilian firearms ownership is wholly unrelated to this

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[155] A result that is statistically significant at the one percent level is often described as "highly significant," as the concluding remarks of this footnote show.

Although it is not typical to include, in an essay reporting the results of regressions, background information as to foundational principles concerning the meaning of assorted statistical terms, the author has been advised that inclusion of such information is desirable. Hence, the author notes the following which is relevant to understanding the results of the statistical investigations reported in this Essay.

A treatise states as to the meaning of a "null" hypothesis, significance levels and *p*-values:

> Tests of significance are generally designed to test the "null hypothesis." The null hypothesis might be that a coin is "fair" or that substance A does not cause illness B. The question addressed by tests of significance is: What must the results of a study look like before we are willing to reject the null hypothesis? A *p*-value represents the probability that a positive association would result from random variation if no association is in fact present, that is, if the null hypothesis is true. A *p*-value of .05 may be interpreted as a 5 percent probability of observing an association at least as large as that found in the study when in truth the null hypothesis of no association is correct.
>
> A test employing a .05 significance level does not mean that when we observe a significant result the null hypothesis has a 95 percent chance of being false. Rather, it means that if the null hypothesis is correct there was less than a 5 percent chance of generating this data.

1 DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY § 2:5 n.6 (2022–2023 ed.).

That treatise elsewhere notes:

> In practice, statistical analysts often use certain preset significance levels—typically 5% or 1%. The 5% level is the most common in social science, and an analyst who speaks of "significant" results without specifying the threshold probably is using this figure. An unexplained reference to "highly significant" results probably means that *p* is less than 1%.

Id. § 5:36 (footnotes omitted).

[156] Kleck, *supra* note 13, at 9–11.

proxy for civilian firearms ownership. However, use of this proxy results in a significantly diminished predictive power for the model. Only one percent to four percent of the variation in the freedom index is accounted for by this proxy.

Table 3: OLS Regressions; Freedom Indices as Dependent Variable

Panel A: Full Data Set

	(1)	(2)	(3)	(4)	(5)	(6)
	Transparency CPI		Government Integrity		Judicial Effectiveness	
Firearms civilian	0.410***		0.640***		0.720***	
per cap (x 100)	(3.039)		(3.236)		(2.941)	
Frac. suicides w/ gun instrumentality (2017)		33.06		51.58*		88.13**
		(1.454)		(1.882)		(2.545)
Constant	39.22***	41.00***	39.36***	41.87***	43.50***	44.27***
	(23.69)	(20.59)	(17.89)	(17.61)	(15.75)	(14.86)
Observations	180	176	176	175	176	175
R-squared	0.078	0.013	0.130	0.022	0.112	0.043

Note—Ordinary least squares regressions, where the dependent variable is a country's freedom index (Transparency International's Corruption Perceptions Index, and The Heritage Foundation's Judicial Effectiveness and Government Integrity scores). Higher scores for each are better. Robust *t*-statistics in parentheses below coefficient estimates. Significance at the 1%, 5% and 10% levels shown by ***, ** and *, respectively.

Panel B: OLS Regressions with Additional Independent Variables

	(7)	(8)	(9)
	Transp. CPI	Gvt. Integ.	Jud. Effect.
Law enforcement firearms per cap	-10.67**	-12.77**	-8.752
(x 100)	(-2.163)	(-2.203)	(-1.020)
Rate of selected serious crime (x	0.0238***	0.0285***	0.0292***
100,000)	(3.714)	(4.211)	(3.798)
Firearms civilian registered per cap	0.792***	0.928***	1.356***
(x 100)	(2.718)	(2.653)	(3.498)
Africa	-29.05***	-34.24***	-28.95***
	(-7.057)	(-6.679)	(-4.386)
Americas	-23.18***	-27.41***	-20.38***
	(-4.889)	(-5.235)	(-3.116)
Asia	-11.40*	-13.52*	-19.99**
	(-1.986)	(-1.991)	(-2.436)
Constant	57.62***	62.62***	64.18***
	(10.57)	(9.810)	(7.927)
Observations	74	75	75
R-squared	0.407	0.417	0.428

Note—Ordinary least squares regressions, where the dependent variable is a country's freedom index (Transparency International's Corruption Perceptions Index, and The Heritage Foundation's Judicial Effectiveness and Government Integrity scores). Higher scores for each are better. In these models, countries in Oceania are omitted, in light of their infrequency in the sample. Robust *t*-statistics in parentheses below coefficient estimates. Significance at the 1%, 5% and 10% levels shown by ***, ** and *, respectively.

The first primary extension made in this Essay's investigation allows examination of whether other explanatory factors account for the variation between freedom statistics and civilian firearms ownership. The initial approach to that is included in Table 3, Panel B. With the larger data set, one can control for the geographic region of the country, the rate of selected serious crimes, and the number of firearms possessed by the country's law enforcement, expressed per capita of the general population (x 100), i.e., the per capita computation does not reflect the number of law enforcement firearms per law enforcement officer. In these estimations, civilian firearms ownership is limited to the apparently more reliably

reported registered firearms. In these models, countries in Oceania are omitted, in light of their infrequency in the sample.

Controlling for these additional factors, the relationship between the more reliably reported civilian firearms ownership (the registered firearms) and each statistic representing country freedom remains positive and statistically significant at the one-percent confidence level (a level much more demanding than the customary five-percent level for identifying statistically significant relationships).[157]

The results also show a statistically significant relationship between the rate of selected serious crime and freedom. The relationship is positive—higher serious crime rates are associated with greater freedom. Indeed, there are reasons to expect there might be such a positive relationship. As noted above, the American tradition, memorialized in the Bill of Rights, involves identifying certain actions that government cannot take that, although potentially increasing public safety, are off-limits as improperly infringing on the core components of a free society.

The United States is atypical in its extent of civilian firearms ownership—a distinction that was conceptualized at the Founding as a desirable feature.[158] In unreported results, the models were re-estimated excluding the United States. The relationship between *firearms civilian registered per cap (x 100)* and each dependent variable remains statistically significant at the one-percent level.[159]

The estimations show that the independent variables account for a healthy portion of the variation in freedom among the countries. In each model, this handful of variables accounts for forty percent or more of the variation in the freedom index (R^2 ranging from 0.407 to 0.428).[160]

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[157] *See supra* Table 3: Panel B.

[158] As eminent litigator Stephen Halbrook, the author of the leading treatise on firearms law, *see* STEPHEN P. HALBROOK, FIREARMS LAW DESKBOOK 1 (2022–2023 ed.) [hereinafter, HALBROOK, FIREARMS DESKBOOK], has noted:

> When independence was won and the federal Constitution was proposed, James Madison heralded that Americans possess an "advantage of being armed . . . over the people of almost every other nation," adding: "Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms."

Stephen P. Halbrook, *Virginia's Second Amendment Sanctuaries: Do They Have Legal Effect?*, 33 REGENT U. L. REV. 277, 300 (2021) (footnote omitted) (first quoting THE FEDERALIST NO. 46 (James Madison); and then quoting *id.*).

[159] Royce Barondes, Table 3: Panel B Data Calculations (on file with Regent Law Review) (displaying coefficients for registered firearm possession of 0.830, 0.975, and 1.392 for the OLS regressions for CPI, Government Integrity, and Judicial Effectiveness, respectively, with *p*-values of 0.6%, 0.6%, and 0.1%, respectively).

[160] *See supra* Table 3: Panel B.

C. Two-Stage Least Squares Regressions

These results reported in Section IV.B rely on a measure of firearms ownership that is adjusted, prior to reporting, in ways that are not fully transparent. If those adjustments are related to perceptions of freedom in the country, the assumptions underlying an ordinary least squares model—the type of model reported in Part IV.B—are not present.

An alternative technique, which may attenuate the impact of the hidden adjustments, was also used: a two-stage least squares model. In this approach, a country's registered civilian firearms ownership is (in the first stage) estimated based on the fraction of its suicides that are committed using a firearm (and other controlling variables). In this technique, one then computes the relationship between that estimate, consisting of a combination of variables that are not directly adjusted by the authors of the Small Arms Survey, and indices of freedom.[161]

In particular, we model the relationship in two steps. First, we predict *firearms civilian registered per cap (x 100)* given the variables: *fraction of suicides where gun instrumentality (2017)* and dummy variables identifying the region, Africa, Americas, and Asia. Europe is omitted, because that is the held-out or comparison case. That is, we estimate:

> $$\textit{firearms civilian registered per cap (x 100)} = \alpha + \beta_1 \textit{ fraction of suicides where gun instrumentality (2017)} + \beta_2 \textit{ Africa} + \beta_3 \textit{ Americas} + \beta_4 \textit{ Asia} + \textit{random error}$$

This produces an estimate for registered civilian firearms ownership in which the impact of adjustments made by the authors of the Small Arms Survey is attenuated. Let us say, for example, that the Small Arms Survey authors made an adjustment for the firearms figures for one country: let's call it Country X. That adjustment made by the survey authors for a single country typically would have a minor impact on the predicted values for Country X.[162] It would simply result in a slight adjustment of the

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[161] *See generally* THOMAS H. WONNACOTT & RONALD J. WONNACOTT, INTRODUCTORY STATISTICS FOR BUSINESS AND ECONOMICS 731–33 (4th ed. 1990) (discussing the two stage least squares technique).

[162] In some circumstances, however, an individual observation may be particularly influential in determining the estimated relationship. One procedure for identifying those highly influential observation involves computing the Cook's distance. *See* StataCorp LLC, Regress Postestimation, at 11, https://www.stata.com/manuals/rregresspostestimation.pdf (last visited Feb. 15, 2023). "[V]alues of Cook's distance greater than $4/n$ should also be examined." *Id.* For a sample size of 75, the referenced value is 0.053. Re-estimating Models 10 through 12, omitting observations with a Cook's distance greater than or equal to 0.05 in the first stage, yields estimations in which *fraction of suicides where gun instrumentality (2017)* remains statistically significant at the one percent level. Royce Barondes, Table 4: Panel A Data Calculations (on file with Regent Law Review) (running regressions duplicating the estimations reproduced in Table 4, Panel A, but omitting observations with, in the first stage, a Cook's distance greater than or equal to 0.05).

weighting applied to the variables not generated by the authors of the Small Arms Survey—the continent of the country and the fraction of suicides where a firearm was the instrumentality.

The predicted values from this estimation are then used as one of the independent variables in estimating the variable of interest—the freedom index:

> *freedom index = $\alpha + \beta_1$ predicted firearms civilian registered per cap (x 100) + β_2 law enforcement firearms per cap (x 100) + β_3 rate of selected serious crime (x 100,000) + random error*

The results of estimating the ultimate models of interest (the second step models) are shown in Table 4, Panel A. Although the statistical software package used, Stata 15, does not automatically report the results of the first step, those were separately estimated to report in Panel B, models 13 through 15.

Table 4: Two-Stage Least Squares Regression
Panel A: The Final Regressions Estimating Level of Freedom

	(10)	(11)	(12)
	Transp. CPI	Gvt. Integ.	Jud. Effect
Predicted firearms civilian registered	2.833***	3.424***	3.848***
per cap (x 100)	(4.386)	(4.518)	(4.939)
Law enforcement firearms	-6.181	-7.586	-3.488
per cap (x 100)	(-0.985)	(-1.026)	(-0.459)
Rate of selected serious crime	0.0115	0.0140	0.0232**
(x 100,000)	(1.525)	(1.577)	(2.537)
Constant	35.98***	36.51***	37.42***
	(6.260)	(5.416)	(5.399)
Observations	74	75	75
R-squared			0.074
Wald chi-squared	19.94	21.15	27.52
p-value	0.0002	0.0001	0.0000

Note—First-stage estimates the variable *predicted firearms civilian per cap (x 100)* (the dependent variable in the first stage), using independent variables *fraction of suicides where gun instrumentality (2017)*, *Africa*, *Americas* and *Asia* (Europe being held-out). The *z*-statistics in parentheses are below the coefficient estimates. Significance at the 1%, 5% and 10% levels shown by ***, ** and *, respectively.

Panel B: Regressions Estimating the Instrumental Variable: Dependent variable is *firearms civilian registered per cap (x 100)*

	(13)	(14)	(15)	(16)	(17)	(18)
Frac. suicides w/ gun	29.43***	29.44***	29.44***	29.39***	29.40***	29.40***
instrumentality (2017)	(3.368)	(3.394)	(3.394)	(3.337)	(3.363)	(3.363)
Africa	-5.863*	-5.862*	-5.862*	-5.904*	-5.905*	-5.905*
	(-1.764)	(-1.776)	(-1.776)	(-1.754)	(-1.767)	(-1.767)
Americas	-6.178***	-6.190***	-6.190***	-6.295***	-6.308***	-6.308***
	(-4.074)	(-4.169)	(-4.169)	(-3.481)	(-3.569)	(-3.569)
Asia	-4.633**	-4.632**	-4.632**	-4.605**	-4.604**	-4.604**
	(-2.446)	(-2.464)	(-2.464)	(-2.397)	(-2.414)	(-2.414)
Rate selected serious				0.000322	0.000329	0.000329
crime (x 100,000)				(0.121)	(0.125)	(0.125)
Constant	6.086***	6.085***	6.085***	6.048***	6.046***	6.046***
	(5.133)	(5.170)	(5.170)	(4.892)	(4.929)	(4.929)
Observations	74	75	75	74	75	75
R-squared	0.311	0.313	0.313	0.311	0.313	0.313

Note—Ordinary least squares regressions, where the dependent variable is a country's *firearms civilian registered per cap (x 100)*. In these models, countries in Oceania are omitted, in light of their infrequency in the sample. The *t*-statistics in parentheses are below the coefficient estimates. Significance at the 1%, 5% and 10% levels is shown by ***, ** and *, respectively.

Using this alternative technique, the *predicted firearms civilian registered per capita (x 100)* remains positively associated with each freedom index, statistically significant at the one-percent level. Such a positive relationship, again statistically significant at the one-percent level, is also found in unreported results where the United States is omitted.[163] And the results shown in Panel B indicate that using the proxy recommended by Gary Kleck, and the other variables, accounts for a substantial percentage, thirty-one percent, of the variation in *firearms civilian registered per cap (x 100)* between countries reported in the Small Arms Survey.

An R-squared value is not reported by the software for two of the models (models 10 and 11). The absence of a reported R-squared for this

[163] *See* Royce Barondes, Table 4: Panel A Data Calculations (on file with Regent Law Review) (running regressions duplicating the estimations reproduced in Table 4, Panel A, but omitting the United States (decreasing the number of observations in each of the estimated models by one) continues to show a positive relationship between predicted firearms civilian registered per cap (x 100) and the dependent variable (the level of freedom); the *p*-value for the civilian firearm variable in each model is 0.00).

style of model is not a problem: "Does this mean our parameter estimates are no good? Not really. . . . If our two-stage model produces estimates of these parameters with acceptable standard errors, we should be happy—regardless of . . . R^2."[164] The two-stage models reported in Table 4, Panel A, have "acceptable" standard errors, i.e., are associated with statistically significant estimates.[165]

The variable *rate of selected serious crime (x 100,000)* is not included in estimating in the *predicted firearms civilian registered per capita (x 100)* in the first stage. Models 16 through 18, in Panel B, reveal what the first-stage regression would look like were *rate of selected serious crime (x 100,000)* included. The point is to show that the omission is suitable. That variable would not be statistically significant (a *t*-statistic of 0.12 or 0.13).[166]

D. How the Results Contextualize an Assessment of the Civil Right to Bear Arms

In this section, we will examine how the empirical results reported above contextualize the analysis of the constitutionality of red flag laws.

1. The Need to Identify Salient Benefits of an Enumerated Right

Even taking into account the country's law enforcement firearms per capita and the rate of selected serious crimes, lawful civilian firearms ownership is associated with increased freedom in all model constructs. And the relationship persists when one uses more intricate modeling techniques designed to mitigate the impact of any possibility of bias in adjustments made in the Small Arms Survey data by that survey's authors.

The results for the rates of serious crimes illuminate the trade-off between safety and some aspects of freedom (see models 7, 8, 9 and 12). That would be consistent with the notion that higher freedom (along at least some dimensions) is associated with increased serious crime, but that harm may be mitigated by increased freedom associated with lawful civilian firearms ownership.

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[164] William Sribney et al., *Negative and Missing R-squared for 2SLS/IV*, STATA (https://www.stata.com/support/faqs/statistics/two-stage-least-squares/) (last visited Dec. 18, 2022).

[165] *See supra* Table 4: Panel A (showing *p*-values not greater than one percent for the predicted registered firearms variable in the regression models that lack R^2 values).

[166] Moreover, the parameter estimate would indicate that any counter-factual hypothesized relationship would not be material in magnitude. Multiplying the highest parameter estimate, 0.000329, by the average value of the serious crime parameter within the sample, 231.29, would result in a predicted change in *firearms civilian registered per capita (x 100)* of 0.076. That figure is negligible compared to the average *firearms civilian registered per capita (x 100)* in the sample, 5.8. *See supra* Table 1.

It is not suggested that the empirical analysis reported above is tailored to address exclusively the relationship between freedom and firearms restrictions under red flag laws. That is not to say the empirical analysis is irrelevant to understanding the suitability of red flag laws. It is relevant. And that is a consequence of the way the relevant analysis is framed by the opinion in *Bruen,* and the alternative approaches that the *Bruen* opinion rejects.[167]

As noted above, one perspective that courts could take in assessing the contours of the civil right to bear arms involves "re-fram[ing] the Second Amendment's core value as safety . . . ."[168] However, the Court in *Bruen* founds its analysis of restrictions on the civil right to bear arms upon restrictions present at the founding (or potentially at the time of the adoption of the Fourteenth Amendment) for purposes of deriving the scope of the right.[169] This relevant inquiry the Court styles as involving whether a "firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms."[170] Thus, the framework that *Bruen* adopts involves first identifying general principles that guide the analysis of restrictions on the civil right to bear arms and then applying those general principles to a particular context.

The benefits of the civil right to bear arms and its disadvantages have disproportionate levels of conspicuousness. The alleged harms arising from having a civil right to bear arms often are presented in contexts where those harms can be framed in a particularly conspicuous fashion. The alleged benefits from recognizing that civil right in the presented contexts are more diffuse.

When an unstable person criminally misuses firearms to injure multiple people, proponents of red flag laws present the situation as a basis for more widespread adoption of or adding extensive prohibitions, to existing red flag laws. The framing is misleading because one cannot say that red flag laws would have made a difference. The presence of a red flag law in a jurisdiction that experiences one of these events will often be accompanied by claims that the problem is the relevant red flag law was not sufficiently comprehensive.[171]

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[167] *See* New York State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2129–30 (2022) (rejecting the use of "means-end scrutiny" or an "interest-balancing analysis" when deciding the constitutionality of firearm regulations and requiring a historical analysis to reveal if the regulation is consistent with legal tradition).

[168] Fagundes & Miller, *supra* note 99, at 682.

[169] *See Bruen*, 142 S. Ct. at 2129–31.

[170] *Id.* at 2127.

[171] *See* Ian Ayres & Frederick E. Vars, *New York's Red Flag Law Failed in Buffalo. Here's How to Fix It*, WASH. POST (May 24, 2022, 7:00 AM), https://www.washingtonpost.com/opinions/2022/05/24/new-york-red-flag-law-failed-buffalo-shooting-gun-violence/ (after the Buffalo shooting recommending that grounds for an ERPO under New York's red flag law should be broader).

The salience of the circumstances results in calls to "do something", detached from cogent analysis. President Biden, for example, stated just after adoption of the Bipartisan Safer Communities Act,[172] "'Their message to us was: Do something,' Mr. Biden said of the families of gun violence victims. 'How many times have you heard that? Just do something. For God's sake, just do something.' 'Well, today, we did,' the president added."[173] The call to do something, untethered to either efficacy or contextualization of the civil right to bear arms as among the various rights that are promoted for purposes of having a free society at the conscious expense of safety concerns, was not restricted to one side of the aisle. Senator Sen. John Cornyn, a Republican of Texas, noted, "I've received tens of thousands of calls and letters and emails with a singular message—do something."[174]

One cannot ignore the possibility that salience in public discourse of the disadvantages of recognizing an enumerated constitutional right will influence a judge to adopt an unwarranted curtailment of the constitutional right. James Madison in fact expressed such a concern in referencing ambivalence to adoption of a Bill of Rights.[175]

As part of analyzing a reflexive legislative response to an unreasoning herd mentality that is fomented following one of these events, it is important to identify those most salient benefits of the civil right to bear arms. This Part presents one such piece of authority. Although it does not have the same appeal to an unreasoning crowd, it has the advantage of salience arising from precise quantification. In sum, the context in which the general principles are applied influences the extent to which one needs to emphasize salient benefits arising from adoption of the civil right to bear arms. And it is for that reason that the analysis in Section IV has been presented in connection with considering this particular restriction on the civil right to bear arms (red flag laws).

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[172] Bipartisan Safer Communities Act, Pub. L. No. 117-159, 136 Stat. 1313 (2022).

[173] Cochrane & Kanno-Youngs, *supra* note 2.

[174] Consider This from NPR, *On Gun Control, Two Big Steps in Opposite Directions*, NPR, at 0:47 (June 27, 2022), https://www.npr.org/2022/06/27/1107919152/on-gun-control-two-big-steps-in-opposite-directions.

[175] He wrote:

> My own opinion has always been in favor of a bill of rights; provided it be so framed as not to imply powers not meant to be included in the enumeration. At the same time I have never thought the omission a material defect, nor been anxious to supply it even by *subsequent* amendment, for any other reason than that it is anxiously desired by others. I have favored it because I supposed it might be of use, and if properly executed could not be of disservice. I have not viewed it in an important light . . . . because experience proves the inefficacy of a bill of rights on those occasions when its controul is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State. In Virginia I have seen the bill of rights violated in every instance where it has been opposed to a popular current.

Madison, *supra* note 3, at 271.

2. Analysis Does Not Support Firearms Registration Requirements

The results in this Essay show a positive relationship between freedom and both civilian firearms ownership, per capita, and civilian registered firearms ownership, per capita. It would be erroneous to conclude that this latter relationship supports firearms registration in the United States.

The United States is atypical in terms of the number of civilian firearms per capita.[176] As among developed countries, the United States is atypical in that, in many parts of the United States, civilian-owned firearms are not required to be registered.[177] In many countries, unregistered civilian firearms are necessarily arms possessed unlawfully.[178]

What is relevant for purposes of assessing the relationship between freedom and civilian firearms ownership is the extent to which firearms are possessed by persons other than those who should not possess firearms. Because the Second Amendment preserves the natural right to bear arms from infringement, in the American tradition, that is limited to

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[176] *See Civilian Firearms Holdings, 2017*, *supra* note 128 (estimating that the United States is the only country to have more guns than citizens).

[177] Creating a federal registry of ordinary firearms through assorted information currently collected by the federal government is unlawful. *See* HALBROOK, FIREARMS DESKBOOK, *supra* note 158, § 3:16. There is a registry for certain types of firearms, including machine guns. 26 U.S.C. §§ 5841, 5845, 5861, 5871 (requiring the registration of certain types of firearms—including machine guns—and designating a penalty of imprisonment or a fine for unregistered possession). Some states have statutes requiring the registration of firearms. *See, e.g.*, HAW. REV. STAT. §§ 134-1, 134-3 (LexisNexis, LEXIS current through 2022 Legis. Sess.). It is beyond the scope of this Essay to discuss the extent to which, after *Bruen*, those requirements are lawful.

[178] It is not within the scope of this Essay to attempt to compile current information concerning the extent of registration requirements of other countries. One will encounter statements that, as to many countries, apparently equate unregistered arms with illegally-owned ones. *E.g.*, Nicholas J. Johnson, *Imagining Gun Control in America: Understanding the Remainder Problem*, 43 WAKE FOREST L. REV. 837, 854 (2008) ("The German police union estimates that Germany has 'about 45 million civilian guns: about 10 million registered firearms; 20 million that should be registered, but apparently are not; and 15 million firearms—such as antiques . . . and black-powder weapons . . . that do not have to be registered.'") (quoting SMALL ARMS SURVEY, GRADUATE INST. OF INT'L STUDIES, SMALL ARMS SURVEY 2007: GUNS AND THE CITY 51)). These requirements are, of course, subject to change.

The Johnson and co-authors book has online two volumes, comprising 437 pages, addressing international and comparative issues identifying information from various countries. NICHOLAS JOHNSON ET AL., FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY chs. 18–19 (3d ed. 2022), http://firearmsregulation.org/www/FRRP3d_CH18.pdf, http://firearmsregulation.org/www/FRRP3d_Ch19.pdf. Those chapters of that book identify assorted registration requirements for various countries as of various points in time. *E.g.*, *id.* at 1733 ("Since 1920, all lawful acquisitions of handguns in Great Britain have been registered with the government . . . ."); *id.* at 1740 (stating, as to Switzerland, "Current owners [of semi-automatic rifles] may keep them, but must register them within three years." (footnote omitted); *id.* at 1800 (stating as to South Africa, "[a]ll guns must be registered").

persons who have done something warranting disarmament, after a finding affording due process.[179] And registration may ultimately limit the frequency of firearms possession by the law-abiding that has a beneficial relationship with freedom.[180]

Although a full analysis is beyond the scope of this Essay, it is noted, by way of example, that registration is related to disarmament. In 1976, Nelson T. "Pete" Shields, identified in the Nicholas Johnson and co-authors text as chairman of the National Coalition to Control Handguns, an organization that "would later change its name to Handgun Control, Inc., and later still to the Brady Campaign," stated:[181]

> Our ultimate goal—total control of handguns in the United States—is going to take time. My estimate is from seven to ten years. The first problem is to slow down the increasing number of handguns being produced and sold in this country. The second problem is to get handguns registered. And the final problem is to make the possession of *all* handguns and *all* handgun ammunition—except for the military, policemen, licensed security guards, licensed sporting clubs, and licensed gun collectors—totally illegal.[182]

3. Causation

Kopel, Moody, and Nemerov dedicate much of their discussion to issues of causation.[183] Discussion of the results in this Essay may bog down on consideration of whether civilian firearms ownership causes increased freedom, or whether increased freedom causes increased civilian firearms ownership. That one is construing a constitutional provision influences the suitable perspective to take as to that matter. Contemporary courts are not in the position of creating the content of the civil right to bear arms on their own.[184] Rather, the process of adopting a written constitution entails setting the basic principles. In the

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[179] In discussing the requirement for federal funding of red flag procedures, referenced above, Halbrook writes, "Presumably such programs would be subject to the Constitution without this declaration." HALBROOK, FIREARMS DESKBOOK, *supra* note 158, § 2:44. *See generally supra* note 20 and accompanying text.

[180] *See* Heller v. District of Columbia, 670 F.3d 1244, 1291 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("[R]egistration requirements are often seen as half-a-loaf measures aimed at deterring gun ownership.").

[181] NICHOLAS J. JOHNSON ET AL., FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 431 (1st ed. 2012) (reproducing the following quote).

[182] Richard Harris, *A Reporter at Large: Handguns*, NEW YORKER, July 26, 1976, at 53, 57–58.

[183] *See* Kopel et al., *supra* note 115, at 23–28, 30–31 (exploring the different causal relationships between guns and freedom).

[184] *See* N.Y. Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2131 (2022) (concluding that because the founding generation set the bounds of the Second Amendment, the place of modern courts is to give "unqualified deference" to the preeminent right of citizens to use firearms in self-defense).

constitutional sphere, courts have the more limited role of applying the principles that have been duly adopted to the circumstances at hand.[185]

However, it may be beneficial to make a few observations concerning causation and a relationship between freedom and firearms ownership. One might imagine that the relationship might be of three types:

i. Being armed causes freedom, in the sense of being armed prevents deprivation of freedom. That could be deprivation by lower-level actors (states or municipalities, in the United States, or members of the public), or it might be deprivation by the jurisdiction's highest governmental authority (the federal government, in our case).

ii. Being armed is part of exercise of a right free people are understood to have. In this case, it does not seem entirely apt to say that possessing firearms causes freedom, or that freedom causes (results in) firearm ownership. In this case, possession of a firearm is an essential tool necessary to have—to be able to exercise—one component of freedom.

iii. Being armed is caused by having freedom. This might be a circumstance where a free society has a government that is viewed by its population with sufficient favor that the government allows its subjects to be armed—that the government does not fear that having an armed population will result in its overthrow.

We shall turn to illustrations. But it is helpful, before doing that, to note the relevance to firearms restrictions in the United States. Each of the relationships could provide support for the notion that application of the Second Amendment should not be guided by attempts to restrict historically recognized firearms rights to make society safer.

Let us turn to the first nature of a relationship between freedom and firearms possession. As to some applications of the civil right to bear arms, the context, as identified by the Supreme Court, illustrates that the direction of causality is that firearms possession causes increased freedom.[186] A detailed reading of *McDonald* and *Bruen* reveals a conclusion that one objective of making the Second Amendment applicable to the states was to prevent disarmament of freedmen, and that was done so as to facilitate their exercise of civil rights more generally.[187] That is,

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[185] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 173–78 (1803) (establishing that courts are bound by the language of the Constitution and must apply its text to the cases before them).

[186] *See Bruen*, 142 S. Ct. at 2150–52 (recognizing the Second Amendment freedom to defend oneself and how it can be used to preserve other rights, particularly the right to life); *see also* THE FEDERALIST NO. 46, 247–48 (James Madison) (George W. Carey & James McClellan eds., 2001) (describing the important role firearm ownership can have in preserving individual liberty).

[187] Through a relatively tedious review of the language of *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and *Bruen*, one comes to the conclusions that (i) following the Civil War, Congress perceived that blacks needed to be allowed to be armed in order to allow their exercise of political rights, (ii) prior federal law was not up to the task of assuring that those

in this circumstance, adoption of the amendment was designed to implement causality in a particular direction: allowing persons to retain arms that were perceived as necessary to exercise other civil rights.

The second style of relationship—the right to bear arms represents a right that is integral being able to possess one aspect of freedom—may be illustrated by recent events. In the recent school shooting in Uvalde, Texas:

> Eva Mireles' husband, a police officer, tried to save her after she was shot at Robb Elementary School in Uvalde, Texas, according to the director of the state Department of Public Safety, Col. Steven McCraw.

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persons could remain armed and (iii) adoption of the Fourteenth Amendment was part of the Federal effort to do that.

Although inclusion of these details, ancillary to the point of an essay, may be excessively intricate for some, the author notes:

(i) *Bruen's* analysis recites the following:

> On July 6, 1868, Congress extended the 1866 Freedmen's Bureau Act, see 15 Stat. 83, and reaffirmed that freedmen were entitled to the "full and equal benefit of all laws and proceedings concerning personal liberty [and] personal security . . . including the constitutional right to keep and bear arms." That same day, a Bureau official reported that freedmen in Kentucky and Tennessee were still constantly under threat: "No Union man or negro who *attempts to take any active part in politics*, or the improvement of his race, is safe a single day; and nearly all sleep upon their arms at night, and carry concealed weapons during the day."

Bruen, 142 S. Ct. at 2151–52 (emphasis added) (citation omitted) (first quoting Freedmen's Bureau Act, § 14, 14 Stat. 173 (1866); and then quoting H.R. Exec. Doc. No. 329, at 40).

(ii) As to prior law not being up to the task, *McDonald* notes: "Throughout the South, armed parties, often consisting of ex-Confederate soldiers serving in the state militias, forcibly took firearms from newly freed slaves." *McDonald*, 561 U.S. at 772.

(iii)(a) As to the Fourteenth Amendment being necessary to achieve the objective:

> Congress, however, ultimately deemed these legislative remedies insufficient. Southern resistance, Presidential vetoes, and this Court's pre-Civil-War precedent persuaded Congress that a constitutional amendment was necessary to provide full protection for the rights of blacks. Today, it is generally accepted that the Fourteenth Amendment was understood to provide a constitutional basis for protecting the rights set out in the Civil Rights Act of 1866.

Id. at 775 (footnote omitted).

(iii)(b) As to the Fourteenth Amendment doing so:

> Representative Bingham believed that the Civil Rights Act protected the same rights as enumerated in the Freedmen's Bureau bill, which of course explicitly mentioned the right to keep and bear arms. The unavoidable conclusion is that the Civil Rights Act, like the Freedmen's Bureau Act, aimed to protect "the constitutional right to bear arms" and not simply to prohibit discrimination. See also Amar, Bill of Rights 264–265 (noting that one of the "core purposes of the Civil Rights Act of 1866 and of the Fourteenth Amendment was to redress the grievances" of freedmen who had been stripped of their arms and to "affirm the full and equal right of every citizen to self-defense").

Id. at 742 (citation omitted).

> During a Texas Senate hearing Tuesday on the police response to the shooting, McCraw said that Mireles' husband, Ruben Ruiz, had his gun taken away, was detained and escorted off the scene after he received a call from his wife.[188]

Being able to defend oneself or one's loved-ones—not being dependent on the whims of a government that has discretion to decide who is worthy of being defended and in what contexts—is a core component of freedom.[189] That is even more strongly the case where governmental exercise of that discretion is not accompanied by accountability.[190] Compelled dependency on an ineffectual government is the converse of freedom.

This is not a novel concept within the American tradition. Nicholas Johnson and co-authors describe Samuel Adams as having made the "most extensive prewar American analysis of the right to arms" in a newspaper article, written under the pseudonym E.A.,[191] which includes the following:

> At the revolution, the British Constitution was again restor'd to its original principles, declared in the bill of rights; which was afterwards pass'd into a law, and stands as a bulwark to the natural rights of subjects. "To vindicate these rights,["] says Mr. *Blackstone*, ["]when actually violated or attack'd, the subjects of England are entitled first to the regular administration and *free course of justice* in the courts of law—next to the right of *petitioning the King* and parliament for redress of grievances—and lastly, to the right of *having and using arms for self-preservation and defence."* These he calls "auxiliary subordinate rights, which serve principally as *barriers* to protect and maintain inviolate the three great and primary rights of *personal security*, *personal liberty* and *private property*": And that of *having arms for their defense* he tells us is "a public allowance, under due restrictions, of the *natural right of resistance and self preservation*, when the sanctions of society and laws are found *insufficient* to restrain the *violence of oppression*."[192]

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[188] Liz Calvario, *Officer Husband of Slain Uvalde Teacher Tried to Save Her. His Gun Was Taken Away.*, NBC NEWS (June 22, 2022), https://www.nbcnews.com/news/us-news/slain-uvalde-teachers-officer-husband-tried-wife-gun-was-taken-away-rcna34710.

[189] *See* District of Columbia v. Heller, 554 U.S. 570, 594 (2008) ("[Blackstone's] description of it [(the right to have arms)] cannot possibly be thought to tie it to militia or military service. It was, he said, 'the natural right of resistance and self-preservation.'" (citations omitted) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES 139 (1765))); State v. Buzzard, 4 Ark. 18, 36 (1842) (Lacy, J., dissenting) ("I deny that any just or free government upon earth has the power to disarm its citizens and to take from them the only security and ultimate hope that they have for the defense of their liberties and their rights.").

[190] *See, e.g.*, *supra* notes 87–98 and accompanying text (illustrating an absence of an enforceable governmental duty to protect the public).

[191] JOHNSON ET AL., *supra* note 178, at 220.

[192] SAMUEL ADAMS, E.A. (1769), *reprinted in* 1 THE WRITINGS OF SAMUEL ADAMS 316, 317–18 (Henry Alonzo Cushing, ed., G.P. Putnam's Sons 1904) (1769) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *141, *143–44).

The third style of relationship, in which increased freedom causes more firearms being personally owned, might arise where there are regional cultural norms that are associated with freer societies and that cultural norm also independently of freedom interests results in increased firearms possession.[193] One of the ways one seeks to control for that is through controlling for other factors in the empirical investigation, as this work does by including continent and law enforcement firearms.

We have noted that the Second Amendment and the Fourteenth Amendment were framed to further freedom.[194] The increasingly extensive modeling of the relationship between firearms ownership and freedom increasingly narrows the ability to claim plausibly that the authors of those instruments were in error in perceiving relationships between freedom and firearms rights.

CONCLUSION

This Essay began referencing a widely-cited perspective on allowable error rates in the criminal context. Blocher and Charles assert that, in assessing red flag confiscation orders, the apt comparison is to civil proceedings, not criminal proceedings. Because we are assessing conscious adoption of legislation that gives rise to a propensity to being killed by the government at a rate that is substantial, relative to the murder rate, the relevant vantage-point involves the errors suitable in administering the criminal law (and, one supposes, the criminal law applicable to capital crimes). Extrapolating from the experience following Maryland's adoption of red flag confiscation orders reveals rates of police officers killing targets that is substantial when compared to the murder rate.

The Supreme Court in *Bruen* directly rejected New York's position that alleged safety benefits of preventing firearms possession in public justified a style of impingement on the right to bear arms that was not

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[193] *See* Kopel et al., *supra* note 115, at 26 (discussing a possible relationship between cultural norms and firearms ownership).

[194] *See supra* notes 186–87, 190–92 and accompanying text.

Blocher and Charles write:

> Although the consequence (denial of access to a firearm) might be significant, extreme risk laws are a *civil* proceeding designed to protect both the gun owner and those close to him or her. So long as it is complied with, the order carries no criminal sanctions, and there is no situation in which "gun owners are presumed to be guilty and must then prove their innocence." Of course, constitutional protections apply in the civil context as well as the criminal context, but the relevant protections have to do with due process rather than constitutional criminal procedure rights. The rhetoric of criminal law is unhelpful in understanding or resolving those civil due process cases.

Blocher & Charles, *supra* note 12, at 1317 (footnotes omitted) (quoting José Niño, *Red Flag Laws: The Latest Anti-Gun Scheme*, MISES INST. (July 27, 2022), https://mises.org/power-market/red-flag-laws-latest-anti-gun-scheme).

present in the Founding Era.[195] The *Bruen* Court's approach implements the principle expressed in *Heller* that the Second Amendment was not subject to a "freestanding 'interest-balancing' approach."[196]

This Essay expands on the existing empirical evidence that civilian firearms possession is associated with increased freedom. The relationship is shown to remain, significant at the one-percent level, after controlling for the jurisdiction's rate of serious crime and law enforcement firearms per capita. And the relationship holds when one uses an alternative technique that may address bias introduced by undisclosed adjustments made in the firearms ownership data by the authors of the Small Arms Survey.

After *Bruen*, maintaining a society that enhances the public's freedom remains central to application of the Second Amendment to impingements on firearms rights, such as red flag laws. The empirical evidence supports the ongoing vitality of that focus. Civilian firearms ownership remains associated with a government structured to enhance the freedom of the governed.

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[195] *See supra* notes 106–09 and accompanying text.

[196] *See supra* note 104 and accompanying text.

ARMING TAIWAN: A U.S. LAW PERSPECTIVE ON AMERICAN ARMS SALES TO TAIWAN

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INTRODUCTION

In March 1996, China fired missiles towards the coast of Taiwan, with one missile passing almost directly over Taipei before landing nineteen miles off the coast.[1] Taiwan was about to hold its first democratic presidential election, and China's response was to send missiles.[2] China rapid-fired three M-9 ballistic missiles at the Taiwan Strait, the narrow strait separating the island of Taiwan from China, targeting the shipping lanes adjacent to the island's two principal seaports.[3] Throughout that month, China continued conducting war games, including further missile tests and live-fire drills in the Taiwan Strait.[4] This series of events, known as the Third Taiwan Strait Crisis, stoked fears in Taiwan of possible invasion, fears "fuelled [*sic*] by planned People's Liberation Army ("PLA") exercises simulating an amphibious assault and live-fire exercises . . . ."[5] President Clinton of the United States ("U.S.") responded by deploying a second carrier battle group to join one that was already located close to Taiwan, with both groups staying in international waters.[6] China eventually stopped its military exercises when Taiwan voted in a presidential candidate that was in favor of Taiwan independence.[7] In 1996, the U.S. avoided an international crisis that could have escalated to war. More than two decades later, in August 2022, this crisis reappeared: China fired missiles over the Taiwan Strait in response to then-U.S. Speaker of the House Nancy Pelosi visiting the island.[8] The U.S., China, and Taiwan are watching history repeat itself, and all are wondering what will happen if there is a failure in de-escalation.

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1 Barton Gellman, *U.S. and China Nearly Came to Blows in '96*, WASH. POST (June 21, 1998), https://www.washingtonpost.com/archive/politics/1998/06/21/us-and-china-nearly-came-to-blows-in-96/926d105f-1fd8-404c-9995-90984f86a613/.

2 *Id.*; J. Michael Cole, *The Third Taiwan Strait Crisis: The Forgotten Showdown Between China and America*, NAT'L INT. (Mar. 10, 2017), https://nationalinterest.org/feature/the-third-taiwan-strait-crisis-the-forgotten-showdown-19742.

3 Gellman, *supra* note 1.

4 *Chronology: A Review of the Decades Long U.S.-China Face Off Over the Island of Taiwan*, PBS, https://www.pbs.org/wgbh/pages/frontline/shows/china/etc/cron.html (last visited Oct. 17, 2022).

5 Cole, *supra* note 2.

6 Gellman, *supra* note 1; *see also* Cole, *supra* note 2.

7 *See Taiwan Strait 21 July 1995 to 23 March 1996*, GLOBALSECURITY.ORG, https://www.globalsecurity.org/military/ops/taiwan_strait.htm (last visited Nov. 3, 2022).

8 Yimou Lee & Sarah Wu, *Furious China Fires Missiles Near Taiwan in Drills After Pelosi Visit*, REUTERS (Aug. 5, 2022), https://www.reuters.com/world/asia-pacific/suspected-drones-over-taiwan-cyber-attacks-after-pelosi-visit-2022-08-04/; Emily Feng, *China Fires Waves of Missiles Over the Taiwan Strait, Raising Tensions in the Region*, NPR (Aug. 4, 2022), https://www.npr.org/2022/08/04/1115550972/china-taiwan-missile-exercises.

As Sino-U.S. tensions have increased within the last decades,[9] it is important to consider the ever-present incongruence in this relationship: the Taiwan question. That is, the question of whether Taiwan is an independent country or part of China. The U.S. government has long recognized the significance of Taiwan as a U.S. national security interest, but has been forced to navigate muddled legal waters to support the island due to Taiwan's ambiguous political status.[10] U.S. arms sales to Taiwan is one of the most prominent issues, mainly due to the difficulty in reconciling the five authorities guiding U.S.-Taiwan arms sales within the last half-century: the Taiwan Relations Act ("TRA"), the three Joint Sino-U.S. Communiques, and the "Six Assurances" to Taiwan.[11] A careful review of these authorities suggests that the U.S. is legally authorized to increase defensive arms sales to Taiwan, despite its previous commitments made to the P.R.C. to gradually reduce such arms sales.[12] The TRA, which allows the U.S. to provide Taiwan with defensive arms and services "necessary to enable Taiwan to maintain a sufficient self-defense capability," is the only authority that is legally binding on the U.S. government.[13] The other authorities, some of which seemingly contradict the TRA, are simply non-binding bilateral statements of U.S. policy.[14] The text of the TRA, supported by historic U.S. interpretations of the communiques, lead to the conclusion that the U.S. has the legal authority to link US-Taiwan arms sales to the evolving balance of forces across the

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[9] Barbara Plett Usher, *Why US-China Relations Are at Their Lowest Point in Decades*, BBC NEWS (July 24, 2020), https://www.bbc.com/news/world-us-canada-53517439.

[10] *See* Lindsay Maizland, *Why China-Taiwan Relations Are So Tense*, COUNCIL ON FOREIGN RELS. (Aug. 3, 2022, 4:45 PM), https://www.cfr.org/backgrounder/china-taiwan-relations-tension-us-policy-biden#chapter-title-0-2; Elbridge Colby & Jim Mire, *Why the Pentagon Should Focus on Taiwan*, WAR ON THE ROCKS (Oct. 7, 2020), https://warontherocks.com/2020/10/why-the-pentagon-should-focus-on-taiwan (explaining Taiwan's significance to the United States and other countries in the region).

[11] *See* Ted Galen Carpenter, *U.S. Arms Sales to Taiwan: A Delicate, Troublesome Issue*, CATO INST. (Nov. 7, 2013, 5:02 PM), https://www.cato.org/blog/us-arms-sales-taiwan-delicate-troublesome-issue ("[A]rms sales of any sort to Taipei have long been a major irritant in U.S.-China relations"); John Feng, *China Rejects Historic U.S. Law Protecting Taiwan As 'Illegal and Invalid'*, NEWSWEEK (Nov. 10, 2021, 12:38 PM), https://www.newsweek.com/china-rejects-historic-us-law-protecting-taiwan-illegal-invalid-1647908 (showing how the U.S. and China differ based on the authorities each view as the legal foundation of their relationship). *See generally* KERRY DUMBAUGH, CONG. RSCH. SERV., TAIWAN: TEXTS OF THE TAIWAN RELATIONS ACT, THE U.S.-CHINA COMMUNIQUES, AND THE "SIX ASSURANCES" (1998).

[12] John Tkacik, *TRA Still Core of US Taiwan Policy*, TAIPEI TIMES (May 22, 2017), https://www.taipeitimes.com/News/editorials/archives/2017/05/22/2003671050.

[13] DUMBAUGH, *supra* note 11, at 2; *see* Tkacik, *supra* note 12 (noting that the TRA is the U.S.'s legal core to Taiwan relations and interpretation of a one-China policy).

[14] *See* Tkacik, *supra* note 12 ("The TRA is the controlling legal core of 'our "one China" policy,' while the Three Joint Communiques are diplomatic imprecisions . . . ."). *See generally* DUMBAUGH, *supra* note 11.

Strait.[15] Therefore, in light of China's military buildup and increasingly aggressive military actions in the Taiwan Strait, the U.S. is within its domestic legal boundaries to increase arms sales to Taiwan.

Section II of this Note provides historical background detailing the emergence of the Republic of China ("R.O.C.") government in Taiwan and the People's Republic of China ("P.R.C.") government in China. Section III then introduces the five authorities that guide U.S.-China and U.S.-Taiwan policymaking and explains how each influences U.S. arms sales to Taiwan. Section IV examines the legal status of the three Sino-U.S. Joint Communiques under U.S. domestic law, while Sections V and VI examine the legal implications of the TRA and the Six Assurances respectively. The Note then concludes that the U.S. is within its legal rights to maintain and increase its supply of defensive arms to Taiwan.

I. HISTORICAL CONTEXT

An analysis of U.S. military and political support to Taiwan must begin with understanding the history behind the conflict between China and Taiwan, and the U.S.'s role in this conflict. China has long seen the Taiwan issue as a matter of China's own internal affairs and has strongly opposed any foreign interference on the matter.[16] The U.S., on the other hand, has adopted a policy of strategic ambiguity concerning the legal status of Taiwan, recognizing the importance of maintaining Taiwan as a buffer against China and preserving the island's status as a democracy.[17]

A. Formation of the R.O.C. and the P.R.C.

Until the early twentieth century, imperial dynasties governed China, covering lands currently thought of as China, Taiwan, Mongolia, and parts of Russia.[18] The Japanese Empire defeated China's last dynasty, the Qing dynasty, during the First Sino-Japanese War in 1895, resulting in the Treaty of Shimonoseki.[19] This treaty required the Qing government to cede its sovereignty over a number of its territories to Japan, one of

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[15] *See* Tkacik, *supra* note 12 (noting that the United States interprets the communiques to acknowledge China's position that Taiwan is a part of China, but that the United States takes no position of its own on the issue); DUMBAUGH, *supra* note 11, at 2.

[16] *See* Jessica Drun, *One China, Multiple Interpretations*, CTR. FOR ADVANCED CHINA RSCH. (Dec. 28, 2017), https://www.ccpwatch.org/single-post/2017/12/29/One-China-Multiple-Interpretations; *Wang Yi Elaborates on China's Position on the Taiwan Question at a Press Conference for Chinese and Foreign Media*, MINISTRY OF FOREIGN AFFS. OF CHINA (Aug. 6, 2022), https://www.fmprc.gov.cn/eng/zxxx_662805/202208/t20220806_10736474.html.

[17] Drun, *supra* note 16.

[18] CHINA & THE WORLD 28 (David Shambaugh ed., 2020); *Qing Dynasty*, ENCYC. BRITANNICA (Dec. 2, 2022), https://www.britannica.comhttps://www.britannica.com/topic/Qing-dynasty.

[19] *History*, MINISTRY OF FOREIGN AFFS., REPUBLIC OF CHINA (TAIWAN), https://www.taiwan.gov.tw/content_3.php# (last visited Oct. 17, 2022).

which was the island of Formosa, known today as Taiwan.[20] The foreign defeat of the Qing dynasty opened the way for the 1911 Chinese Revolution that replaced the dynastic empire with the R.O.C., led by Sun Yat-sen.[21] Sun transformed his revolutionary league into the Nationalist political party, named the Kuomintang ("KMT").[22]

The KMT's overall ambition was to reunite China under one government, but it lacked the resources to suppress the warlord states that had cropped up during the power vacuum left by the Qing government's collapse.[23] The Union of Soviet Socialist Republics agreed to provide military aid to the KMT on the condition that the KMT coalesce with the Chinese Communist Party ("CCP") to fight against the warlords.[24] The KMT consented to this condition, and the KMT and CCP, under KMT Generalissimo Chiang Kai-shek, began the first United Front that successfully dismantled the warlords' power.[25] With Sun's death in 1925,[26] the KMT-CCP alliance fell apart when Chiang massacred a number of communists in Shanghai in April 1927,[27] effectively ending the United Front and triggering the Chinese Civil War between the KMT and the CCP.[28] This Civil War briefly halted in 1937 when the KMT and CCP entered into a Second United Front to counter another Japanese invasion during the Second Sino-Japanese War, part of Japan's World War II theatre.[29] In 1943, Generalissimo Chiang (R.O.C.), President Roosevelt (U.S.), and Prime Minister Churchill (U.K.) issued the Cairo Declaration, which stated: "all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and the Pescadores, shall be restored to the Republic of China."[30] With the Allied defeat of Japan, the island of Taiwan

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[20] *Treaty of Shimonoseki, 1895*, USC US-CHINA INST., https://china.usc.edu/treaty-shimonoseki-1895 (last visited Jan. 11, 2023); *see also* MINISTRY OF FOREIGN AFFS., REPUBLIC OF CHINA (TAIWAN), *supra* note 19 ("Following defeat in the First Sino-Japanese War (1894-1895), the Qing government sign[ed] the Treaty of Shimonoseki, by which it cede[d] sovereignty over Taiwan to Japan, which rule[d] the island until 1945.").

[21] *The Chinese Revolution of 1911,* OFF. OF THE HISTORIAN, https://history.state.gov/milestones/1899-1913/chinese-rev (last visited Oct. 17, 2022).

[22] *Nationalist Party: Chinese Political Party*, ENCYC. BRITANNICA, https://www.britannica.com/topic/Nationalist-Party-Chinese-political-party (Sept. 6, 2022).

[23] OFF. OF THE HISTORIAN, *supra* note 21.

[24] *United Front*, ENCYC. BRITANNICA, https://www.britannica.com/topic/United-Front-Chinese-history-1937-1945 (last visited Oct. 17, 2022).

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Chinese Civil War (1927-1949)*, GLOBALSECURITY.ORG, https://www.globalsecurity.org/military/world/war/prc-civil.htm (last visited Jan. 11, 2023).

[29] Sophia Maroulis, *The Second United Front: A KMT and CCP Alliance in Name, but Not in Practice*, PAC. ATROCITIES EDUC. (Aug. 8, 2022), https://www.pacificatrocities.org/blog/the-second-united-front-a-kmt-and-ccp-alliance-in-name-but-not-in-practice.

[30] *The Cairo Declaration*, WILSON CTR., https://digitalarchive.wilsoncenter.org/document/122101 (last visited Jan. 11, 2023).

was returned to the R.O.C. in 1945.[31] Shortly after Japan's surrender, the Chinese Civil War was reignited, with the U.S. backing the KMT and the U.S.S.R. backing the CCP.[32] Eventually, the KMT retreated to the island of Taiwan, and in 1949, the CCP set up a new government on the mainland: the P.R.C.[33] The KMT-led R.O.C. established itself as a government in exile in Taiwan, with both the R.O.C. and the P.R.C. claiming to be the sole, legitimate government of China.[34]

B. Effect of P.R.C. Recognition on US-R.O.C. Relations

At the start of the Cold War, the U.S.'s foremost foreign policy priority was to contain the spread of international communism as a buffer against the USSR.[35] In line with this priority, the U.S. chose to back the R.O.C. as the legitimate government of China, and both governments signed the Sino-American Mutual Defense Treaty in 1954, which expressed "their common determination to defend themselves against external armed attack."[36] The treaty text implied that the U.S. would defend the R.O.C. against the P.R.C., and in the years following the signing of the treaty, the U.S. provided significant assistance to the R.O.C.'s military modernization efforts.[37]

On the international scale, an increasing number of foreign states began recognizing the P.R.C. as the legitimate government of China throughout the 1950s to the 1970s.[38] In October 1971, the United Nations

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[31] MINISTRY OF FOREIGN AFFS., REPUBLIC OF CHINA (TAIWAN), *supra* note 19.

[32] *Chinese Civil War,* ENCYC. BRITANNICA (Feb. 18, 2020), https://www.britannica.com/event/Chinese-Civil-War; Charles Kraus, *How Stalin Elevated the Chinese Communist Party to Power in Xinjiang in 1949*, WILSON CTR.: SOURCES AND METHODS (May 11, 2018), https://www.wilsoncenter.org/blog-post/how-stalin-elevated-the-chinese-communist-party-to-power-xinjiang-1949.

[33] *Establishment of the People's Republic of China*, PBS, https://www.pbs.org/wgbh/americanexperience/features/china-republic-establishment/ (last visited Apr. 10, 2021).

[34] *Id.*

[35] *See Cold War History*, HISTORY, https://www.history.com/topics/cold-war/cold-war-history (June 22, 2022); Kennedy Hickman, *The History of Containment Policy*, THOUGHTCO. (Aug. 8, 2019), https://www.thoughtco.com/definition-of-containment-2361022.

[36] Mutual Defense Treaty Between the United States and the Republic of China, China-U.S., Dec. 2, 1954, 6 U.S.T. 433, at 435.

[37] Alexander Chieh-cheng Huang, *The United States and Taiwan's Defense Transformation*, BROOKINGS (Feb. 16, 2010),

[38] *See The Second Upsurge in the Establishment of Diplomatic Relations*, MINISTRY OF FOREIGN AFFS. OF CHINA, https://www.fmprc.gov.cn/mfa_eng/ziliao_665539/3602_665543/3604_665547/200011/t20001117_697875.html (last visited Nov. 3, 2022, 7:22 PM) (showing an increase of countries establishing diplomatic relations with the P.R.C. from 23 in 1955 to 50 by the end of 1969); *The third wave of establishing diplomatic relations with other countries*, MINISTRY OF FOREIGN AFFS. OF CHINA, https://www.fmprc.gov.cn/mfa_eng/ziliao_665539/3602_665543/3604_665547/200011/t20001117_697859.html (last visited Nov. 11, 2022, 4:39 PM) (showing an increase by the end of the 1970s to 120 countries having entered into diplomatic relations with the P.R.C.).

General Assembly passed a resolution recognizing the P.R.C. as "the only legitimate representatives of China to the United Nations" and expelling the R.O.C. from the organization.[39] The U.S. voted against this resolution,[40] but already announced that President Nixon would visit Beijing the next year.[41] In 1972, President Nixon met with Chairman Mao Zedong, the CCP leader of the P.R.C., and together they issued the Shanghai Communique, which commenced the process of normalizing relations between the U.S. and the P.R.C.[42] In this communique, the U.S. did not challenge the "one China" policy, which was "that all Chinese on either side of the Taiwan Strait maintain there is but one China and that Taiwan is a part of China."[43]

Nixon's resignation in 1974 due to the Watergate scandal and Mao's death in 1976 impeded the normalization process for a while, but negotiations restarted with the rise of CCP leader Deng Xiaoping and President Carter's determination to normalize relations during his first term in office.[44] Under Deng's leadership, the P.R.C. agreed to normalize relations with the U.S. in January 1979, following the issuance of the Normalization Communique.[45] In accordance with this joint communique, the U.S. shifted recognition from the R.O.C. to the P.R.C. as "the sole legal Government of China."[46] The U.S. terminated the 1954 Sino-American Mutual Defense Treaty and ended official diplomatic relations with the R.O.C., while noting that the U.S. would "maintain cultural, commercial, and other unofficial relations with the people of Taiwan."[47] Needing a legal framework for these unofficial relations, and because some members of Congress were dissatisfied with the Carter administration's handling of the Normalization Communique,[48] the U.S. Congress passed the TRA in

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[39] G.A. Res. 2758 (XXVI), at 2 (Oct. 25, 1971).

[40] *Restoration of the lawful rights of the People's Republic of China in the United Nations: resolution / adopted by the General Assembly*, UNITED NATIONS DIGIT. LIBR., https://digitallibrary.un.org/record/654350 (last visited Jan. 10, 2023, 11:40 PM).

[41] *Transcript of Nixon TV Address to Nation*, NY TIMES (July 16, 1971), https://www.nytimes.com/1971/07/16/archives/transcript-of-nixon-tv-address-to-nation.html (supporting that the announcement of Nixon's visit to China occurred before voting against the resolution); *see also Chronology of U.S.-China Relations, 1784-2000*, OFF. OF THE HISTORIAN, https://history.state.gov/countries/issues/china-us-relations (last visited Oct. 17, 2022).

[42] OFF. OF THE HISTORIAN, *supra* note 41.

[43] Joint Communique, China-U.S., Feb. 28, 1972 [hereinafter *Shanghai Communique*].

[44] OFF. OF THE HISTORIAN, *supra* note 41.

[45] *Id.*; Joint Communique of the United States of America and the People's Republic of China, China-U.S., Dec. 15, 1978 [hereinafter *Normalization Communique*].

[46] *Normalization Communique*, *supra* note 45.

[47] *Id.*; OFF. OF THE HISTORIAN, *supra* note 41.

[48] CONG. RSCH. SERV., RS22388, TAIWAN'S POLITICAL STATUS: HISTORICAL BACKGROUND AND ITS IMPLICATIONS FOR U.S. POLICY (2009); *China Policy*, OFF. OF THE

April 1979, which committed the U.S. to provide defensive military support to Taiwan amongst other terms.[49] The P.R.C. strenuously objected to the TRA, as they believed the TRA violated the Normalization Communique.[50]

The issue of U.S. arms sales to Taiwan had been tabled during negotiations over the first two joint communiques, as both the P.R.C. and the U.S. took strong positions on this matter.[51] The U.S. refused to stop selling arms to the R.O.C., and the P.R.C. refused to accept the U.S.'s position.[52] By passing the TRA, the U.S. reopened the issue.[53] After tense negotiations, the U.S. and P.R.C. issued another joint communique in 1982 in which the U.S. stated that "it intends gradually to reduce its sale of arms to Taiwan," while the P.R.C. embraced the "policy to strive for a peaceful solution to the Taiwan question."[54] Meanwhile, the U.S. also sent private assurances, the "Six Assurances," to the R.O.C. pledging to continue providing support to Taiwan.[55] While current U.S. policy regarding Taiwan is guided mostly by the TRA and these Six Assurances,[56] it is important to examine the interaction of these authorities with the three joint communiques. The next section puts forward the historical and legal background of each one of these authorities.

HISTORIAN, https://history.state.gov/milestones/1977-1980/china-policy (last visited Oct. 26, 2022).

[49] OFF. OF THE HISTORIAN, *supra* note 41; *see* Taiwan Relations Act, 22 U.S.C. §§ 3301–3316 ("It is the policy of the United States . . . to provide Taiwan with arms of a defensive character . . . ."); JOHN W. GARVER, CHINA'S QUEST 422 (2016) (observing that "[w]hen negotiating the Normalization Communique, the US informed the PRC that it would continue to sell defensive arms to Taiwan. Though Deng protested, he agreed to set the issue aside and signed the Normalization Communique. The TRA put a legal requirement in place for the US to base its arms sales to Taiwan on. China claimed the TRA was a violation of the Shanghai and Normalization Communiques, but even if President Carter wanted to veto the TRA, the Senate had the numbers to override the veto and Carter signed the legislation").

[50] GARVER, *supra* note 49, at 422.

[51] *See id.* at 407.

[52] *See id.*

[53] *Id.* at 420.

[54] Joint Communique Issued by the Governments of the United States and the People's Republic of China, China-U.S., Aug. 17, 1982 [hereinafter *August 17 Communique*]; *see The August 17, 1982 U.S.-China Communiqué on Arms Sales to Taiwan*, OFF. OF THE HISTORIAN, https://history.state.gov/milestones/1981-1988/china-communique (last visited Oct. 25, 2022) (discussing the eight months of contentious negotiations culminating in the August 17 Communique).

[55] *Declassified Cables: Taiwan Arms Sales & Six Assurances (1982)*, AM. INST. TAIWAN (1982), https://www.ait.org.tw/declassified-cables-taiwan-arms-sales-six-assurances-1982/?_ga=2.235332673.1364414957.1666028467-968171397.1657764250.

[56] *See* Sherry Hsiao, *US House Passes Taiwan Assurance Act*, TAIPEI TIMES (May 9, 2019), https://www.taipeitimes.com/News/front/archives/2019/05/09/2003714812; H.R. Res. 273, 116th Cong. (2019).

II. AN OVERVIEW OF RELEVANT AUTHORITIES

The three Sino-U.S. Communiques, the TRA, and the Six Assurances form what can be referred to as the "bible" of U.S.-Taiwan policy. This section introduces these authorities in chronological order.

A. 1972 US-P.R.C. Joint Communique (Shanghai Communique)

In 1967, Richard Nixon wrote in *Foreign Affairs* that "[t]aking the long view, we simply cannot afford to leave China forever outside the family of nations."[57] Chairman Mao read Nixon's article and observed that the formerly antagonistic U.S.-China policy might change if Nixon were to win the 1968 US presidential election.[58] After winning the presidency, Nixon arranged a historic visit to Beijing to meet with Mao and discuss the possibility of rapprochement between the two nations.[59] The Taiwan issue proved to be a key area of disagreement during Sino-US negotiations, but the Cold-War Soviet threat put pressure on each side to reach an accommodation.[60] During the drafting of the communique, Mao proposed that the "two sides state their radically different views, leaving only a final concluding section to lay out their areas of agreement."[61] The U.S. agreed to this proposal, and the P.R.C. and the U.S. issued the Shanghai Communique, with its text shifting between both sides' perspective, paragraph by paragraph.[62] In one section of the communique, the P.R.C. affirmed its belief that it is the "sole legal government of China," that Taiwan is a part of China, that the "liberation of Taiwan" is an internal affair, and that "all U.S. forces and military installations must be withdrawn from Taiwan."[63] In response,

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[57] Richard Nixon, *Asia After Vietnam*, 46 FOREIGN AFFS. 111, 121 (1967).

[58] *See* GARVER, *supra* note 49, at 290.

[59] *Id.* at 297–99.

[60] *Id.* at 299–300. Chairman Mao instructed Zhou En Lai to take a more relaxed approach to negotiations: "There's no hurry for Taiwan, for there's no war there. A war is being fought and lives lost in Vietnam. If we want Nixon to come, we cannot think merely of ourselves." *Id.* at 300.

[61] *Id.* at 299 ("When it came time to draft the communique capping the Mao-Nixon summit, Mao proposed an innovative departure from diplomatic norms. Such communiques usually featured platitudes about peace, cooperation, mutual trust, and so on. Kissinger [the then US National Security Advisor] had himself prepared such a draft communique, which he submitted to Zhou En Lai [the then P.R.C. Premier, or Prime Minister] during a second visit to China in October 1971. Mao vetoed this 'bullshit communique' and directed Zhou to propose that the two sides state their radically different views, leaving only a final concluding section to lay out their areas of agreement.").

[62] *Shanghai Communique*, *supra* note 43, at 1–4.

[63] *Id.* at 3. One section of this communique states:

> The two sides reviewed the long-standing serious disputes between China and the United States. The Chinese side reaffirmed its position: The Taiwan question is the crucial question obstructing the normalization of relations between China and the United States; the Government of the People's Republic

> The U.S. side declared: The United States acknowledges that all Chinese on either side of the Taiwan Strait maintain there is but one China and that Taiwan is a part of China. The United States Government does not challenge that position. It reaffirms its interest in a peaceful settlement of the Taiwan question by the Chinese themselves. With this prospect in mind, it affirms the ultimate objective of the withdrawal of all U.S. forces and military installations from Taiwan. In the meantime, it will progressively reduce its forces and military installations on Taiwan as the tension in the area diminishes.[64]

The unorthodox back-and-forth format of the communique was critical for each side to maneuver around the Taiwan problem while still being able to advance relations between the two countries.[65] However, this format's ambiguity has led the P.R.C. and the U.S. to develop differing interpretations of what exactly each countries' "legal" obligations are under this agreement.[66] China interprets this agreement as obligating the U.S. to reduce its military presence on the island and accept the "One China" policy.[67] The U.S., on the other hand, interprets the communique

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> of China is the sole legal government of China; Taiwan is a province of China which has long been returned to the motherland; the liberation of Taiwan is China's internal affair in which no other country has the right to interfere; and all U.S. forces and military installations must be withdrawn from Taiwan. The Chinese Government firmly opposes any activities which aim at the creation of "one China, one Taiwan," "one China, two governments," "two Chinas," and "independent Taiwan" or advocate that "the status of Taiwan remains to be determined."

Id.

[64] *Id.*

[65] *See* GARVER, *supra* note 49, at 299 (noting that the Taiwan question was the most difficult part of the negotiation, and that the back-and-forth nature of the communique allowed the United States to clearly state its positions to reassure allies in Asia and the American public at home).

[66] Hungdah Chiu, *Certain Legal Aspects of Recognizing the People's Republic of China*, 11 CASE W. RSRV. J. INT'L L. 389, 391–393 (1979) ("Some commentators have assumed that [the 1972 Communique] is a treaty or international agreement concluded between the United States and the PRC. This view is questionable. It is true that the PRC appears to regard this document as a treaty by including it in its official Treaty Series, but the United States has not yet treated this document as such. The Communique has not been included in the Department of State annual official publication, *Treaties in Force*, which includes all United States treaties, agreements, exchange of notes, and others; nor is the Communique included in the *Treaties and International Agreements Series* ("T.I.A.S.") of the United States.").

[67] Jerry Z. Li, *The Legal Status of Three Sino—US Joint Communiques*, 5 CHINESE J. INT'L L. 617, 619 (2006) ("Based on the communique, China demanded further concessions from the USA over the Taiwan issue by setting three conditions for the normalization of its relations with the USA, as it did to Japan, which also had a complex relations with Taiwan at the time of normalization of its relationship with China: (1) termination of official US relations with Taiwan; (2) termination of the 1954 US–ROC Mutual Defense Treaty; and (3) withdrawal of American troops and military installations from Taiwan.").

to imply conditionality, reading the pledge to reduce its military forces as conditioned on whether "the tension in the area diminishes."[68]

B. 1978 US-P.R.C. Joint Communique on Establishing Diplomatic Relations (Normalization Communique)

U.S.-Sino normalization stagnated for a period of time following the passing away of Chairman Mao and President Nixon's resignation in the mid-1970s.[69] Deng Xiao-ping emerged as the next leader of the P.R.C., and he pushed for China to modernize its economy, a task requiring the aid of advanced, capitalist countries, such as the U.S.[70] Because of this goal, Deng revitalized negotiations for normalization of relations with the U.S. under the Carter administration.[71] "Deng laid out 'three tasks' . . . to make normalization possible: 1) abrogate the 1954 mutual security treaty with Taiwan, 2) withdraw all US military personnel from Taiwan, and 3) sever diplomatic relations with Taiwan."[72] The U.S. delegation acceded to Deng's "three tasks" and responded with its own demands, two of which were that the U.S. "would retain a full range of economic, cultural, and other relations with Taiwan on an unofficial basis" and that the U.S.

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[68] *Shanghai Communique*, *supra* note 43, at 3; *see also* GARVER, *supra* note 49, at 302 (arguing that when viewed as a whole, the communique seems to condition the withdrawal of U.S. forces on the presence of peace in the region).

[69] *See* JUSSI HANHIMÄKI, THE FLAWED ARCHITECT: HENRY KISSINGER AND AMERICAN FOREIGN POLICY 333, 340 (2006) (noting that in the shadow of the Watergate Scandal, "[f]ull normalization with China was rendered impossible, as Nixon could not fathom alienating his conservative supporters by breaking off diplomatic relations with Taiwan"); *United States Relations with China: Separation and Reopening (1950-2001)*, U.S. DEP'T OF STATE ARCHIVE, https://2001-2009.state.gov/r/pa/ho/pubs/fs/90835.htm (last visited Oct. 25, 2022) (noting that, in 1974, Nixon resigned in the aftermath of the Watergate scandal and Mao's health began to fail—Mao eventually died in 1976—thus "[t]hese leadership shifts delayed the normalization process").

[70] GARVER, *supra* note 49, at 402, 403 ("Deng concluded, China would look to the advanced capitalist countries of Western Europe, Japan, and North America for technology, scientific and managerial know-how, export markets, and capital to transform communist-ruled socialist PRC into a powerful and relatively prosperous country by the end of the twentieth century."); Chen Jian, *From Mao to Deng: China's Changing Relations with the United States*, *in* COLD WAR INT'L HIST. PROJECT, WOODROW WILSON INT'L CTR. FOR SCHOLARS 1, 16–17 (Christian F. Ostermann & Charles Kraus eds., 2019) ("Deng and the post-Mao Chinese leadership began to perceive China's path toward modernity from a totally different perspective, and they looked to the West for ways to formulate China's own development strategy . . . . To lay the foundation of this reform project, China under Deng significantly broadened its external connections by . . . China's trade with Western countries, welcoming foreign investments, and, among other measures . . . ."); *United States Relations with China: Separation and Reopening*, *supra* note 69 (noting that Deng took power in 1977, after Mao's death).

[71] *See* GARVER, *supra* note 49, at 402–04 (noting Deng's willingness to enter talks with the U.S.); *United States Relations with China: Separation and Reopening*, *supra* note 69 (noting that President Carter was in office when Deng resumed negotiations).

[72] GARVER, *supra* note 49, at 404.

"would continue to sell arms to Taiwan."[73] The arms sales issue almost deadlocked the negotiation. As one scholar describes,

> [P.R.C. Foreign Minister] Huang Hua maintained that since the United States had committed itself to a "one China policy" in the 1972 Communiqué, this required that the United States stop selling weapons to Taiwan as soon as Sino-US relations were normalized. The United States found no such obligation in the 1972 Communiqué. US negotiators in 1978 agreed that the United States would not sell arms to Taiwan during 1979, the year immediately after normalization, in order to avoid highlighting the issue and embarrassing Beijing. Washington was also willing to agree that the United States would handle arms sales to Taiwan in a cautious and prudent manner and transfer only defensive weapons. But beyond that US negotiators would not go.[74]

After struggling to make ground on this issue, President Carter communicated to Deng that the U.S. would not compromise on the issue of continuing defensive arms sales to Taiwan; Deng protested, but indicated he understood the U.S. position and moved forward, as he did not want this issue to delay normalization of U.S.-P.R.C. ties.[75] The final text[76] of the Normalization Communique established diplomatic relations

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[73] Michel Oksenberg, *Memorandum to the President's Assistant for National Security Affairs (Brzezinski)*, *in* 13 FOREIGN RELATIONS OF THE UNITED STATES, 1977–1980: CHINA 1150, 1151 (David P. Nickles & Adam M. Howard eds., 2013) (1980).

[74] GARVER, *supra* note 49, at 407.

[75] *See id.* ("Deng maintained that continued US arms sales were contrary to a peaceful solution of the Taiwan question because they would dissuade Taipei from entering into negotiations with Beijing, making use of force the only way to incorporate Taiwan into the PRC. After spending almost an hour objecting to the US position, Deng said the Taiwan problem was the one problem remaining unresolved and asked, 'What shall we do about it?' [U.S.] Ambassador Woodcock opined that with normalization and the passage of time the American people would come to accept that Taiwan was part of China. The important first task was normalization. Deng answered '*hao*' (OK), and the impasse over arms sales to Taiwan was overcome—for several years.").

[76] *Normalization Communique*, *supra* note 45. The full text of this communique reads:

> The United States of America and the People's Republic of China have agreed to recognize each other and to establish diplomatic relations as of January 1, 1979.
>
> The United States of America recognizes the Government of the People's Republic of China as the sole legal Government of China. Within this context, the people of the United States will maintain cultural, commercial, and other unofficial relations with the people of Taiwan.
>
> The United States of America and the People's Republic of China reaffirm the principles agreed on by the two sides in the Shanghai Communique and emphasize once again that:
>
> Both wish to reduce the danger of international military conflict.

between the U.S. and the P.R.C., with the U.S. recognizing the P.R.C. as "the sole legal Government of China."[77] The agreement reaffirmed the Shanghai Communique and included the clause that "the people of the United States will maintain cultural, commercial, and other unofficial relations with the people of Taiwan."[78] Additionally, the U.S. and the P.R.C. simultaneously issued two parallel unilateral statements with the issuance of the communique.[79] The U.S.'s statement declared that "the United States continues to have an interest in the peaceful resolution of the Taiwan issue and expects that the Taiwan issue will be settled peacefully by the Chinese themselves,"[80] while the P.R.C.'s statement

> Neither should seek hegemony in the Asia-Pacific region or in any other region of the world and each is opposed to efforts by any other country or group of countries to establish such hegemony.
> Neither is prepared to negotiate on behalf of any third party or to enter into agreements or understandings with the other directed at other states.
> The Government of the United States of America acknowledges the Chinese position that there is but one China and Taiwan is part of China.
> Both believe that normalization of Sino-American relations is not only in the interest of the Chinese and American peoples but also contributes to the cause of peace in Asia and the world.
> The United States of America and the People's Republic of China will exchange Ambassadors and establish Embassies on March 1, 1979.

Id.

[77] *Id.*

[78] *Id.*

[79] GARVER, *supra* note 49, at 406.

[80] U.S. Statement on Diplomatic Recognition of the P.R.C. *in* SHIRLEY A. KAN, CONG. RSCH. SERV., RL 30341, CHINA/TAIWAN: EVOLUTION OF THE "ONE CHINA" POLICY—KEY STATEMENTS FROM WASHINGTON, BEIJING, AND TAIPEI 35–36 (2015). On the day the U.S. and P.R.C. issued the Normalization Communique, President Carter stated that:

> The change that I'm announcing tonight will be of great long-term benefit to the peoples of both our country and China—and, I believe, to all the peoples of the world. Normalization—and the expanded commercial and cultural relations that it will bring—will contribute to the well-being of our own Nation, to our own national interest, and it will also enhance the stability of Asia. These more positive relations with China can beneficially affect the world in which we live and the world in which our children will live.
>
> We have already begun to inform our allies and other nations and the Members of the Congress of the details of our intended action. But I wish also tonight to convey a special message to the people of Taiwan—I have already communicated with the leaders in Taiwan—with whom the American people have had and will have extensive, close, and friendly relations. This is important between our two peoples.

Address by President Carter to the Nation, OFF. OF THE HISTORIAN, https://history.state.gov/historicaldocuments/frus1977-80v01/d104 (last visited Apr. 10, 2021).

professed that "bringing Taiwan back to the embrace of the motherland and reunifying the country" was "entirely China's internal affair."[81]

C. Taiwan Relations Act (TRA) of 1979

After shifting diplomatic recognition from the R.O.C. to the P.R.C. government, the U.S. needed a legal framework on which basis it could continue to conduct "cultural, commercial, and other unofficial relations with the people of Taiwan."[82] Other unofficial relations likely referred to security considerations because terminating the Sino-American Mutual Defense Treaty eliminated the U.S.'s legal obligation to defend Taiwan "against external armed attack."[83] To address these legislative gaps, Congress, led by pro-Taiwan and anti-communist coalitions, passed the TRA the same year as the normalization agreement was issued.[84] Though the P.R.C. pushed Carter to veto this bill as a violation of the Normalization Communique, Congressional votes indicated that the bill was veto-proof and Carter signed the TRA into law in 1979.[85] The TRA, slightly changing the language from the Normalization Communique, authorized "the continuation of commercial, cultural, and other relations between the people of the United States and the people on Taiwan."[86] Most importantly, this legislation gave the U.S. the legal authority to continue providing Taiwan with "arms of a defensive character."[87]

D. The Six Assurances

During the Reagan presidency, Beijing and Washington waged a diplomatic battle over U.S. arms sales to Taiwan.[88] U.S.-P.R.C. negotiations then were focused on creating a third communique expressing each countries' policy on this issue.[89] To allay concerns that the

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81 KAN, *supra* note 80, at 36.

82 *Normalization Communique*, *supra* note 45; *see* GARVER, *supra* note 49, at 419–20 (explaining that under U.S. law legislation was necessary to allow private citizens to conduct business and cultural relations with Taiwan).

83 Mutual Defense Treaty, *supra* note 36.

84 GARVER, *supra* note 49, at 419–20; Taiwan Relations Act, *supra* note 49, § 3301.

85 GARVER, *supra* note 49, at 420 (noting that the TRA "passed [by a vote of] 345 to 55 in the House, and 90 to 6 in the Senate," which was enough votes to get the two-thirds of each chamber required to overcome a presidential veto under Article 1, Section 7 of the U.S. Constitution).

86 Taiwan Relations Act, *supra* note 49, § 3301(a)(2).

87 *Id.* § 3301(b)(5).

88 *See* Ho Veng-si, *Chinese Views on U.S. Arms Sales to Taiwan*, 7 FLETCHER F. 373, 374 (1983) ("To the PRC, such arms sales constitute recognition of Taiwan as a *de facto* government and make a mockery of the 1978 Normalization Communiqué.").

89 *See, e.g.*, KAN, *supra* note 80, at 41 (showing that President Reagan's Six Assurances were the underlying policy points for the U.S. during negotiations for the third Joint Communique with China); GARVER, *supra* note 49, at 421–23 (noting that China's policy goals in the negotiations were to assert its dominance in the region and to reduce U.S. arm's sales to Taiwan).

U.S. would abandon Taiwan in these negotiations, the U.S. Under Secretary of State sent a cable to James Lilley, the Director of the American Institute in Taiwan ("AIT") (the de facto U.S. embassy in Taiwan), instructing him to meet with President Chiang of the R.O.C..[90] "The cable [communicated to] Lilley [specific] talking points that were authorized by President Reagan."[91] In 2020, the Trump administration declassified this cable, "ma[king] public the definitive language [of the] assurances":[92]

> [T]he U.S. Side:
> - Has not agreed to set a date for ending arms sales to Taiwan
> - Has not agreed to consult with the PRC on arms sales to Taiwan
> - Will not play any mediation role between Taipei and Beijing
> - Has not agreed to revise the Taiwan Relations Act
> - Has not altered its position regarding sovereignty over Taiwan
> - Will not exert pressure on Taiwan to enter into negotiations with the PRC.[93]

Lilley delivered these Six Assurances to President Chiang on July 14, 1982, a month before the third U.S.-China communique was issued.[94] Due to the secretive nature of communicating these assurances to Taiwan, many different versions exist, but the differences are mostly changes in wording, with the six positions remaining basically unchanged.[95]

E. 1982 US-P.R.C. Joint Communique on Arms Sales (Arms Sales Communique)

The U.S. had continued selling arms to Taiwan in 1979, which some in the P.R.C. interpreted as a contradiction of its promise not to do so during normalization negotiations.[96] The U.S. then increased its arms sales to Taiwan by more than sixty million dollars from 1978 to 1980,

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[90] SUSAN V. LAWRENCE, CONG. RSCH. SERV., IF11665, PRESIDENT REAGAN'S SIX ASSURANCES TO TAIWAN (2020).

[91] *Id*.

[92] *Id*.

[93] *Declassified Cables: Taiwan Arms Sales & Six Assurances (1982)*, *supra* note 55.

[94] LAWRENCE, *supra* note 90.

[95] *See, e.g.*, Ching Chang & YuJane Chen, Re-examining the US "Six Assurances" to Taiwan 13–18 (July 30, 2012) (unpublished manuscript), https://ssrn.com/abstract=2119784 (providing and commenting on various versions of the Six Assurances that have circulated over the years).

[96] GARVER, *supra* note 49, at 421–22. It is worth noting that the U.S. only committed to *suspending* arms sales for one year after normalization, and that arms already in the pipeline were significant enough to cover needs for the coming year. *See* Veng-si, *supra* note 88, at 374–75 ("In 1979, the year of the moratorium on new weapons sales, the Carter Administration delivered $800 million worth of weapons to Taiwan, roughly equivalent to the total arms deliveries to Taiwan for the previous four years.").

further angering the P.R.C.[97] Deciding that U.S. action had grown too extreme, Deng pressed Reagan to limit arms sales to Taiwan to levels and quality not in excess of those under the Carter administration, as well as to set a definite date for when U.S. arms sales to Taiwan would end.[98] The U.S., in response, argued that the P.R.C. in insisting upon these stringent terms was acting beyond the scope of what had been agreed to in the Normalization Communique.[99] In regard to arms sales, the Chinese and U.S. sides finally settled on the following text:

> [T]he United States Government states that it does not seek to carry out a long-term policy of arms sales to Taiwan, that its arms sales to Taiwan will not exceed, either in qualitative or in quantitative terms, the level of those supplied in recent years since the establishment of diplomatic relations between the United States and China, and that it intends gradually to reduce its sale of arms to Taiwan, leading, over a period of time, to a final resolution.[100]

There is significant disagreement as to whether the language in this communique conditions the decrease of U.S. arms sales on the P.R.C.'s acceptance of a peaceful solution to the Taiwan question. Historical records show that from the U.S.'s perspective, negotiations "were premised on the clear understanding that any reduction of arms sales depends upon peace in the Taiwan Strait and the continuity of China's declared 'fundamental policy' of seeking a peaceful resolution of the Taiwan issue."[101] The P.R.C. disagreed with this assessment.[102] The following section examines the legal arguments against the claim that the three Sino-US joint communiques legally bind the U.S. to decrease its arms sales to Taiwan.

III. LEGAL STATUS OF THE THREE COMMUNIQUES

The P.R.C. sees the three communiques as binding international legal agreements.[103] Throughout the last half-century, P.R.C. officials have often criticized U.S. arms sales to Taiwan as unacceptable violations

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[97] GARVER, *supra* note 49, at 421.

[98] *Id.* at 422.

[99] *Id.*

[100] *August 17 Communique*, *supra* note 54.

[101] GARVER, *supra* note 49, at 423 (quoting Memorandum from President Ronald Reagan on Arms Sales to Taiwan (Aug. 17, 1982) (on file with Regent University Law Review)).

[102] *See* GARVER, *supra* note 49, at 423–24 (explaining that the Chinese government believed the cessation of arms sales to Taiwan was predicated on and grounded in the Communique's language of mutual respect for each country's sovereignty).

[103] *See* Jacques deLisle, *Trump, Tsai, and the Three Communiques: Prospects for Stability in US-China-Taiwan Relations*, FOREIGN POL'Y RSCH. INST., (Mar. 9, 2017), https://www.fpri.org/2017/03/trump-tsai-three-communiques-prospects-stability-us-china-taiwan-relations/ ("To China, the Communiques embody binding international commitments.").

of these agreements.[104] In February 2021, Yang Jiechi, the director of the Office of the Central Committee for Foreign Affairs of the Politburo, insisted that the U.S. "strictly abide by the one-China principle and the three Sino-U.S. joint communiques."[105] Though the U.S. has at many times recognized the three communiques as guiding U.S. policy,[106] it has declined to recognize these agreements as legally binding,[107] a decision this Article argues is justified under U.S. law.

A. Status as International Agreements under U.S. Domestic Law

The U.S. interprets the three communiques as policy statements that carry no legal effect under the law.[108] The main U.S. authority governing whether a document constitutes an international agreement is 22 C.F.R. § 181.[109] 22 C.F.R. § 181.2 states:

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[104] *See, e.g.*, Yang Shen, *US arms sales to Taiwan "offensive, but useless"*, GLOB. TIMES (Oct. 27, 2020), https://www.globaltimes.cn/content/1204800.shtml (noting the Chinese Foreign Ministry spokesperson Wang Wenbin's disaffection with the arms sales and stating that "the US arms sales to Taiwan violated the three joint communiques that China and the US signed"); Alexandra Stevenson, *China Threatens Reaction After U.S. Announces Arms Sales to Taiwan*, N.Y. TIMES (Sept. 4, 2022), https://www.nytimes.com/2022/09/04/world/asia/taiwan-china-arms.html ("Mr. Liu, the Chinese spokesman, called on Washington to 'honor its commitments to the one-China principle' and affirmed Beijing's line that Taiwan is an 'inalienable part of Chinese territory.'").

[105] Xinhua, *Senior Chinese Diplomat Holds Phone Conversation with U.S. Secretary of State*, PEOPLE'S DAILY ONLINE (Feb. 7, 2021, 8:36 AM), http://en.people.cn/n3/2021/0207/c90000-9816940.html (paraphrasing the phone conversation, stating that "[t]he Taiwan question, the most important and sensitive core issue in China-U.S. relations, bears on China's sovereignty and territorial integrity . . . . [A]dding that Hong Kong, Xinjiang and Tibet-related affairs are all China's internal affairs and allow no interference by any external forces"). A month later Foreign Minister Wang Yi articulated hope that the incoming administration would act in accordance with the three communiques and honor the one China policy. Xinhua, *China Urges New U.S. Administration to Drop Predecessor's "Dangerous Practice" on Taiwan*, PEOPLE'S DAILY ONLINE (Mar. 7, 2021, 6:05 PM), http://en.people.cn/n3/2021/0307/c90000-9826289.html.

[106] *See, e.g.*, deLisle, *supra* note 103 ("The U.S. and China have had different understandings of these fundamental texts [the three communiques]. To China, the Communiques embody binding international commitments. For the U.S., they are [the] two sides' parallel statements of deeply entrenched policies."); *Why Taiwan Matters, Part II: Hearing Before the Comm. On Foreign Affs. H.R.*, 112th Cong. (2011) (statement of Assistant Secretary of State Kurt Campbell) ("Taiwan Relations Act, plus the so-called Six Assurances and Three Communiques, form the foundation of our overall approach . . . ."); Remarks Following Discussions With Premier Wen Jiabao of China and an Exchange With Reporters, 2 PUB. PAPERS 1701 (Dec. 9, 2003) (noting president Bush's statement, "[t]he United States Government's policy is 'one China,' based upon the three communiques and the Taiwan Relations Act").

[107] *See* Hungdah Chiu, *supra* note 66, at 4–5 (noting that the United States did not consider the 1972 Communique as a legally binding treaty).

[108] *Id.*

[109] *See* S. COMM. ON FOREIGN RELS., 106th CONG., TREATIES AND OTHER INT'L AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 50 & n.30 (Comm. Print 2001) (noting that the guidelines used by the Department of State to determine what constitutes

> General. The following criteria are to be applied in deciding whether any undertaking, oral agreement, document, or set of documents, including an exchange of notes or of correspondence, constitutes an international agreement . . . . Each of the criteria except those in paragraph (a)(5) of this section must be met in order for any given undertaking of the United States to constitute an international agreement.
>
> (i) Identity and intention of the parties. . . .
>
> (ii) Significance of the arrangement. . . .
>
> (iii) Specificity, including objective criteria for determining enforceability. . . .
>
> (iv) Necessity for two or more parties. . . .
>
> (v) Form. . . . [110]

These factors parallel the Vienna Convention Law of Treaties ("VCLT") criteria for when a document constitutes an international agreement.[111] Because the Senate has not given its advice and consent to the VCLT, it is not recognized as a treaty under Article II, Section 2 of the U.S. Constitution[112]; however, the U.S. Department of State has stated that the U.S. "considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties."[113] Therefore, this section will use VCLT principles to expand the legal understanding of the criteria established by 22 C.F.R. § 181.2. As shown above, four of the regulatory requirements (intent, significance, specificity, and necessity for two or more parties) must all be met in order for an instrument to constitute an international agreement.[114] The

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an international agreement are contained in 22 C.F.R. 181). *See generally* 22 C.F.R. § 181.2 (2021).

110 22 C.F.R. § 181.2(a) (2021).

111 Vienna Convention on the Law of Treaties, art. 3, May 23, 1969, 1155 U.N.T.S 331 ("The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect: (*a*) the legal force of such agreements; (*b*) the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention; (*c*) the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties.").

112 U.S. CONST., art. II, § 2 ("The President . . . shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . ."); *Vienna Convention on the Law of Treaties*, U.S. STATE DEPT., https://2009-2017.state.gov/s/l/treaty/faqs/70139.htm (last visited Apr. 10, 2021) ("The U.S. Senate has not given its advice and consent to the [Vienna Convention on the Law of Treaties]."); *Treaties Pending in the Senate*, U.S. STATE DEPT. (Oct. 22, 2019), https://www.state.gov/treaties-pending-in-the-senate/ (noting that the Vienna Convention on the Law of Treaties was submitted to the Senate for approval in November of 1971 but is still pending approval).

113 Vienna Convention on the Law of Treaties, *supra* note 111.

114 22 C.F.R. § 181.2(a)(1)–(4).

following sections argue that the three communiques are not international agreements because they fail to meet the intention and specificity requirements from 22 C.F.R. § 181.2.

1. Identity and Intention of the Parties

In regard to this first criterion, 22 C.F.R. § 181.2 states that "[t]he parties must intend their undertaking to be legally binding, and not merely of political or personal effect. Documents intended to have political or moral weight, but not intended to be legally binding, are not international agreements."[115] During the communiques' negotiations, the U.S. made it clear that it was negotiating policy-based documents, not legally binding agreements.[116] Even though the U.S. made subsequent affirmations that it would abide by the communiques, these affirmations were framed as decisions based on foreign relations considerations, and not based on law.[117]

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[115] 22 C.F.R. § 181.2(a)(1).

[116] *See, e.g.*, GARVER, *supra* note 49, at 407 (noting that the U.S. expressly denied that the Shanghai Communique bound them legally to reduce arms sales to Taiwan while negotiating the Normalization Communique with China); Letter from President Ronald Reagan to Deng Xiaoping, Ronald Reagan Presidential Libr.) (Apr. 5, 1982) (on file with Ronald Reagan Presidential Library) (stating "[t]his government continues to stand firmly by the principles agreed upon in the Joint Communique on the Establishment of Diplomatic Relations between the United States and China of January 1, 1979," and that the position agreed to in the forthcoming communique on arms sales was a "policy" rather than a law); Cable for Ambassador from the Secretary, Taiwan Arms Issue: Approval for Next Round, Ronald Reagan Presidential Libr. (Aug. 7, 1982) (on file with Ronald Reagan Presidential Library) (directing the Ambassador, in the course of negotiations with China over the 1982 communique, to "continue to make clear in the most straightforward and explicit terms that we cannot have a communique which does not have wording reflecting the fact that what we plan to do in our future policy is related to the peaceful approach they have been taking and which they state to be their 'fundamental' policy in this communique").

[117] *See, e.g.,* KAN, *supra* note 80, at 30 ("U.S. policy has considered Taiwan's status as unsettled. U.S. policy leaves the Taiwan question to be resolved by the people on both sides of the strait: a 'peaceful resolution' with the assent of Taiwan's people and without unilateral changes. In other words, U.S. policy focuses on the *process* of resolution of the Taiwan question, not any set outcome."); Remarks in a Roundtable Discussion on Shaping China for the 21st Century in Shanghai, China, 1 PUB. PAPERS 1095 (June 30, 1998) (noting President Clinton's framing of the issue as one of policy rather than a legal issue: "I had a chance to reiterate our Taiwan policy, which is that we don't support independence for Taiwan, or two Chinas, or one Taiwan-one China. And we don't believe that Taiwan should be a member in any organization for which statehood is a requirement. So I think we have a consistent policy. Our only policy has been that we think it has to be done peacefully"); Remarks Following Discussions With Premier Wen Jiabao of China and an Exchange With Reporters, 2 PUB. PAPERS 1701 (Dec. 9, 2003) (noting president Bush's use of the term "policy" rather than a legal term, "[t]he United States Government's policy is 'one China,' based upon the three communiques and the Taiwan Relations Act"); Remarks Prior to a Meeting With Party Secretary of the Shanghai Municipal Committee Yu Zhengsheng in Shanghai, China, 2 PUB. PAPERS 1692 (Nov. 16, 2009) (containing President Obama's statement of policy, "[w]ell, I have been clear in the past that my administration fully supports a one-China policy, as

Furthermore, Articles 11 through 17 of the VCLT outline the various acceptable means for States to express their consent to be bound by a treaty.[118] For the delineated means, which are "signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession,"[119] the VCLT requires that the instrument provide for consent to be expressed by a specific mean, or that it was otherwise established by the negotiating parties that consent may be expressed by a specific means.[120] Article 11 also allows for consent to be bound by a treaty to be expressed "by any other means if so agreed."[121] The text of the communiques contains no provision detailing what method the contracting States should use to express such consent, and the negotiating history shows no clear agreement between the two parties as to whether and how they would express their consent to be bound by the agreements as international law.

When President Reagan signed the Arms Sales Communique in 1982, he made both "public and internal clarifications that U.S. arms sales [would] continue" according to the TRA, "with the [] expectation that the PRC[]" continue to follow a peaceful approach to resolving the Taiwan question.[122] In one of his public statements, President Reagan declared that

> Regarding future U.S. arms sales to Taiwan, our *policy*, set forth clearly in the [Arms Sales] communique . . . is fully consistent with the Taiwan Relations Act. Arms sales will continue in accordance with the act and with the full expectation that the approach of the Chinese Government to the resolution of the Taiwan issue will continue to be peaceful. We attach great significance to the Chinese statement in the communique regarding China's "fundamental" *policy*, and it is clear from our statements that our future actions will be conducted with this peaceful *policy* fully in mind. The position of the United States Government has always been clear and consistent in this regard. The Taiwan question is a matter for the Chinese people, on both sides of the Taiwan Strait, to resolve.[123]

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reflected in the three joint communiqués that date back several decades, in terms of our relations with Taiwan as well as our relations with the People's Republic of China. We don't want to change that policy and that approach").

[118] Vienna Convention on the Law of Treaties, *supra* note 111, at art. 11–17.

[119] *Id.* at art. 11.

[120] *Id. But see* RESTATEMENT (FOURTH) OF FOREIGN RELS. L. § 304 (AM. L. INST. 2018) ("While the text of an international agreement may be finalized by any of several steps . . . such steps do not generally serve to express a state's consent to be bound by the treaty unless the treaty expressly so provides.").

[121] Vienna Convention on the Law of Treaties, *supra* note 111, at art. 11.

[122] KAN, *supra* note 80, at 8, 21, 41, 43.

[123] *Id.* at 43 (emphasis added); Statement on United States Arms Sales to Taiwan, 2 PUB. PAPERS 1054 (Aug. 17, 1982).

This statement shows that President Reagan interpreted the Arms Sales Communique to set forth both U.S. and Chinese policy practices; a policy position that, for the U.S., must be attached to the TRA to give it legal weight. Thus, the intention of the parties works against the claim that the communiques are international agreements. Additionally, during negotiations, there was no agreement between the P.R.C. and the US as to how to express consent. With no Article 11 consent, the communiques are unenforceable as treaties under the VCLT.[124]

2. Significance of the Arrangement

22 C.F.R. § 181.2(a)(2) presents agreements that "[a]re of political significance" as an example of arrangements that constitute international agreements.[125] History demonstrates that the communiques were of major consequence to U.S. foreign relations of the time, so asserting a claim that invalidates the communiques as "[m]inor or trivial undertakings" is unpersuasive.[126]Though the communiques are likely agreements of political significance under this criterion, the communiques fail to meet other criteria required by the regulation.

3. Specificity

22 C.F.R. § 181.2(a)(3) provides that "[i]nternational agreements require precision and specificity in the language setting forth the undertakings of the parties. Undertakings couched in vague or very general terms containing no objective criteria for determining enforceability or performance are not normally international agreements. Most frequently such terms reflect an intent not to be bound."[127] The communiques as a whole reiterate Chinese and U.S. policies and positions and contain no objective criteria governing how such policies should be enforced.[128]

There is disagreement centered around the Chinese-language version of the Normalization and Arms Sales Communiques with regard to

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[124] *See* Vienna Convention on the Law of Treaties, *supra* note 111, at arts. 9, 11 (explaining that the consent of all parties is needed for treaties–such as the communiques–to be enforceable).

[125] 22 C.F.R. § 181.2(a)(2) (2021).

[126] *Id*; *see* KAN, *supra* note 80, at 30 (providing an example of how the U.S.'s stance on the status of Taiwan is unsettled and affects policy matters).

[127] *Id.* at § 181.2(a)(3).

[128] *E.g.*, *August 17 Communique*, *supra* note 54. To provide another example, paragraph seven of the Shanghai Communique states the following:

> In order to bring about, over a period of time, a final settlement of the question of United States arms sales to Taiwan, which is an issue rooted in history, the two Governments will make every effort to adopt measures and create conditions conducive to the thorough settlement of this issue.

Shanghai Communique, *supra* note 43, at 1–3. The communique fails to further define what "measures" and "conditions" are being considered in this context. *Id.*

specificity.[129] In the English-language text, both communiques assert that the U.S. *acknowledges* "the Chinese position that there is but one China and Taiwan is part of China."[130] The Chinese version of the Shanghai Communique had used the word *renshidao* (to know or understand) as the English equivalent of "acknowledge" in a similar clause, but in the latter two communiques, Chinese negotiators successfully pushed to use the word "*chengren*" instead.[131] "*Chengren*" (to recognize) is used in international law as a diplomatic term of art by an already-established sovereign state to confer the legal status of sovereignty on an entity claiming such status.[132] In other words, to "*chengren*" a state is to accept that state's "sovereign control over a particular territory."[133] Thus, the interpretation of the statement that "the Chinese position [is] that there is but one China and Taiwan is part of China"[134] changes according to whether one is reading the English-language or the Chinese-language version of the communique. The Chinese text supports the assertion that the U.S. should refrain from engaging in cross-Strait relations, including arms sales, since the U.S. "*chengren*" (recognized) that Taiwan was a part of China, thus accepting China's legal claim of sovereignty over the island.[135] The U.S., on the other hand, considers the English-language version of the communique as the authoritative text, where the U.S. simply *acknowledged* the Chinese position concerning Taiwan with no legal ramifications.[136] The competing interpretations of such a key term

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[129] GARVER, *supra* note 49, at 406. *Compare Normalization Communique*, *supra* note 45 (showing that the English-language version of the joint communique says that the U.S. *acknowledges* China's views of Taiwan), *with* Zhōnghuá rénmín gònghéguó hé měilìjiān hézhòngguó liánhé gōngbào (yījiǔbā'èr nián bā yuè shíqī rì fābiǎo) (中华人民共和国和美利坚合众国联合公报（一九八二年八月十七日发表)) [Joint Communique between the People's Republic of China and the United States of America, China-U.S., Aug. 17, 1982] (English version: http://www.gov.cn/test/2006-02/28/content_213333.htm) [hereinafter *Joint Communique between the People's Republic of China and the United States of America*] (showing that the Chinese-language version of the joint communique says that the U.S. *recognizes* China's views of Taiwan).

[130] *Normalization Communique*, *supra* note 45; *August 17 Communique*, *supra* note 54.

[131] GARVER, *supra* note 49, at 405–07; *Joint Communique between the People's Republic of China and the United States of America*, *supra* note 129.

[132] GARVER, *supra* note 49, at 405.

[133] *Id.*

[134] *Normalization Communique*, *supra* note 45; *August 17 Communique*, *supra* note 54.

[135] GARVER, *supra* note 49, at 405.

[136] *Id*; *see also* Neil Thomas, *When it Comes to Negotiating with China, the Devil is in the Details*, WASH. POST (Mar. 26, 2019, 6:00 AM), https://www.washingtonpost.com/outlook/2019/03/26/when-it-comes-negotiating-with-china-devil-is-details/ (explaining that the Normalization Communique used the noncommittal English word *acknowledged* instead of *recognized*).

demonstrates a lack of precision and specificity in the drafting of the communiques.

4. Necessity for Two or More Parties.

U.S. law makes a clear differentiation between unilateral commitment and international agreements. 22 C.F.R. § 181.2(a)(4) recognizes that even though some unilateral commitments "may be legally binding, they do not constitute international agreements."[137] International agreements require two or more contracting parties; the three Sino-US joint communiques meet this statutory criterion.[138]

5. Form

Some Chinese international law scholars assert that "international law does not strictly require treaties be in certain forms; therefore any forms that clearly show what parties agree to should be accepted as . . . legally binding international agreements."[139] U.S. law, however, does not place such importance on form, stating that it "is not normally an important factor."[140] The regulation notes that "[f]ailure to use the customary form [for international agreements] may constitute evidence of a lack of intent to be legally bound by the arrangement."[141] The unorthodox format of the Shanghai Communique and the negotiating history preceding the issuance of this communique suggest such a lack of intent. The bulk of the Normalization Communique reaffirms the principles agreed on by both sides in the Shanghai Communique,[142] and can be treated similarly. The Arms Sales Communique seems to take inspiration from the Shanghai Communique's format, with paragraphs stating the perspective of both sides.[143]

With regard to publication, the American Institute of Taiwan, America's de facto embassy with Taiwan, has published all three communiques as "[k]ey [f]oreign [p]olicy [d]ocuments."[144] The U.S. government has not registered the communiques with the United Nations, nor has published them as part of the Department of State or Congressional treaty collections, likely due to the fact that the communiques have never been treated as treaties under the U.S.

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137 22 C.F.R. § 181.2 (a)(4) (2021).

138 *Id.* (explaining that international agreements require "two or more parties"); *Shanghai Communique*, *supra* note 43; *Normalization Communique*, *supra* note 45; *August 17 Communique*, *supra* note 54.

139 Li, *supra* note 67, at 622–23.

140 22 C.F.R. § 181.2 (a)(5).

141 *Id.*

142 *Normalization Communique*, *supra* note 45.

143 *August 17 Communique*, *supra* note 54.

144 *Key U.S. Foreign Policy Documents for the Region*, AM. INST. TAIWAN, https://web-archive-2017.ait.org.tw/en/key-documents.html (last visited Oct. 22, 2022).

Constitution.[145] Though VCLT does state that "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty,"[146] this claim is moot once it is established that the communiques are not legally equivalent to treaties. The three joint communiques cannot be classified as legally binding international agreements as they do not meet all of the requirements of 22 C.F.R. § 181.2.[147]

6. Restatement's Emphasis on Intent

As noted by the 22 C.F.R. § 181.2, "intent of the parties is the key factor" in determining the legal status of an agreement. [148] This emphasis on intent is reflected throughout the entirety of 22 C.F.R. § 181.2(a) and is supported by the Restatement (Fourth) of the Foreign Relations Law of the United States.[149] The Restatement notes that

> Under international law, an international agreement enters into force for the United States—as for other states—when it has expressed its consent to be bound, by means consistent with the agreement, and when the other conditions required by the agreement have been fulfilled. Thus, an international agreement signed by the United States, but remaining subject to its ratification, will not bind the United States to act in accordance with its terms.[150]

As examined further in the next section, the three communiques have never been sent to the U.S. Senate for their advice and consent, and therefore have never reached the stage of ratification. Therefore, in line with the Restatement, the communiques do not legally bind the U.S. to their terms.

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[145] Li, *supra* note 67, at 634.

[146] Vienna Convention on the Law of Treaties, *supra* note 111, at art. 11; Li, *supra* note 67, at 635.

[147] 22 C.F.R. § 181.2 (a)(1)–(5) (2021) (demonstrating the requirements for legally binding international agreements); RESTATEMENT (FOURTH) OF FOREIGN REL. L.: APPROVAL TREATIES UNDER CONST. § 303 (AM. L. INST. 2018) (explaining that treaties are not legally binding when they are not sent to the senate for ratification); *see also* Curtis Bradley et al., *The Rise of Nonbinding International Agreements: An Empirical, Comparative, and Normative Analysis*, 90 U. CHI. L. REV. 22, 24–25, 67 & n.232 (2022) (explaining that joint communiques are nonbinding because they fail to meet the requirements of 22 C.F.R 181.2(a)).

[148] 22 C.F.R. § 181.2 (a)(3).

[149] *See* 22 C.F.R. § 181.2 (a); RESTATEMENT (FOURTH) OF FOREIGN REL. L.: ENTRY INTO FORCE INT'L AGREEMENTS § 304 (AM. L. INST. 2018) ("(1) An international agreement enters into force as an international obligation for a state, including the United States, when: (a) the state has expressed its consent to be bound by means consistent with the agreement; and (b) the other conditions established by the agreement, including consent by the requisite number of states, have been satisfied.").

[150] RESTATEMENT (FOURTH) OF FOREIGN REL. L.: ENTRY INTO FORCE INT'L AGREEMENTS § 304 cmt. c (AM. L. INST. 2018).

B. Treaty Status under the U.S. Constitution

The U.S. Constitution vests the power to make treaties on behalf of the state in both the executive and the legislative branches of government.[151] Article II treaties are made based on the constitutional authority that states "[the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . ."[152] As none of the three communiques have been ratified by the President with a two-thirds majority in the Senate, they cannot be classified as Article II treaties.[153] Though the executive has the constitutional foreign relations authority to negotiate and sign agreements like the joint communiques, this authority does not grant the executive sole power to ratify an international agreement as a treaty. As explained by the most recent Restatement of Foreign Relations Law,

> [p]articularly when treaty negotiations take place at a foreign capital or international conference, U.S. negotiators proceed on the basis of State Department instructions and "full powers" issued by the President or the Secretary of State that authorize signature of the treaty on behalf of the United States [citation omitted]. Signature at this phase, which typically coincides with the conclusion of multilateral negotiations, [citation omitted] is distinct from ratification—since, in the U.S. legal system, a treaty enters into force for the United States only after the Senate has given its advice and consent and the President has ratified the treaty.[154]

C. Status as Presidential Executive Agreements

In addition to Article II treaties, the U.S. also recognizes that "international agreements may take the form of . . . (2) executive agreements concluded pursuant to a treaty, (3) executive agreements concluded on the basis of legislation enacted by Congress and (4) executive agreements concluded on the basis of the President's constitutional powers including foreign affairs powers."[155] The fourth type of agreement

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[151] U.S. CONST. art. II, § 2.

[152] *Id.*

[153] *Id.*; *see* U.S DEP'T OF STATE, A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2020 81–86 (2020) (listing the treaties that are currently in force and ratified by the President but not including the three communiques, implying that they have not been ratified by the President); *Treaties Pending in the Senate*, *supra* note 112 (explaining that the Vienna Convention on the Law of Treaties is still pending in the Senate for approval).

[154] RESTATEMENT (FOURTH) OF FOREIGN REL. L.: APPROVAL TREATIES UNDER CONST § 303 n.1 (AM. L. INST. 2018).

[155] Phillip R. Trimble, *Foreign Policy Frustrated*—Dames & Moore*, Claims Court Jurisdiction and a New Raid on the Treasury*, 84 COLUM. L. REV. 317, 329–30, 329 n.47 (1984).

is often referred to as a "presidential executive agreement" or as an "executive agreement."[156] The Supreme Court has recognized these types of agreements, acknowledging the President's authority to make legally binding agreements with foreign nations without seeking the advice and consent of the Senate.[157] Though presidential executive agreements "are not treaties under the Treaty Clause of the Constitution, they may in appropriate circumstances have an effect similar to treaties in some areas of domestic law."[158] As long as the subject matter of the agreement is a matter "of international concern" and "does not contravene any of the limitations of the Constitution,"[159] the scope of such agreements may "deal with any matter that under the Constitution falls within the independent powers of the President."[160]

Since the communiques cannot be classified as a treaty under U.S. law, classifying them as presidential executive agreements is the main argument in favor of the position that they place legal obligations on the U.S. However, this is an incorrect classification. The three communiques are not presidential executive agreements as they have never become legally binding on the U.S.

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[156] *Id.* at 329 n.47.

[157] United States v. Belmont, 301 U.S. 324, 331 (1937); United States v. Pink, 315 U.S. 203, 207–08 (1942); Weinberger v. Rossi, 456 U.S. 25, 29–30 n.6 (1982). The Supreme Court in a footnote in *Weinberger* states that "[w]e have recognized, however, that the President may enter into certain binding agreements with foreign nations without complying with the formalities required by the Treaty Clause of the Constitution, even when the agreement compromises commercial claims between United States citizens and a foreign power." *Weinberger*, 456 U.S. at 30 n.6.

[158] *Weinberger*, 456 U.S. at 30 n.6.

[159] RESTATEMENT (SECOND) OF FOREIGN REL. L.: SCOPE INT'L AGREEMENTS § 117 (AM. L. INST. 1965).

[160] *Id.* § 121. The Restatement puts forward the constitutional basis for the independent power of the president to make executive agreement:

> The authority of the President to make executive agreements in the field of foreign relations is based on the following provisions of the Constitution:
>
> "The executive Power shall be vested in a President of the United States of America." [U.S. CONST.] art. II, § 1;
>
> "The President shall be Commander in Chief of the Army and Navy[. . . .]" [U.S. CONST.] art. II, § 2;
>
> "He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties[, . . .] and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls[. . . .]" [U.S. CONST.] art. II, § 2;
>
> "[H]e shall take Care that the Laws be faithfully executed[. . . .]" [U.S. CONST.] art. II, § 3.

Id.

The executive does have constitutional authority under his foreign relations power to negotiate agreements with other countries, but such agreements only become binding upon the U.S. "upon signature or other action by the President . . . in accordance with the rule stated in §122 [of the Restatement]."[161] Section 122 states that "[a]n international agreement comes into effect upon signature . . . or other event as indicated by the intention of the signatories, manifested by the terms of the agreement, or otherwise."[162] The comments to this section then elaborate on the importance of intent: "If [the negotiating parties'] intention is clearly indicated by the terms of the agreement, these terms control. If it is not, other manifestations of their intention, such as the negotiating history, diplomatic custom, and the respective constitutions of the signatories, may be considered."[163]

Though some executive agreements have been accepted by the U.S. as legally binding instruments,[164] this is not the case with the three communiques. Nowhere in any of the three joint communiques is there a clause indicating that the agreements become binding upon signature, so one must look to the negotiating history, diplomatic custom, and Chinese and U.S. constitutions to determine if there existed an intent to enter into a legally binding agreement.[165] Earlier sections of this Article discuss how the history of the communiques demonstrates U.S. intent to classify these instruments as policy documents rather than legally binding international agreements.[166] The U.S. Constitution requires senatorial concurrence to make an agreement between nations a treaty, but does not reference other specific forms of international agreements.[167] Thus, the communiques do not have the proper intent to constitute executive agreements. The following case helps explain why it is highly questionable whether such agreements are "legally equivalent to a treaty for purposes of superseding prior federal legislation."[168]

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161 *Id.* SCOPE EXEC. AGREEMENT PURSUANT TO PRESIDENT'S CONST. AUTH. § 131.

162 *Id.* GEN. RULE § 122.

163 *Id.* GEN. RULE § 122 cmt. a.

164 *See* STEPHEN P. MULLIGAN, CONG. RSCH. SERV., RL32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW 2, 32 (2018) (explaining that pacts between the U.S. and foreign nations can take the form of executive agreements, which courts have recognized as binding international commitments).

165 *Id.*; *Shanghai Communique*, *supra* note 43; *Normalization Communique*, *supra* note 45; *August 17 Communique*, *supra* note 54.

166 *See* discussions *supra* Sections II.E, III.A (explaining how the U.S. has historically interpreted the three communiques as policy statements without legally binding force).

167 U.S. CONST. art. II, § 2.

168 Trimble, *supra* note 155, at 329 n.47.

1. Distinguishing *United States v. Belmont*

In *United States v. Belmont*, the U.S. Supreme Court upheld the executive's sole authority to enter into executive agreements with foreign states and declared that these agreements trump state law.[169] A Russian corporation had deposited money with Belmont, a private banker in New York, prior to 1918, the year when the Soviet government nationalized all of its corporations.[170] The deposit account with Belmont became Soviet government property until 1933 when the Soviet Union assigned to the U.S. all amounts American nationals owed to the U.S. government.[171] Belmont refused to pay the amount from the deposit account requested by the U.S. government, so the government brought suit against Belmont to recover that amount.[172] The Court observed that "[t]he assignment was effected by an exchange of diplomatic correspondence between the" two governments,[173] further stating that

> The [U.S.'s] recognition [of the Soviet government], establishment of diplomatic relations, the assignment, and agreements with respect thereto, were all parts of one transaction, resulting in an international compact between the two governments. That the negotiations, acceptance of the assignment and agreements and understandings in respect thereof were within the competence of the President may not be doubted. Governmental power over internal affairs is distributed between the national government and the several states. Governmental power over external affairs is not distributed, but is vested exclusively in the national government. And in respect of what was done here, the Executive had authority to speak as the sole organ of that government. The assignment and the agreements in connection therewith did not, as in the case of treaties, . . . require the advice and consent of the Senate.[174]

Thus, the Supreme Court recognized the executive's authority to create international agreements outside of Article II treaties that supersede state law, and ordered Belmont to return the deposit account.[175] One Chinese scholar points out significant parallels between the Normalization Communique and the assignment at issue in *Belmont*, arguing that this communique specifically deserves the same treatment

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169 301 U.S. 324, 331–32 (explaining that the President has the authority to enter into executive agreements with foreign states and that these treaties would be ineffective if they did not trump state law, so they necessarily trump state law).

170 *Id.* at 325–26.

171 *Id.* at 326.

172 *Id.* at 325–26.

173 *Id.* at 326.

174 *Id.* at 330.

175 *See id.* at 331–32 (explaining that the President may create international agreements without the Senate's approval—outside of Article II—and ruling against *Belmont*).

that the Supreme Court gave to the *Belmont* assignment.[176] The Court's holding in *Belmont*, however, speaks more to federalism issues than to separation of power concerns[177]; the Court establishes that executive agreements preempt state laws, but does not address how such executive-made agreements interact with federal legislation. [178] Even if one agrees that the Normalization Communique is legally similar to the *Belmont* assignment, *Belmont* itself suggests only that the Normalization Communique would preempt state law, and determines nothing as to the question of whether it preempts federal law as well, notably the TRA.[179]

D. U.S. Department of State Interpretation

Despite claims to the contrary,[180] the U.S. Department of State has consistently held to the position that the three Sino-U.S. joint-communiques are only reflections of U.S. foreign policy and impose no legal obligations on the U.S.[181] The Department recognized in a memorandum that non-legally binding documents may exist in many

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[176] Li, *supra* note 67, at 638–40.

[177] *See Belmont*, 301 U.S. at 331–32 (holding that executive constitutional powers over foreign relations issues supersede state laws, which speaks more to federalism than separation of powers).

[178] *See id.* at 332.

[179] *See id.* at 331–32 (holding that international treaties supersede state law, but failing to address the effects of international treaties on federal law). An outdated version of the Restatement suggests that:

> 1) An executive agreement, made by the United States without reference to a treaty or act of Congress, conforming to the constitutional limitations . . . , and manifesting an intention that it shall become effective as domestic law of the United States at the time it becomes binding on the United States
> (a) supersedes inconsistent provisions of the law of the several states, but
> (b) does not supersede inconsistent provisions of earlier acts of Congress.

RESTATEMENT (SECOND) OF FOREIGN REL. L. § 144 (AM. L. INST. 1965). Even if the Arms Sales Communique was to be interpreted as a presidential executive agreement, its statement that the U.S. "intends gradually to reduce its sale of arms to Taiwan," *August 17 Communique*, *supra* note 54, does not supersede TRA provisions that obligate the U.S. to "make available to Taiwan such defense articles and defense services in such quantity as may be necessary to enable Taiwan to maintain a sufficient self-defense capability," Taiwan Relations Act, *supra* note 49, § 3302(a).

[180] *See* Li, *supra* note 67, at 641 (arguing that "[t]he position of the Department of State on the exact legal nature of the three Sino-US joint communiques is ambivalent and self-contradictory").

[181] Bureau of East Asian and Pacific Affairs, U.S. Relations with Taiwan: Fact Sheet, U.S. DEP'T OF STATE (May 28, 2022), https://www.state.gov/u-s-relations-with-taiwan/ (stating that the three U.S.-China Joint Communiques are related to long-standing policy that has remained consistent for decades); *The Taiwan Security Enhancement Act: Hearing on S. 693 Before the S. Comm. on Foreign Rels.*, 106th Cong. 32 (1999) (statement of Hon. Richard V. Allen, Allen & Co., Washington D.C.) ("According to the legal advisor of the State Department in 1982: These communiques do not constitute a treaty or a legally binding international agreement, creating obligations and rights under international law, but, rather, are statements of future U.S. policy.").

forms, including joint communiques.[182] That same memorandum, explaining when an international document is non-binding, used the Shanghai Communique as an example of a non-binding bilateral document.[183] The memorandum then quotes Assistant Secretary of State John Holdridge's testimony before the Senate Foreign Relations Committee, where he states that in regard to the Arms Sales Communique, "[w]e should keep in mind that what we have here is not a treaty or agreement but a statement of future U.S. policy. We fully intend to implement this policy, in accordance with our understanding of it."[184]

Additionally, when asked whether the Normalization Communique would be transmitted to the Senate Committee on Foreign Relations in accordance with the Case-Zablocki Act of 1972, Deputy Secretary of State Warren Christopher answered: "[y]es, the communique will be transmitted although it is not formally an agreement."[185] Though the Case-Zablocki Act requires the Secretary of State to transmit the text of any international agreement that is not a treaty to Congress,[186] Christopher's clear statement that the communique "is not formally an

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[182] Memorandum from Robert E. Dalton, Asst. Legal Adviser for Treaty Affs., U.S. DEPT. OF STATE 1 (Mar. 18, 1994), https://2009-2017.state.gov/documents/organization/65728.pdf.

[183] *Id.* at 4.

[184] Id. The memorandum incorrectly references the Shanghai Communique instead of the August 17 Communique. Li, supra note 67, at 643. For further discussion, see below:

> 'It (the communique) is not an international agreement and thus imposes no obligations on either party under international law,' State Department legal adviser Davis Robinson told Sen. John East, chairman of the Senate Judiciary subcommittee on separation of powers. . . .
>
> Robinson said the communique is not a binding pact, but merely a statement the president is constitutionally entitled to make of policies he intends to pursue.
>
> 'The communique is an example of such a statement of policy and thus is clearly within the authority of the president,' he said.
>
> Robinson also said the administration had 'regular and extensive' consultations with the Senate Foreign Relations Committee and the House Foreign Affairs Committee before the communique was announced. . . .
>
> 'The issuance of the communique did not encroach on any constitutional or statutary [sic] power of the Congress,' Robinson said. 'The Taiwan Relations Act is and will remain the law of the land unless amended by Congress.'
>
> Under that law, the United States is committed 'to provide Taiwan with arms of a defensive character' and 'to maintain its capacity to resist any resort to force or other forms of coercion that would jeopardize the security or the social or economic system of the people on Taiwan.'
>
> On Aug. 20, three days after the communique with China was issued, the administration formally notified Congress it intends to supply Taiwan with 60 F-5E and F-5F jet fighters over the next 2.5 years.

Juan Walte, The State Department told Congress Monday that a joint…, UNITED PRESS INT'L (Sept. 27, 1982), https://www.upi.com/Archives/1982/09/27/The-State-Department-told-Congress-Monday-that-a-joint/3109401947200/.

[185] Li, *supra* note 67, at 641–42.

[186] Case-Zablocki Act, 1 U.S.C. § 112b(a).

agreement" overcomes the presumption that transmittance to Congress automatically makes an instrument an internationally binding agreement.[187]

Since the three joint communiques are not international agreements and hold no legal weight under U.S. domestic law, one must turn to the Taiwan Relations Act to understand the legal authority underlying U.S. arms sales to Taiwan.

IV. TAIWAN RELATIONS ACT

The U.S. Congress passed the Taiwan Relations Act (TRA) in 1979 to fill in the legal gap caused by the U.S.'s non-recognition of the R.O.C. in favor of the P.R.C. as the legitimate government of China.[188] Since the U.S. no longer had diplomatic relations with Taiwan, the U.S. government needed to establish a legal framework to continue its relations with the island.[189] The need for such a framework, anti-communist sentiment, and congressional dissatisfaction over President Carter's failure to consult with Congress concerning the U.S.-P.R.C. normalization led to the drafting of this legislation.[190] The Act passed with veto-proof majorities in both houses,[191] and despite coming under pressure from the P.R.C. to veto the legislation, President Carter decided to sign the TRA into law.[192] The

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[187] *Taiwan: Hearing on S. 245 Before the S. Comm. on Foreign Rels.*, 96th Cong. 23 (1979) (statement of Warren Christopher, Deputy Secretary of State); *see also* Li, *supra* note 67, at 641–42.

[188] Taiwan Relations Act, Pub. L. No. 96-8, 93 Stat. 14 (1979) (codified as amended in 22 U.S.C. § 3301). See also:

> According to Stephen Solarz, the former chairman of the Subcommittee on Asian and Pacific Affairs of the US House of Representatives, the TRA was thus enacted 'to solve an unprecedented diplomatic problem: how to continue US substantive relations with the people on Taiwan even though the US government terminated diplomatic relations with the government in Taipei, as a precondition for normalization of relations with Beijing.'

Vincent Wei-cheng Wang, The Taiwan Relations Act at 30: Enduring Framework or Accidental Success?, TAIWAN TODAY (Apr. 1, 2009), https://taiwantoday.tw/news.php?post=4360&unit=4,29,31,45.

[189] Taiwan Relations Act § 2(a). Section 2(a) of the TRA states:

> The President having terminated governmental relations between the United States and the governing authorities on Taiwan recognized by the United States as the Republic of China prior to January 1, 1979, the Congress finds that the enactment of this Act is necessary–
>
> 1) to help maintain peace, security, and stability in the Western Pacific; and
>
> 2) to promote the foreign policy of the United States by authorizing the continuation of commercial, cultural, and other relations between the people of the United States and the people on Taiwan.

[190] Steven M. Goldstein & Randall Schriver, *An Uncertain Relationship: The United States, Taiwan and the Taiwan Relations Act*, 165 CHINA Q. 147, 148 (2001).

[191] GARVER, *supra* note 49, at 420; see also supra text accompanying note 85.

[192] GARVER, *supra* note 49, at 420.

following sections outline key textual phrases from the TRA related to arms sales as well as the legislative history behind those phrases.

A. Statutory Interpretation

1. Textual Analysis

Section 2 of the TRA declares that the resolution of the Taiwan question is a security concern of international import and lays out U.S. policy regarding how the U.S. would insert itself in this issue:

> It is the policy of the United States
>
> 1) to preserve and promote extensive, close, and friendly commercial, cultural, and other relations between the people of the United States and the people on Taiwan, as well as the people on the China mainland and all other peoples of the Western Pacific area;
> 2) to declare that peace and stability in the [Western Pacific] area are in the political, security, and economic interests of the United States, and are matters of international concern;
> 3) to make clear that the United States decision to establish diplomatic relations with the People's Republic of China rests upon the expectation that the future of Taiwan will be determined by peaceful means;
> 4) to consider any effort to determine the future of Taiwan by other than peaceful means, including by boycotts or embargoes, a threat to the peace and security of the Western Pacific area and of grave concern to the United States;
> 5) to provide Taiwan with arms of a defensive character; and
> 6) to maintain the capacity of the United States to resist any resort to force or other forms of coercion that would jeopardize the security, or the social or economic system, of the people on Taiwan.[193]

Section 2(b)(3) explicitly links the US's decision to establish diplomatic relations with the P.R.C. with "the expectation that the future of Taiwan will be determined by peaceful means," a linkage the P.R.C. had repeatedly rejected during normalization negotiations.[194] Furthermore, this act expands what the U.S. sees as a threat to the area by considering economic actions, such as boycotts and embargoes, that are used to coerce Taiwan to resolve the Taiwan question as matters of grave concern to the

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[193] Taiwan Relations Act, 22 U.S.C. § 3301(b)(2)–(6).

[194] Id. § 3301(b)(3); Rapprochement with China, 1972, OFF. OF THE HISTORIAN, https://history.state.gov/milestones/1969-1976/rapprochement-china (last visited Dec. 19, 2022).

U.S.[195] Most damning, however, from the P.R.C.'s perspective is clause 2(b)(4) that spells out the US's defense commitment to Taiwan. Section 3 of the TRA elaborates on this commitment:

> a) In furtherance of the policy set forth in section 2 of this Act, the United States will make available to Taiwan such defense articles and defense services in such quantity as may be necessary to enable Taiwan to maintain a sufficient self-defense capability.
> b) The President and the Congress shall determine the nature and quantity of such defense articles and services based solely upon their judgment of the needs of Taiwan, in accordance with procedures established by law. Such determination of Taiwan's defense needs shall include review by United States military authorities in connection with recommendations to the President and the Congress.
> c) The President is directed to inform the Congress promptly of any threat to the security or the social or economic system of the people on Taiwan and any danger to the interests of the United States arising therefrom. The President and the Congress shall determine, in accordance with constitutional processes, appropriate action by the United States in response to any such danger.[196]

The language in this section of the Act provides a legally sound basis for the U.S. to sell defensive arms to Taiwan, giving the President and Congress the power to determine "the nature and quantity of such defense articles."[197] This determination is to be made on the basis of what the U.S. deems is "necessary to enable Taiwan to maintain a sufficient self-defense capability."[198] An exact definition of what "a sufficient self-defense capability" entails is not provided, and this phrase is still "left open to interpretation."[199] Additionally, Congress sets forth that Taiwan's security interests are directly related to U.S. security interests,[200] as the TRA authorizes the President and Congress to respond to dangers to U.S. interests arising from threats made on Taiwan's security, social, or economic systems.[201] The statute, however, lacks specific text mandating the U.S. to come to Taiwan's defense militarily. As one scholar writes, the

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[195] *Id.* § 3301(b)(4).
[196] *Id.* § 3302(a)–(c).
[197] *Id.* § 3301(3)(b).
[198] *Id.* § 3302(a).
[199] MARTIN L. LASATER, THE TAIWAN CONUNDRUM IN U.S. CHINA POLICY 124 (2000) (quoting 22 U.S.C. § 3302(a)).
[200] Id.
[201] 22 U.S.C. § 3302(c).

TRA "was less of an explicit military commitment than the Mutual Defense Treaty between the US and [the] R.O.C. which it replaced."[202]

By enacting specific policy guidelines for both the President and Congress in the TRA, Congress "gave itself an unprecedented role in U.S. foreign policy."[203] This legislation thus presents potential constitutional tensions between the executive and legislative branches of government. An argument could be made that the TRA is unconstitutional on the basis that Congress wrongfully infringed on the executive's constitutional power to administer foreign policy, but this assertion has never been made in court. If there ever comes a time when the executive and legislative branches do substantially disagree on how to handle relations with Taiwan, an analysis of how the Supreme Court would resolve which branch takes precedence would be helpful. Both branches of government historically have been supportive of Taiwan, however, and with the current administration's alignment with Congress's pro-Taiwan stance,[204] significant disagreement concerning the implementation of the TRA is unlikely to occur. The TRA is unlikely to face a constitutional challenge in the upcoming decades, so the issue of the TRA's constitutionality is treated as outside the scope of this Article. Suffice it to say, U.S. presidents, including President Carter and President Reagan, have publicly stated that certain actions they took were in line with the TRA,[205] demonstrating that the executive branch accepts the principles of the TRA and has not publicly challenged its constitutionality.

2. Legislative History

After announcing the normalization of ties between the U.S. and the P.R.C., President Carter submitted draft legislation to Congress detailing

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[202] Cal Clark, *The Taiwan Relations Act and the U.S. Balancing Role in Cross-Strait Relations*, 17 AM. J. CHINESE STUD. 3, 4 (2010).

[203] LASATER, *supra* note 199199.

[204] *See* Ian Easton, Will America Defend Taiwan? Here's What History Says, STRATEGIKA (June 30, 2021), https://www.hoover.org/research/will-america-defend-taiwan-heres-what-history-says (stating that past policies of the U.S. show a precedent of supporting Taiwan); David Sacks, Biden Administration Sends Important Signals for the Future of U.S.-Taiwan Ties, COUNCIL ON FOREIGN RELS. (Jan. 28, 2021, 1:32 PM), https://www.cfr.org/blog/biden-administration-sends-important-signals-future-us-taiwan-ties (providing examples of U.S. administrations supporting Taiwan signaling strong commitment); Ryo Nakamura, Key US Lawmaker Calls for More 'Clarity' on Taiwan Policy, NIKKEI ASIA (Apr. 9, 2021, 7:29 JST), https://asia.nikkei.com/Editor-s-Picks/Interview/Key-US-lawmaker-calls-for-more-clarity-on-Taiwan-policy (listing recent arms sales to Taiwan).

[205] Goldstein & Schriver, *supra* note 190, at 170. (The TRA "was an intensely political and ambiguous piece of legislation shaped in form by inter-branch conflict and in substance by the balance between the two branches as well as that within Congress. The central finding is that the TRA has, over the past 21 years, taken on different colourations depending on the nature of these factors.").

how future U.S.-Taiwan relations should be handled.[206] Congress, however, felt that the President's proposed legislation failed to adequately address Taiwan's security and failed to provide a strong enough legal foundation for continuing cultural and commercial relationships with Taiwan.[207] Accordingly, Congress drafted a clean bill separate from the President's draft that eventually became the TRA.[208] When examining Congressional conference reports and statements made by representatives involved in the legislation's drafting, one theme that emerges is Congress' desire to provide security assurances to Taiwan. For example, a conference report submitted by the House Committee on Foreign Affairs stated that

> [t]he security provisions [of the TRA] are designed to make clear, among other things, that settlement of issues involving Taiwan by use of military force or coercion . . . is unacceptable to the United States. . . . . [T]he United States will continue to sell arms to Taiwan for its defense.[209]

This committee report also declares that if "an armed attack or use of force against Taiwan were to occur, the legislation makes clear that there should be a prompt response by the United States."[210] Interestingly, the committee opines that in the event of such an attack, the U.S. should "seriously consider withdrawing recognition of the PRC," a much more radical stance than that taken by President Carter's administration during normalization talks.[211] Statements made by both Republican and Democrat representatives during committee debates showed that there was bipartisan support in Congress to provide military support to Taiwan without regard to whether or not the U.S. obtained the P.R.C.'s consent.[212] During one debate, Democrat Representative Lester Wolff emphasized that "[we] do not mean that we will deliver to [Taiwan] outmoded, outdated, horse-drawn vehicles . . . . We mean that we will deliver to them appropriate equipment which is necessary to the defense of Taiwan."[213] Republican Representative Edward Derwinski added during the final floor debate concerning the TRA that "[t]his provision is meant to ensure that Taiwan's defense needs are determined by its authorities and those of the United States without regard to the views of the PRC."[214] When

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[206] MARTIN L. LASATER, THE TAIWAN ISSUE IN SINO-AMERICAN STRATEGIC RELATIONS 160 (1984).

[207] H.R. Rep. No. 96-71, at 4–5 (1979).

[208] *Id.* at 5.

[209] H.R. Rep. No. 96-26, at 5–6 (1979).

[210] *Id.* at 6.

[211] *Id.*

[212] Stephen J. Yates, The Taiwan Relations Act After 20 Years: Keys to Past and Future Success, HERITAGE FOUND. BACKGROUNDER, Apr. 16, 1999, at 3.

[213] *Id.*

[214] *Id.*

interpreting the TRA according to congressional intent, one cannot escape that the purpose of Congress in passing the security portions of the TRA was to assure Taiwan that the U.S. would continue its sales of defensive arms to the island and would oppose any potential aggression from the P.R.C.

V. LEGAL VALUE OF THE SIX ASSURANCES

The most recent National Defense Authorization Act stated that "[i]t is the sense of Congress that the [TRA] and the Six Assurances . . . are the foundation for United States-Taiwan relations."[215] The political promises contained within the Six Assurances are meant to guide U.S. implementation of the TRA, but do not represent a legal mandate.[216] The Six Assurances originated from the Reagan administration's negotiations with the P.R.C. over the Arms Sales Communique, a political agreement containing language that suggested the U.S. "intends gradually to reduce its sale of arms to Taiwan."[217] President Reagan determined that the U.S. needed to reassure Taiwan it would not abandon the island's interests even while negotiating with the P.R.C., and instructed James Lilley, the de facto ambassador to the R.O.C., to orally deliver six political assurances to Taiwan's President Chiang.[218] Lilley explained that the U.S.

- Had not agreed to set a date for ending arms sales to the Republic of China;
- Had not agreed to hold prior consultations with the P.R.C. regarding arms sales to the Republic of China;
- Would not play a mediation role between the P.R.C. and the Republic of China;
- Would not revise the Taiwan Relations Act;
- Had not altered its position regarding sovereignty over Taiwan; and
- Would not exert pressure on the Republic of China to enter into negotiations with the P.R.C.[219]

After Lilley had orally delivered these six promises to President Chiang, he then sent Chiang a "non-paper" reiterating the assurances.[220] As

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[215] James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 5512(1) (2022).

[216] *See* Chang & Chen, *supra* note 95, at 4–5 (explaining that the Six Assurances is informal in nature and has not gone through any process that generally make international treaties legitimate).

[217] *August 17 Communique*, *supra* note 5454; *see* Harvey Feldman, *President Reagan's Six Assurances to Taiwan and Their Meaning Today*, HERITAGE FOUND. (Oct. 2, 2007), https://www.heritage.org/asia/report/president-reagans-six-assurances-taiwan-and-their-meaning-today.

[218] Feldman, *supra* note 217.

[219] *Id.* See Declassified Cables: Taiwan Arms Sales & Six Assurances (1982), *supra* note 55, for official communication.

[220] Feldman, *supra* note 228.

explained by Ambassador Harvey Feldman, known for his work helping to pass the TRA,[221] "in American diplomacy, a 'non-paper' is a document on plain bond paper, without seal or signature, intended to convey a position or policy in an informal but nevertheless authoritative manner."[222] Such policy statements do not present the U.S. with any legal obligations, but instead act as a guideline for policymakers. One scholar notes that the Six Assurances have "never ever gone through any formal codification, signing, ratification and depository process generally adopted for pledging the legitimacy and legality in charging of the international affairs."[223] Thus the Six Assurances cannot function as internationally binding treaties. Additionally, as these statements were made unilaterally by the U.S. to Taiwan, the U.S. has never assigned legal value to these assurances.[224] Though the U.S. is not legally bound by the Six Assurances, as recently as January 2021, the U.S. Department of State has expressed that it will continue its policy of observing the U.S.'s commitments reflected by Three Communiques, the TRA, and the Six Assurances.[225] This statement in effect "elevate[d] the Six Assurances to hold[] the same [policy-]weight as the three joint communiqués."[226]

VI. RESOLVING THE TENSION BETWEEN THE ARMS SALES COMMUNIQUE AND THE TRA

From a U.S. legal perspective, the TRA takes precedence over any of the policies presented by the three Sino-US joint communiques.[227] The seemingly contradictory nature of the TRA's authorization of U.S. arms sales with the Arms Sales Communique's statement that the U.S. "does not seek to carry out a long-term policy of arms sales to Taiwan"[228] can be resolved by looking to President Reagan's interpretation of the Communique in light of the TRA. In an internal presidential memorandum, he stated:

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[221] William Lowther, *Harvey Feldman Remembered for Spirit, Dedication*, TAIPEI TIMES (Mar. 2, 2009), https://www.taipeitimes.com/News/taiwan/archives/2009/03/02/2003437377.

[222] Feldman, *supra* note 217.

[223] Chang & Chen, *supra* note 95, at 5.

[224] *See id.* at 2, 3–4.

[225] Press Release, Ned Price, Department Spokesperson, P.R.C. Military Pressure Against Taiwan Threatens Regional Peace and Stability, U.S. Dep't of State (Jan. 23, 2021), https://www.state.gov/prc-military-pressure-against-taiwan-threatens-regional-peace-and-stability/ (recognizing the commitment of the U.S. to the Six Assurances although the U.S. is not bound by them); see also Jacques deLisle, The Taiwan Relations Act at 40: Political Entrenchment of Foreign Policy through Law, FOREIGN POL'Y RSCH. INST. (Apr. 8, 2019) https://www.fpri.org/article/2019/04/the-taiwan-relations-act-at-40-political-entrenchment-of-foreign-policy-through-law/ (comparing the binding effect of the TRA to the unilateral nature of the Six Assurances).

[226] Sacks, *supra* note 204.

[227] DeLisle, *supra* note 225.

[228] *August 17 Communique*, *supra* note 54.

> As you know, I have agreed to the issuance of a joint communique with the People's Republic of China in which we express United States policy toward the matter of continuing arms sales to Taiwan.
>
> The talks leading up to the signing of the communique were premised on the clear understanding that any reduction of such arms sales depends upon peace in the Taiwan Straits and the continuity of China's declared "fundamental policy" of seeking a peaceful resolution of the Taiwan issue.
>
> In short, the U.S. willingness to reduce its arms sales to Taiwan is conditioned absolutely upon the continued commitment of China to the peaceful solution of the Taiwan-P.R.C. differences. It should be clearly understood that the linkage between these two matters is a permanent imperative of U.S. foreign policy.
>
> In addition, it is essential that the quality and quantity of the arms provided Taiwan be conditioned entirely on the threat posed by the PRC. Both in quantitative and qualitative terms, Taiwan's defense capability relative to that of the PRC will be maintained.[229]

From this, President Reagan seemed to have understood that the issuance of the Arms Sales Communique must be preconditioned on the terms of the TRA. By linking the U.S. reduction of arms sales to the P.R.C.'s commitment to a peaceful resolution, President Reagan retained the possibility that the U.S. could maintain or increase its arms sales to Taiwan if the P.R.C. increased in aggression against the island. Since 1982, the year the Arms Sales Communique was issued, the P.R.C. has consistently intensified its military buildup along the Taiwan Strait.[230] In 2005, the National People's Congress, the national legislature of the P.R.C., passed the Anti-Secession Law that stated in the case of Taiwan independence, the P.R.C. "shall employ non-peaceful means and other necessary measures to protect China's sovereignty and territorial integrity."[231] In 2020, Chinese military patrols roaming the Taiwan Strait breached the median line between China and Taiwan multiple times, breaking decades-long precedent.[232] And then, as discussed in the introduction to this Article, the P.R.C. in 2022 conducted live-fire military drills in six areas encircling Taiwan; these drills included firing several

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[229] Declassified Memorandum from Ronald Reagan, President, to George P. Shultz, Sec'y of State, and Caspar W. Weinberger, Sec'y of Defense, The White House (Aug. 17, 1982), (https://china.usc.edu/sites/default/files/article/attachments/reagan-1982-08-17-arms-sales-to-taiwan.pdf).

[230] *See, e.g.*, U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION, ANNUAL REPORT TO CONGRESS 398–399 (2021).

[231] Anti-Secession Law, MINISTRY OF NAT'L DEF. OF THE PEOPLE'S REPUBLIC OF CHINA (Mar. 14, 2005), eng.mod.gov.cn/publications/2021-06/29/content_4888396.htm.

[232] Michael Beckley, *China Keeps Inching Closer to Taiwan*, FOREIGN POL'Y (Oct. 19, 2020, 4:50 PM), https://foreignpolicy.com/2020/10/19/china-keeps-inching-closer-to-taiwan/.

waves of missiles over the Taiwan Strait. [233] To many U.S. observers, it seems almost indisputable that the P.R.C. has increased its military aggression over the past few decades with an eye on Taiwan and that the balance of power is increasingly tilted in the P.R.C.'s favor.[234] The P.R.C., it would seem, is not fulfilling its commitment to working towards a "peaceful resolution," and it would follow that because of this, the U.S. is not compelled to end or decrease its arms sales with Taiwan.

CONCLUSION

Whether or not the U.S. should increase its supply of arms and other defensive aid to Taiwan is a question of foreign policy, best left to those with international relations experience and an intimate knowledge of the P.R.C. The question of whether the U.S. can legally arm Taiwan, however, is a question of law, and can be determinatively answered in the positive. After examining sources of both international and U.S. domestic law, this Article concludes that the U.S. is within its legal rights to continue supplying arms of a defensive nature to Taiwan and to increase this supply if it so chooses. Though the three Sino-U.S. Joint Communiques included language that may have suggested the U.S. would decrease arm sales to the island, this Article laid forth arguments demonstrating that these documents do not bind the U.S. from either an international- or domestic-law perspective. The three communiques "are bilateral

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[233] *See* Yimou Lee & Sarah Wu, *supra* note 8; Emily Feng, *supra* note 8; Yimou Lee & Ben Blanchard, *Taiwan Says China Bolstering Ability to Attack, Blockade Island*, REUTERS (Mar. 19, 2021, 7:45 AM EST), https://www.reuters.com/article/us-taiwan-defence-idUSKBN2BB16V.

[234] OFFICE OF THE SECRETARY OF DEFENSE, DEPARTMENT OF DEFENSE: MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA 2020, 119–20 (2020),

> Taiwan has historically enjoyed military advantages in the context of a cross-Strait conflict, such as technological superiority and the inherent geographic advantages of island defense, but China's multidecade military modernization effort has eroded or negated many of these advantages. Although Taiwan is taking important steps to compensate for the growing disparities – building its war reserve stocks, growing its defense-industrial base, improving joint operations and crisis response capabilities, and strengthening its officer and noncommissioned officer corps – these improvements only partially address Taiwan's declining defensive advantages. . . .
>
> Consistent with the TRA, the United States contributes to peace, security, and stability in the Taiwan Strait by providing defense articles and services to enable Taiwan to maintain a sufficient self-defense capability. In May 2020, the White House publicly released a report to Congress entitled, United States Strategic Approach to the People's Republic of China. The report states, "Beijing's failure to honor its commitments under the communiques, as demonstrated by its massive military buildup, compels the United States to continue to assist the Taiwan military in maintaining a credible self-defense, which deters aggression and helps to ensure peace and stability in the region.

Id.

statements that do not create a binding legal obligation, although they do state U.S. policy. . . . [A]s the U.S. officially sees it, there is nothing there that's legally binding."[235] The Six Assurances, privately given to Taiwan's leaders, hold the same non-legal weight as the three communiques, but as their terms tend to favor Taiwan, they are easily implementable with actions authorized under the TRA. The TRA has provided the U.S. the strongest legal authority to arm Taiwan for the past few decades, and as of 2022, there exists the political will in the U.S. to bolster this authority.[236]

As U.S.-China tensions grow riskier in the upcoming years, U.S. policymakers will have to consider how best to act under the TRA and other legislation to protect U.S. interests in Taiwan. With regard to these interests and the interests of Taiwan itself, President Tsai Ing-Wen, the current president of Taiwan, proclaimed that the TRA "provided a framework where one day we could defend our shared values. In today's world of increasing complexity and challenge, this has been more necessary than ever before. One thing that we learned from the previous century is that the forward marching of democracy is not a given."[237]

Christina Chan[*]

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[235] *Hearing on Military Modernization and Cross-Strait Balance: Hearing Before the U.S.-China Econ. and Sec. Rev. Comm'n*, 108th Cong. 67 (2004) (statement of Jaques deLisle, Professor of Law, University of Pennsylvania, during Luncheon Panel: Discussion, Questions and Answers).

[236] In 2022, Congress passed the Taiwan Enhanced Resilience Act ("TERA") in the National Defense Authorization Act for Fiscal Year 2023. The TERA sought to strengthen the U.S.' ability to assist in Taiwan's national defense, and authorized Foreign Military Financing ("FMF") assistance for U.S. arms sales to Taiwan for the first time. However, the Congressional Research Service noted that

> The FMF assistance authorized by TERA includes up to $2 billion a year in loans and up to $2 billion a year in grant assistance for Taiwan through FY2027. The Consolidated Appropriations Act, 2023 (P.L. 117-328) makes up to $2 billion available for FMF loans to Taiwan in FY2023, but does not appropriate funds for FMF grant assistance to Taiwan.

SUSAN V. LAWRENCE & CAITLIN CAMPBELL, CONG. RSCH. SERV., TAIWAN: POLITICAL AND SECURITY ISSUES (2023). More time is needed to completely understand the impact of the TERA and its funding schemes, so this Article puts forth the TRA as the main authority governing U.S. arms sales to Taiwan. In the future, however, the TERA will likely play a significant role in the U.S.-Taiwan legal landscape. Depending on how it is interpreted and amended, the TERA might end up replacing the TRA as the main authority in this area.

[237] Tsai Ing-wen, President, The Republic of China (Taiwan), VTC Speech and Q&A with Her Excellency President Tsai Ing-wen of the Republic of China (Taiwan): The Taiwan Relations Act at Forty and U.S.-Taiwan Relations (Apr. 9, 2019) (transcript available at https://www.csis.org/analysis/taiwan-relations-act-forty-and-us-taiwan-relations).

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GOOD 4 WHO? WHY THE CURRENT STANDARDS OF MUSIC COPYRIGHT INFRINGEMENT DON'T PROTECT TODAY'S ARTISTS AS THEY SHOULD

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INTRODUCTION

It is in human nature to create, and one purpose of the United States Constitution is to allow authors, inventors, and creators to better enjoy the fruits of their labor. However, the current state of the law often does not promote this interest in certain fields but stifles creativity instead. The most recent case law regarding music has left a deep chasm of uncertainty among creators about what elements of music are copyrightable and which are available for public use. This uncertainty leads to fear of litigation and causes musicians to avoid the legal use of art or to capitulate to those who threaten suit for easy money.

One current example that demonstrates this principle is Olivia Rodrigo's hit "good 4 u."[1] Rodrigo, who rose to fame through her involvement with the Walt Disney Company,[2] released her first album, entitled "Sour," in the summer of 2021.[3] "Good 4 u," the sixth track on the album, is a pop-rock break-up song in which she laments how her former partner is doing well after they separated, in contrast to her own struggles.[4] The song quickly grew in popularity and sat at the top of the U.S. Billboard ratings for several weeks.[5]

Soon after its release, social media users started comparing the song with other musical works.[6] One such song was "Misery Business," a 2007 song from the band Paramore. The songs were juxtaposed to emphasize similarities between them, such as their similar instrumentations, basic chord progressions, and themes of teenage angst. Once the songs were shared together, many started remarking that the songs were not merely similar, but that Rodrigo had clearly copied from "Misery Business" and ought to give credit to Paramore for her "theft."[7] Outcry against Rodrigo grew to a head, and she eventually gave writing credits to Paramore

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[1] *See* Kristin Robinson, *Split Decisions: Olivia Rodrigo Has Given Up Millions in Publishing Royalties*, BILLBOARD (Sept. 1, 2021), https://www.billboard.com/pro/olivia-rodrigo-royalties-song-credits-sour/.

[2] *Olivia Rodrigo's Style Evolution: From Disney Cutie to Pop Sensation*, BILLBOARD (Oct. 3, 2022), https://www.billboard.com/photos/olivia-rodrigo-style-evolution-1235078507/.

[3] *See* Emma Nolan, *Olivia Rodrigo's New Album 'Sour' Sparks Wave of Teenage Angst*, NEWSWEEK (May 21, 2021), https://www.newsweek.com/olivia-rodrigo-new-album-sour-sparks-wave-teenage-angst-1593611.

[4] *See Olivia Rodrigo – SOUR Lyrics and Tracklist*, GENIUS, https://genius.com/albums/Olivia-rodrigo/Sour (last visited Oct. 17, 2022); Anna Garrison, *Olivia Rodrigo's Latest Bop "Good 4 U" Is a Breakup Anthem if There Ever Was One*, DISTRACTIFY (May 14, 2021, 11:41 AM), https://www.distractify.com/p/who-is-good-4-u-about; Samantha Coulter, *What Does Olivia Rodrigo's Good 4 U Mean?*, LIST (May 14, 2021, 12:31 PM), https://www.thelist.com/410286/what-does-olivia-rodrigos-good-4-u-mean/.

[5] *See Olivia Rodrigo's 'Good 4 U' Debuts at No. 1 on Hot 100*, BILLBOARD, https://www.billboard.com/video/olivia-rodrigos-good-4-u-debuts-at-no-1-on-hot-100-billboard-news/ (last visited Dec. 18, 2022); *The Kid LAROI & Justin Bieber Extend 'Stay' Atop Hot 100, The Weeknd's 'Take My Breath' Debuts in Top 10*, BILLBOARD (Aug. 16, 2021), https://www.billboard.com/pro/the-kid-laroi-justin-bieber-stay-number-one-second-week/ (noting that "good 4 u" spent eleven weeks in the second spot of Billboard's Hot 100 after a week in first place).

[6] *See, e.g.*, Kate Fowler, *Why TikTok Keeps Remixing Olivia Rodrigo's 'Good 4 U*,' NEWSWEEK (May 25, 2021, 10:51 AM), https://www.newsweek.com/tiktok-olivia-rodrigo-remixes-trend-explained-1594572; Callie Ahlgrim, *Olivia Rodrigo Gives Paramore Songwriting Credits on 'Good 4 U' Amid Ongoing Comparisons to 'Misery Business,'* INSIDER (Aug. 25, 2021), https://www.insider.com/olivia-rodrigo-good-4-u-paramore-misery-business-songwriting-credits-2021-8.

[7] *See also*, Melissa Da Costa, *Olivia Rodrigo and the Issue of Imitation in the Arts*, ESSENTIAL MILLENNIAL (June 30, 2021), https://www.essentialmillennial.com/2021/06/30/olivia-rodrigo-and-the-issue-of-imitation-in-the-arts/ (explaining that fans claimed that the melody of "good 4 u" was stolen from "Misery Business").

members Hayley Williams and Josh Farro, which gave them rights to half of the royalties from the song's profits.[8]

"Good 4 u" is not the first song from "Sour" to go through a similar process. Before the album was released, writing credit was given to Taylor Swift for Rodrigo's "1 step forward, 3 steps back," the fourth track on "Sour."[9] She was also credited for "déjà vu," the fifth track.[10] The kinds of credits given to Williams, Farro, and Swift are called interpolation credits, signifying that Rodrigo had recontextualized their previous musical content, most commonly invoked for melodies.[11]

While there is no suggestion that Williams and Farro threatened litigation against Rodrigo specifically, she must have considered the possibility when deciding to give them credit. The current state of relevant case law does not provide much certainty to music copyright defendants.[12] The most recent cases from the United States Court of Appeals for the

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[8] *See "Good 4 U,"* ASCAP, https://www.ascap.com/repertory#/ace/search/workID/911752981 (last visited Nov. 28, 2022) (indicating that Joshua Farro and Hayley Williams are credited on "good 4 u"); *Split Decisions: Olivia Rodrigo Has Given Up Millions in Publishing Royalties*, BILLBOARD (Sept. 9, 2021), https://www.billboard.com/pro/olivia-rodrigo-royalties-song-credits-sour/ (noting that Paramore's interpolation credits were added retroactively).

[9] *See "1 Step Forward, 3 Steps Back,"* ASCAP, https://www.ascap.com/repertory#/ace/search/workID/911909368 (last visited Nov. 28, 2022) (showing Taylor Swift being given writing credits); GENIUS, *supra* note 4 (indicating "1 Step Forward, 3 Steps Back" as the fourth track of the album); Insanul Ahmed, *Here's Why Taylor Swift Got a Writing Credit on Olivia Rodrigo's "1 Step Forward, 3 Steps Back,"* GENIUS (May 21, 2021), https://genius.com/a/here-s-why-taylor-swift-got-a-writing-credit-on-olivia-rodrigo-s-1-step-forward-3-steps-back (indicating that Taylor Swift was given credit before the album's release).

[10] *See "Déjà Vu,"* ASCAP, https://www.ascap.com/repertory#/ace/search/workID/911318713 (last visited Nov. 28, 2022) (crediting Taylor Swift with writing credits); GENIUS, *supra* note 4 (identifying "Déjà Vu" as the fifth track in the album); Brittany Spanos, *Olivia Rodrigo Adds Taylor Swift, St. Vincent, Jack Antonoff Co-Writes to 'Déjà Vu,'* ROLLING STONE (July 9, 2021), https://www.rollingstone.com/music/music-news/olivia-rodrigo-adds-taylor-swift-st-vincent-jack-antonoff-co-writes-to-deja-vu-1193659/ (indicating Taylor Swift added to writing credits of "Déjà Vu").

[11] *See* Liesl Alyse Eschbach, *Do You Hear What I Hear?: The Inequities in Substantial Similarity Tests for Musical Copyright Infringement Cases*, 11 BERKELEY J. ENT. & SPORTS L. 71, 100 (2022) (defining "interpolation" as "the borrowing of pre-existing musical material and improvising to create a new work"); Sean M. Corrado, *Care for a Sample? De Minimis, Fair Use, Blackchain, and an Approach to an Affordable Music Sampling System for Independent Artists*, 29 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 181, 203 n.135 (2018) ("An interpolation is essentially a replay, where an artist duplicates a track or melody by re-recording it in the studio."); Wayne M. Cox, *Rhymin' and Stealin'? The History of Sampling in the Hip-Hop and Dance Worlds and How U.S. Copyright Law & Judicial Precedent Serves to Shackle Art*, 14 VA. SPORTS & ENT. L.J. 219, 222 (2015) (mentioning how "Planet Rock" is an interpolation of the melody of "For a Few Dollars More").

[12] *See* Amy X. Wang, *How Music Copyright Lawsuits Are Scaring Away New Hits*, ROLLING STONE (Jan. 9, 2020), https://www.rollingstone.com/pro/features/music-copyright-lawsuits-chilling-effect-935310/ (discussing the present uncertainty of music copyright law).

Ninth Circuit are not uniform in their application of the law,[13] and the great likelihood of settlement in these circumstances to avoid the risk leaves a smaller number of decided cases that could provide much-needed certainty to copyright litigants who would use that authority to better advocate for their positions. The threat of heavy litigation costs, even on tenuous legal reasoning, can be enough to convince these artists to opt for the certain—but significant—costs of settlement.

Although the creative work of artists ought to be protected from copying, the system ought to allow other musicians to produce work in the same genre, testing the bounds of creative expression and using all the resources at their disposal. The current state of the law makes it easy for existing musicians to cry "interpolation" and reap the rewards of another's efforts with impunity.[14] This should not be.

This Note demonstrates the current state of copyright law, the confusion brought by Ninth Circuit cases, and a solution to the problem of granting undue interpolation credit as outlined above. Part I lays the foundation for the constitutional and statutory provisions about intellectual property, with a focus on music copyright. Part II recounts in detail the cases of *Williams v. Gaye*, when Marvin Gaye's estate sued Pharrell Williams and Robin Thicke for infringement in their song "Blurred Lines,"[15] and of *Gray v. Perry*, when Christian rapper Flame sued Katy Perry for her song "Dark Horse."[16] It also examines the differences, substantive and procedural, that caused these two cases to conclude so differently. Part III offers an innovative approach to change copyright jurisprudence, an in-depth look at "good 4 u" in the context of these cases, and a vision of what may lie ahead for future copyright infringement litigants.

I. COPYRIGHT LAW: A PRIMER

A. Basic Rules

The foundation of copyright law is rooted in the United States Constitution itself. The Constitution grants Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . ."[17] The Intellectual Property Clause is the ultimate source of copyright and patent protection in the United States

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[13] *See infra* Section II.C.

[14] Bridgeport Music, Inc. v. WB Music Corp., 508 F.3d 394, 396 (6th Cir. 2007); Daniel Abowd, *FRE-Bird: An Evidentiary Tale of Two Colliding Copyrights*, 30 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1311, 1363–64 (2020).

[15] 895 F.3d 1106, 1116 (9th Cir. 2018).

[16] Gray v. Perry, No. 2:15-CV-05642-CAS-JCx, 2020 WL 1275221, at *1 (C.D. Cal. Mar. 16, 2020), *aff'd sub nom.* 28 F.4th 87 (9th Cir. 2022).

[17] U.S. CONST. art. I, § 8, cl. 8.

and establishes the primary purpose of legislation pursuant to this power: promoting progress in these fields and "stimulat[ing] artistic creativity for the general public good."[18] Congress has since passed legislation in Title 17 of the United States Code to establish federal copyright law.[19] Copyright law is governed almost exclusively by statute.[20] Thus, courts have been admonished not to perform "a free-ranging search for the best copyright policy, but rather [to] 'depend[] solely on statutory interpretation'"[21] by "giv[ing] effect to the clear meaning of statutes as written."[22] Copyrightable materials under this title are defined in § 102 as "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[23] Section 102 specifically mentions musical works among the listed works of authorship, but musical works are not defined in § 102 as thoroughly as literary works are.[24] In part, this may be because there are multiple kinds of copyright protection for musical works. Copyright law extends both to the sound recording of a work, granting what are called "master rights,"[25] and to the composition itself, granting "publishing rights";[26] the latter are akin to literary rights and

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[18] *Id.*; Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975); *see* Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272, 274 (2004); *see also* United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948) ("[T]he primary object in conferring the monopoly [rights to copyright owners] lie[s] in the general benefits derived by the public from the labors of authors. . . . [The monopoly rights] serve[] to . . . induce release to the public of the products of [the authors'] creative genius.").

[19] 17 U.S.C. §§ 101–118; *see* U.S. COPYRIGHT OFFICE, CIRCULAR 92, COPYRIGHT LAW OF THE UNITED STATES AND RELATED LAWS CONTAINED IN TITLE 17 OF THE UNITED STATES CODE, at vii–xv (2022), https://www.copyright.gov/title17/title17.pdf (identifying that U.S. copyright law is contained in Title 17 of the U.S. Code and listing all legislation affecting Title 17 since The Copyright Act of 1976 that established the framework of modern copyright law).

[20] *See* 17 U.S.C. § 301(a) (dictating that all copyright cases shall be governed by Title 17); *see, e.g.*, Richard L. Revesz, *Our New Projects*, ALI REP., Spring 2015, at 1, 3.

[21] Star Athletica, LLC v. Varsity Brands, Inc., 580 U.S. 405, 413 (2017) (quoting Mazer v. Stein, 347 U.S. 201, 214 (1954)).

[22] Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 476 (1992)*; see also* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 456 (1984) (stating that, although Congress may change its approach to copyright law, that is not for the Court to decide).

[23] 17 U.S.C. § 102(a).

[24] 17 U.S.C. § 102(a)(2). *See generally* 17 U.S.C. § 101 (providing a clear definition for "literary works" while using the term "musical works" only to support other definitions).

[25] *See* 17 U.S.C. § 106; Rory PQ, *How Music Royalties Work in the Music Industry*, ICON COLLECTIVE, https://iconcollective.edu/how-music-royalties-work/ (May 30, 2020); Jill A. Michael, *Music Copublishing and the Mysterious 'Writer's Share,'* 20 ENT. & SPORTS LAW. 1, 13 (2002) (noting that a copyright can be obtained in a master sound recording).

[26] *See* 17 U.S.C. § 106 (describing the rights an owner of a copyright possesses); PQ, *supra* note 25; ("Publishing rights belong to the owner of the actual music composition."); Michael, *supra* note 25 (noting that a copyright can be obtained in a musical composition).

are primarily at issue in these cases.[27] There are also a few caveats that determine whether a work is copyrightable beyond mere conformity to the statutory definition.

1. The Idea-Expression Dichotomy

Section 102 also clarifies that "[i]n no case does copyright protection for an original work of authorship extend to any idea, . . . concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."[28] The protection covers the expression only, not the ideas upholding it. This is particularly well-demonstrated in *Baker v. Selden*, where Selden had published a book demonstrating his personal method for bookkeeping.[29] The court held that even though Baker was using Selden's methods, his usage did not infringe on Selden's copyright.[30] Selden's copyright protection extended to the words and illustrations he used in explaining his system, but not to the system itself to prevent others from using it.[31]

The degree of abstraction necessary to reduce an expression of an idea to the idea itself is debated; "[n]obody has ever been able to fix that boundary, and nobody ever can."[32] Individual building blocks (e.g. vis-à-vis music, chords, intervals, key signatures, etc.) are certainly free from copyright protection, while complex combinations of those same blocks (e.g., entire compositions) are protected.[33] The space in between is difficult to categorize and will be the subject of litigation for the foreseeable future.

2. The Merger Doctrine

The merger doctrine allows the public to use otherwise copyrightable material.[34] A logical inference from the idea-expression dichotomy, this principle governs situations where there are a limited number of ways to express an idea.[35] When there are only a few ways to express an idea,

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[27] *See* Nicole Lieberman, *Un-Blurring Substantial Similarity: Aesthetic Judgements and Romantic Authorship in Music Copyright Law*, 6 N.Y.U. J. INTELL. PROP. & ENT. L. 91, 126 (2016) (noting that interpolation involves the rights of the composition owner).

[28] 17 U.S.C. § 102(b).

[29] 101 U.S. 99, 99–101 (1879).

[30] *Id.* at 107.

[31] *Id.* at 104. Note that patent law may have provided Selden with stronger and more appropriate protection for his system in the context of business practice, so long as the method was novel and non-obvious. *See* 35 U.S.C. §§ 101–103.

[32] Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930).

[33] 17 U.S.C. § 102; *see, e.g.*, Swirsky v. Carey, 376 F.3d 841, 848 (9th Cir. 2004) (explaining that although an individual chord progression may not be copyright protected, a combination of multiple chord progressions can be).

[34] *See* Pamela Samuelson, *Reconceptualizing Copyright's Merger Doctrine*, 63 J. COPYRIGHT SOC'Y U.S. 417, 464–68 (2016).

[35] LIB. OF CONG., FINAL REPORT OF THE NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS 20 (1979); *see* Samuelson, *supra* note 34, at 461 (identifying the idea-expression dichotomy as a corollary to the merger doctrine).

allowing one person to copyright one expression would be tantamount to allowing "the subject matter [to] be appropriated . . . ," preventing anyone from being able to express the idea without violating someone else's copyright.[36] For example, in *Morrissey v. Procter & Gamble*, the court held that because there are a limited number of ways in which the terms of a sweepstakes contest can be expressed, one variant of the limited set cannot be protected in a manner that prevents another, like Procter & Gamble, from using it as well.[37]

3. Facts and Compilations of Facts

Facts, like concepts and ideas, are not copyrightable.[38] However, compilations of facts are.[39] Congress defined a compilation as "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship."[40] Compilations still must contain at least a small degree of creativity, but even a small amount will suffice.[41] In *Feist Publications, Inc. v. Rural Telephone Service Co.*, the contents of a phone book's white pages were not copyrightable when the list of names, addresses, and numbers were simply arranged in alphabetical order, a standard practice in the industry.[42]

B. Infringement

Once it has been established that copyright protection exists for a work, its author can sue those who infringe her copyright.[43] This typically occurs when another person exercises one of the exclusive rights of the copyright owner, including the derivative works right (the interest in creating works based on the original),[44] the distribution right[45] (the interest in selling or publishing the author's work, notwithstanding the

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[36] Morrissey v. Procter & Gamble Co., 379 F.2d 675, 678–79 (1st Cir. 1967).

[37] *Id.* at 675, 678–79.

[38] *See* 17 U.S.C. § 102(b) (stating that concepts and ideas are not subject to copyright protection); Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 353 (1991) (indicating facts and ideas cannot be copyrighted).

[39] *See* 17 U.S.C. § 103(a).

[40] 17 U.S.C. § 101.

[41] *Feist*, 499 U.S. at 345.

[42] *Id.* at 363 (noting that this arrangement was "commonplace," "rooted in tradition," "unoriginal," and "practically inevitable").

[43] 17 U.S.C. § 501(b).

[44] 17 U.S.C. § 106(2).

[45] 17 U.S.C. § 106(3).

first sale doctrine[46]), and, most relevantly, the right to make copies (the literal "copy-right").[47]

Different circuits have adopted somewhat similar tests to determine if illicit copying has occurred, with a shared touchpoint of "substantial similarity."[48] In the Second Circuit, the test is (1) whether the defendant copied the protected work, and (2) whether that copying rose to the level of improper appropriation.[49] Copying is established either by the direct testimony of the defendant or by sufficient circumstantial evidence of access and substantial similarity, though a lack of any similarities is dispositive of the infringement claim.[50] If the evidence is held sufficient to establish copying, then the second element is determined by the perception of the lay observer without regard to any expert testimony on the subject.[51] The Ninth Circuit has adopted a system that uses an extrinsic test and an intrinsic test.[52] In the extrinsic test, the court will look to "analytical dissection of a work and expert testimony" to establish substantial similarity.[53] In the intrinsic test, the court applies a subjective standard, asking whether an "ordinary, reasonable person would find the total concept and feel of the [works] to be substantially similar."[54] The element of access is established independently.[55] If both of these tests are satisfied and access has been demonstrated, then the protected work has been infringed.[56] One additional requirement for effective litigation is that the work that was infringed must have been registered with the Copyright Office prior to commencing the action.[57] Thus, the Second Circuit test analyzes similarity in two separate steps—first to show copying, then to show propriety of that copying—while the Ninth Circuit test analyzes two aspects of similarity simultaneously.[58] The former presumes that some degree of derivative creativity is permissible; the latter does not, and this test looms largest in the copyright arena.

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[46] 17 U.S.C. § 109(a); *see* Kirtsaeng v. Wiley & Sons, Inc., 568 U.S. 519, 523 (2013) (explaining how 17 U.S.C. § 109(a) is commonly known as the first sale doctrine).

[47] 17 U.S.C. § 106(1).

[48] *See* Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946) (indicating the need to analyze similarity when copying from a copyrighted work); Swirsky v. Carey, 376 F.3d 841, 844–45 (9th Cir. 2004) (discussing the need to analyze substantial similarity in a copyright infringement case); Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1200 (2021) (noting the use of substantial similarity in fair use cases).

[49] *Arnstein*, 154 F.2d at 468.

[50] *Id.*

[51] *Id.*

[52] *Swirsky*, 376 F.3d at 845.

[53] *Id.* (quoting Three Boys Music Corp. v. Bolton, 212 F.3d 477, 485 (9th Cir. 2000)).

[54] *Id.* at 847 (quoting *Three Boys Music Corp*., 212 F.3d at 485).

[55] *Swirsky*, 376 F.3d at 844–45.

[56] *Id.*

[57] *See* 17 U.S.C. § 411 (requiring copyright registration for civil actions).

[58] Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946); *Swirsky*, 376 F.3d at 845.

C. The Historical Approach to Music Copyright Jurisprudence

A few fundamental tenets of music copyright enforcement stem from certain key cases. First, in *Arnstein v. Porter*, the Second Circuit established a principle that, because the validity of copyright infringement cases is closely tied to witnesses' credibility, such cases almost necessarily must go before a jury, precluding summary judgment for either party in a music copyright dispute.[59] Even when a judge believes the plaintiff's testimony about subterfuge to be inherently incredible, he should set the matter before a jury.[60] In his dissent, Judge Clark argued that judges can determine whether a copyright infringement claim has merit without a jury if the songs are sufficiently differentiable based on their "total sound effect."[61] He continued that, while expert testimony may be useful when a matter must go to the jury, there are other times when a "purely theoretical disquisition" will manufacture similarities rather than identify them.[62]

Second, in *Bright Tunes Music Corp. v. Harrisongs Music, Ltd.*, a United States District Court held that George Harrison subconsciously copied "He's So Fine" from The Chiffons when he wrote "My Sweet Lord."[63] Harrison was deemed to have access to the song, and though the court acknowledged that he most likely had not done so deliberately, the identical melodies throughout significant parts of the song were sufficient to establish a claim of copyright infringement.[64]

II. SIGNIFICANT RECENT CASES FROM THE NINTH CIRCUIT

The Court of Appeals for the Ninth Circuit is the most important federal circuit for copyright law because it includes one of the primary cultural centers in the United States: Los Angeles, California.[65] With important film, technology, and music enterprises, the Ninth Circuit's

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59 154 F.2d at 469–70.

60 *Id.* at 469.

61 *Id.* at 475–78, 480 (Clark, J., dissenting).

62 *Id.* at 476–78.

63 420 F. Supp. 177, 180–81 (S.D.N.Y. 1976).

64 *Id.*

65 *See* Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 161 (1998) ("The Second and Ninth Circuits [are] the most important in copyright cases because together they house the New York publishing industry and acting community, Hollywood, and Silicon Valley . . . ."); Ani Khachatryan, Comment, *The Stairway to Fairness: Copyright and Creativity in the Digital Age*, 25 U. DENV. SPORTS & ENT. L.J. 23, 54 (2021–2022) ("[T]he Ninth Circuit operates as a hub for copyright infringement claims . . . ."); Andrew Clark, *How LA Overtook New York as a Cultural Powerhouse*, FIN. REV. (July 17, 2019, 5:55 AM), https://www.afr.com/life-and-luxury/arts-and-culture/no-joke-la-has-pulled-ahead-of-new-york-as-a-cultural-powerhouse-20190709-p525le ("LA is entrenching its role as the world's popular culture capital . . . .").

decisions have an incredible impact on wide swaths of these industries.[66] This court is cognizant of this role; Judge Kozinski once referred to it as "the Court of Appeals for the Hollywood Circuit."[67] California too has a reputation for presenting novel legal theories that have ushered the way for other jurisdictions to follow.[68] Thus, the following two cases, *Williams v. Gaye* (concerning the song "Blurred Lines")[69] and *Gray v. Perry* ("*Gray I*") (concerning the song "Dark Horse"),[70] have significance not only for those that live within the purview of the Ninth Circuit but also on the general trends in copyright law. *Williams* was decided in contradiction to previous jurisprudence,[71] and *Gray I* has loomed large in the public consciousness,[72] and although the trial court's decision was affirmed on appeal on narrower grounds, Judge Christine Snyder's reasoning presents a hopeful picture for the future of music copyright jurisprudence.[73]

A. The "Blurred Lines" Case: Williams v. Gaye

1. The Facts and Procedural History

In 2012, Robin Thicke, Pharrell Williams, and others (the Thicke Parties) collaborated on a song called "Blurred Lines."[74] Released in 2013,

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[66] *See* White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1521 (9th Cir. 1993) (Kozinski, J., dissenting); Schuyler Moore, *The Ninth Circuit Is Tone Deaf to Copyright*, FORBES, https://www.forbes.com/sites/schuylermoore/2019/11/12/the-ninth-circuit-is-tone-deaf-to-copyright/?sh=479ab6d43eab (last visited Dec. 19, 2022).

[67] *White*, 989 F.2d at 1521.

[68] *Compare* Li v. Yellow Cab Co., 532 P.2d 1226, 1243 (Cal. 1975) (introducing the legal theory of comparative responsibility, as opposed to contributory negligence) *with* McIntyre v. Balentine, 833 S.W.2d 52, 55–56 (Tenn. 1992) (adopting comparative responsibility and leaving only four states that utilize the previous theory).

[69] 895 F.3d 1106 (9th Cir. 2018).

[70] No. 15-CV-05642, 2020 WL 1275221, at *1 (C.D. Cal. Mar. 16, 2020), *aff'd sub nom.* Gray v. Hudson, 28 F.4th 87 (9th Cir. filed Mar. 10, 2022).

[71] *See* Eschbach, *supra* note 11, at 105–07, 107 n.253.

[72] *See, e.g.*, Brian McBrearty, *Gimme 3 Minutes to Tell You why Dark Horse Is Not Joyful Noise.*, MUSICOLOGIZE (July 23, 2019), https://www.musicologize.com/occams-razor-says-this-is-why-dark-horse-is-not-joyous-noise/ (arguing for a certain outcome of the ongoing litigation between Perry and Gray); Jon Blistein, *Katy Perry Wins Appeal in 'Dark Horse' Infringement Case*, ROLLING STONE (Mar. 18, 2020), https://www.rollingstone.com/music/music-news/katy-perry-dark-horse-copyright-win-appeal-969009/ (discussing *Gray v. Perry* and its impact on music copyright); *see also* Mark Savage, *Katy Perry Wins in Dark Horse Copyright Appeal*, BBC (Mar. 11, 2022), https://www.bbc.com/news/entertainment-arts-60705977 (reporting on *Gray v. Hudson*'s outcome).

[73] *See* Gray v. Hudson, 28 F.4th 87, 96 (9th Cir. 2022) (affirming *Gray I* in its primary argument that the first composition was not protected without addressing the trial court's proposed standard).

[74] *Williams*, 895 F.3d at 1116; Nick Reilly, *Robin Thicke Says He'll "Never Make" a Music Video Like 'Blurred Lines' Again*, NME (Feb. 12, 2021), https://www.nme.com/news/music/robin-thicke-says-hell-never-make-a-music-video-like-blurred-lines-again-2879061.

their song was the best-selling single globally that year.[75] In the wake of this success, members of the Gaye family insisted that Thicke and Williams pay for infringing their copyright.[76] In 1976, Marvin Gaye had recorded his "Got To Give It Up," itself a very popular song both then and now.[77] His publisher, Jobete Music Co., Inc., registered the copyright and delivered a handwritten transcription of the song to the United States Copyright Office, prepared by an unknown party.[78] The copyright ownership of "Got To Give It Up" passed to Gaye's family upon his death.[79] After negotiations failed to conclude amicably, Williams and Thicke filed suit in the U.S. District Court for the Central District of California for a declaratory judgment that "Blurred Lines" did not infringe the Gayes' copyright.[80] The Gayes, in their counterclaim, asserted that Thicke and Williams did just that.[81]

Three expert witnesses testified in this case: Dr. Ingrid Monson and Judith Finell for the Gayes and Sandy Wilbur for the Thicke Parties.[82] Dr. Monson focused on the overall harmonic and melodic resemblance "Blurred Lines" bore to "Got To Give It Up."[83] Finell identified a "constellation" of similarities between the two works, including elements like individual musical themes, instrumentation, bass lines, and melismas (a type of articulation where a single syllable stretches across multiple notes).[84] Wilbur found no substantial similarity between the two songs in their "melodies, rhythms, harmonies, structures, and lyrics" and refuted all the points Finell raised.[85] Upon hearing the testimony of these experts, the district court denied the Thicke Parties' motion for summary judgment.[86] It ruled that only the deposit copy was subject to infringement, as "Got To Give It Up" was subject to the 1909 Copyright

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[75] *Williams*, 895 F.3d at 1116; *see The Top 40 Biggest Singles of 2013 on the Official Chart*, OFF. CHARTS (Jan. 1, 2014), https://www.officialcharts.com/chart-news/the-top-40-biggest-singles-of-2013-on-the-official-chart__3658./ (listing "Blurred Lines" as the best-selling single globally in 2013).

[76] *Williams*, 895 F.3d at 1116.

[77] *Id.*; *see also Marvin Gaye*, BILLBOARD, https://www.billboard.com/artist/marvin-gaye/ (last visited Dec. 19, 2022) (indicating that "Got To Give It Up" ("GTGIU") remained on Billboard's Hot 100 chart for eighteen weeks); *The Best Summer Songs of All Time*, ROLLING STONE (June 25, 2022), https://www.rollingstone.com/music/music-lists/best-summer-songs-of-all-time-43407/got-to-give-it-up-pt-1-2-marvin-gaye-80492/ (naming "GTGIU" as the third best summer song of all time).

[78] *Williams*, 895 F.3d at 1116.

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.* at 1117.

[83] *Id.* at 1117–18.

[84] *Id.* at 1117; *id.* at 1143 (Nguyen, J., dissenting).

[85] *Id.* at 1117.

[86] *Id.*

Act because of its date of publication, excluding consideration of Marvin Gaye's original sound recording.[87]

The jury heard the evidence and returned a verdict for the Gayes with damages totaling about $7 million.[88] Before the case was submitted to the jury, however, neither the Thicke Parties nor the Gayes moved for judgment as a matter of law.[89] After the verdict was returned, the district court denied the Thicke Parties' motion then for judgment as a matter of law, though the court did reduce the amount of damages.[90] Additionally, it granted the Gayes' motion for ongoing royalties, resulting in a final award of $5 million but with a 50% running royalty for songwriter and publisher credits.[91] The Thicke Parties appealed on the grounds that the district court erred in denying their motion for judgment as a matter of law because they asserted the weight of the evidence did not support the jury's verdict, among other grounds.[92]

2. The Majority Opinion

The Ninth Circuit began by articulating the governing law. The court recited the traditional definition of copyright infringement and the two-part test—extrinsic and intrinsic—as expressed in *Swirsky v. Carey*.[93] It then addressed the concepts of thin and broad copyright protection and their connection to the range of expression present in a creative medium.[94] When range of expression is wide, protection is broad, and the standard of substantial similarity is used.[95] However, if the range of expression is narrow, protection is narrow, and the standard of virtual identity is used instead.[96] The court stated that "[m]usical compositions are not confined to a narrow range of expression" and are thus subject to broad protection and the substantial similarity standard.[97] It contrasted music cases to those of a desktop icon and a glass-in-glass jellyfish sculpture, describing the few elements they contain which circumscribe a narrow range of

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87 *Id.* The effective date of the Copyright Act of 1976 wasn't until January 1, 1978, after Gaye composed "Got To Give It Up." *Id.* at 1121.

88 *Id.* at 1118.

89 *Id.*

90 *Id.*

91 *Id.* at 1118–19.

92 *Id.* at 1115.

93 *Id.* at 1119 (citing Swirsky v. Carey, 376 F.3d 841, 844–45 (9th Cir. 2004)).

94 *Id.* at 1120.

95 *Id.*

96 *Id.*

97 *Id.*

expression.[98] Music, on the other hand, is "comprised of a large array of elements, some combination of which is protectable by copyright."[99]

Ultimately, however, the Ninth Circuit's majority opinion depended upon the procedural status of the case rather than its merits.[100] A critical flaw in the Thicke Parties' argument, it ruled, was the failure to make a motion for judgment as a matter of law *before* the matter was submitted to the jury.[101] The Federal Rules of Civil Procedure require that, if a party wants to make a motion for judgment as a matter of law after the jury begins deliberations, it must first make a similar motion before that time.[102] Because the Thicke Parties failed to do just that, the district court could not grant the motion, and the Ninth Circuit could not say that the district court's ruling was erroneous.[103]

The Ninth Circuit also discussed other elements that impacted the Thicke Parties' argument that the district court erred in denying their motion beyond this procedural flaw. In addition to validating some of the district court's jury instructions, the court stated that Finell's and Dr. Monson's testimonies did not concern unprotectable elements, but that their interpretations were a matter of credibility for the jury to decide, complicated by interpretive differences, made evident by the disagreement between Wilbur and the other experts.[104] The court also found that because Finell's and Monson's testimony was evidence supporting the verdict, there was not an "absolute absence of evidence to support the jury's verdict," and thus the court could not overturn the district court's ruling under an abuse of discretion standard.[105]

The majority affirmed, finding for the Gayes and leaving their victory intact.[106]

3. The Dissent

Judge Nguyen, in her dissent, agreed with the Thicke Parties that the expert testimony did not refer to any copyright-protected elements in "Got To Give It Up."[107] She engaged in a thorough analysis of each point argued by the Gayes' expert Finell, looking at the relevant musical lines

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[98] *Id.* (citing Apple Comput., Inc. v. Microsoft Corp., 35 F.3d 1435, 1444 (9th Cir. 1994) (discussing copyright of a computer icon); Satava v. Lowry, 323 F.3d 805, 810 (9th Cir. 2003) (discussing copyright of a glass-in-glass jellyfish sculpture)).

[99] *Williams*, 895 F.3d at 1120 (quoting Swirsky v. Carey, 376 F.3d 841, 849 (9th Cir. 2004)).

[100] *Id.* at 1138.

[101] *Id.* at 1134.

[102] FED. R. CIV. P. 50(a)–(b).

[103] *Williams*, 895 F.3d at 1134.

[104] *Id.* at 1123–26.

[105] *Id.* at 1117, 1127–28 (quoting Lam v. City of San Jose, 869 F.3d 1077, 1084 (9th Cir. 2017)) (emphasis omitted).

[106] *Id.* at 1138.

[107] *Id.* at 1139 (Nguyen, J., dissenting).

in both songs side by side and explaining why the elements were either too common or not complex enough to warrant copyright protection.[108] A common theme in these analyses is identifying compositions predating both works that contained the points at issue, such as Beethoven's Fifth Symphony for the motif of repeated notes.[109] Nguyen also posits that some elements are too simple, like three repeated notes, or are too insignificant, like a passage that lasts only a few seconds in a four-minute song, or are essentially musical building blocks or tools, like a rhythm pattern.[110] She did acknowledge the principle that non-copyrightable expressions could become protectable in the aggregate.[111] However, when considering the songs in their entirety, she found no basis to establish substantial similarity because of the two songs' disparate structures, harmonies, and use of the themes Finell compared.[112]

She criticized the majority's excuse of hiding behind the procedural issue and its inappropriate analysis of music under the broad protection standard.[113] She described its contrast of music with the computer icon and the jellyfish sculpture inapposite because, under the majority's definition, both, being possible of a wide range of expression, should fall under the broad protection standard as well.[114] In accordance with the precedents underlying these examples, she asserted that written music should be considered under the narrow protection standard of virtual identity.[115]

Judge Nguyen also warned of the dangers presented by the majority's opinion in this case, saying that it would "[strike] a devastating blow to future musicians and composers everywhere."[116] Under the majority's conclusion, a court could virtually never rule that a musical composition fails the extrinsic test so long as the copyright holder has an expert willing to testify about similarities between the two works.[117] She characterized this as an "uncritical deference to music experts" and stated that "we

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[108] *See id.* at 1143–50 (including relevant measures of the songs' scores within the text of the opinion).

[109] *See, e.g.*, *id.* at 1143–45 (using "Happy Birthday" and Beethoven's Fifth Symphony to discuss the use of repeated notes and using "Happy Birthday" again to discuss the use of melisma at the end of a phrase); Newton v. Diamond, 349 F.3d 591, 598–99 (9th Cir. 2003) (using Beethoven's Fifth Symphony to discuss how a passage with only a few notes can be distinctive).

[110] *Williams*, 895 F.3d at 1144–45 (Nguyen, J., dissenting).

[111] *Id.* at 1150.

[112] *Id.*

[113] *Id.* at 1151–52.

[114] *Id.* at 1141.

[115] *See id.* at 1120; *id.* at 1141 (Nguyen, J., dissenting).

[116] *Id.* at 1138 (Nguyen, J., dissenting).

[117] *See id.* at 1152.

cannot simply defer to the conclusions of experts about the ultimate finding of substantial similarity."[118]

4. Conflicting Opinions

The primary difference between the majority and the dissent is in their interpretation of the boundaries of copyright protection. While the majority held that broad protection should apply and was thus satisfied that the Gayes' expert Finell found similarities that didn't rise to the level of being virtually identical, the dissent countered that narrow protection should apply.[119] The dissent's reasoning is more sound in this case. Although an incredibly wide range of expression is possible when considering auditory expression, as in a case where sound recordings are being compared, written musical compositions are much more constrained in their ranges of expression.[120] The standard mentioned by the majority of requiring virtual identity is much more appropriate in this case where the expression at issue is confined to a page instead of the gamut of perceivable sound, as would be the case if the court were comparing recordings of songs.

A noteworthy criticism from the majority about the dissent's approach is that its standard is unworkable considering that it cannot expect district courts to engage with the music at the musicological level of the dissent's independent analysis.[121] While a valid point under the majority's categorization of music under the broad protection standard, under a narrow protection standard, distinguishing between music that is virtually identical to the protected music and that which is not virtually identical is not the impossible task the majority imagines and would be a workable standard.

Because the majority's decision hinged on the procedural issue, its analysis of broad and narrow copyright protection should be considered dicta rather than the holding of the case. However, when the majority opinion became the new standard in the Ninth Circuit in 2018, it generated uncertainty about just how significant the points of similarity needed to be to establish infringement.[122] In the wake of this uncertainty that this next case was decided.

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[118] *Id.*

[119] *Id.* at 1120 (majority op.); *id.* at 1141 (Nguyen, J., dissenting).

[120] *See* TEDx Talks, *Copyrighting All the Melodies to Avoid Accidental Infringement | Damien Riehl | TEDxMinneapolis*, YOUTUBE, at 01:12 (Jan. 30, 2020), https://www.youtube.com/watch?v=sJtm0MoOgiU (arguing that there are only a finite number of melodies that can be created).

[121] *Williams*, 895 F.3d at 1136–37.

[122] *See* Olivia Lattanza, *The Blurred Protection for the Feel or Groove of a Song Under Copyright Law: Examining the Implications of* Williams v. Gaye *on Creativity in Music*, 35 TOURO L. REV. 723, 726–27 (2019) (discussing how *Williams v. Gaye* "inappropriately

B. The "Dark Horse" Case: Gray v. Perry

1. The Facts and Procedural History

In 2013, Katheryn Elizabeth Hudson (popularly known as Katy Perry), Jordan Houston (popularly known as Juicy J), and others released the song "Dark Horse."[123] After each of its choruses, an ostinato (a short musical phrase that repeats throughout a song) can be heard, eight notes in length and descending in a minor scale.[124] Marcus Gray (stage name Flame), a Christian rapper, sued Perry and her codefendants, alleging infringement of his song "Joyful Noise" which featured a similar ostinato.[125] A jury heard the evidence, including the testimony of Perry's expert Dr. Lawrence Ferrera and Gray's expert Dr. Todd Decker.[126] It ruled for Gray and his co-plaintiffs, finding that Perry's ostinato infringed "Joyful Noise" and awarding Grey $2.8 million in damages.[127] The parties filed several post-judgment motions, including Perry's renewed motion for judgment as a matter of law or, in the alternative, for a new trial and Gray's motion for prejudgment interest on his pending award (a protection of the Copyright Act for cases of undisputed copyright infringement to compensate the copyright owner for delays in receiving damages).[128]

2. The Opinion

Judge Christine Snyder began by articulating the same general rule of copyright infringement and the two-part test of the *Williams* court.[129] Next, when focusing on the extrinsic test, she emphasized the importance of considering the ubiquity of musical building blocks, "given the 'limited number of notes and chords available to composers,' and [that] 'common themes frequently reappear in various compositions . . . .'"[130] The testimony of Gray's expert, Dr. Decker, established a number of similarities between the two ostinatos, a number between five and nine

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expanded the scope of copyright protection to the feel or groove of a song" and how "every song or musical work is inspired at least in part by some other artist or musical genre").

[123] Gray v. Perry, No. 2:15-CV-05642, 2020 WL 1275221, at *1 (C.D. Cal. Mar. 16, 2020); Mark Elliott, *'Dark Horse': How Katy Perry Took the Reins for a New Direction*, UDISCOVERMUSIC (Dec. 17, 2021), https://www.udiscovermusic.com/stories/katy-perry-dark-horse-song/; *Repertory*, ASCAP, https://www.ascap.com/repertory#/ace/search/title/dark%20horse/performer/katy%20perry?at=false&searchFilter=SVW&page=1 (last visited Dec. 19, 2022).

[124] *Gray*, 2020 WL 1275221, at *1 & n.1.

[125] *Id.* at *1.

[126] *Id.* at *1, *5, *10.

[127] *Id.* at *1.

[128] *Id.* at *1, *3.

[129] *Id.* at *3; Williams v. Gaye, 895 F.3d 1106, 1119 (9th Cir. 2018).

[130] *Gray*, 2020 WL 1275221, at *4 (quoting Gaste v. Kaiserman, 863 F.2d 1061, 1068 (2d Cir. 1988)).

disputed by plaintiffs and amici.[131] Judge Snyder took each of the nine elements in turn and found each one to be unprotectable by copyright law.[132] Most notably, in her rejection of protection for timbre (the quality of sound that helps distinguish between different instruments and voices), she noted that the synthesizer timbre present in both songs is common to much of popular music and cannot be protected by copyright law.[133]

Judge Snyder next acknowledged that combinations of unprotectable elements can be protected depending on their composition, but that they must be "numerous enough, and their selection and arrangement original enough" in order to be subject to copyright protection.[134] Through an analysis of several past cases, including *Swirsky* and *Williams*, she reasoned that the manner of arrangement is a significant part of the copyright protection of such combinations, although there is no set rule for what distinguishes a protectable combination and an unprotectable one.[135] Regardless of where the line between these falls, Snyder ruled that the ostinato's elements were neither numerous enough nor arranged with sufficient particularity to constitute a protectable combination.[136] As such, she found that "Dark Horse" failed the extrinsic test and that Perry was entitled to judgment as a matter of law.[137]

Judge Snyder continued her analysis to consider whether Perry would still be entitled to judgment as a matter of law if Gray's ostinato were protectable.[138] She applied the narrow copyright protection standard, arguing that an eight-note ostinato has quite a narrow range of expression possible for composers.[139] She drew a distinction between virtual identity and absolute identity with regard to ostinatos, but confirmed that even so, the presence of significant distinctions would negate a finding of virtual identity.[140] Because she found significant distinctions between the two ostinatos, such as different concluding notes, the use of different articulation, and the different musical setting (key,

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[131] *Gray*, 2020 WL 1275221, at *5 (identifying that the nine components the plaintiffs disputed were "(1) a melody build in the minor mode; (2) a phrase length of eight notes; (3) a pitch sequence beginning with '3, 3, 3, 3, 2, 2'; (4) a similar resolution to both phrases; (5) a rhythm of eighth notes; (6) a square and even rhythm; (7) the structural use of the phrase as an ostinato; (8) the timbre of the instrumentation; and (9) the notably empty and sparse texture of the compositions").

[132] *Id.* at *6–7.

[133] *Id.* at *7. Note that timbre, as a quality of a sound recording, is not relevant to the issue of whether the publisher's rights of the written composition have been infringed. Gray v. Hudson, 28 F.4th 87, 99 (9th Cir. 2022).

[134] *Gray*, 2020 WL 1275221, at *8 (quoting Satava v. Lowry, 323 F.3d 805, 811 (9th Cir. 2003)).

[135] *Id.* at *8–10.

[136] *Id.* at *10–11.

[137] *Id.* at *11.

[138] *Id.*

[139] *Id.*

[140] *Id.* at *12.

tempo, harmony, etc.), Judge Snyder decided that Perry would have succeeded on her motion even if Gray's ostinato had been copyright protected.[141]

In March 2022, the Ninth Circuit affirmed the trial court's ruling, but only on the grounds that the ostinato in "Joyful Noise" was not subject to copyright protection and without addressing Judge Synder's proposed standards (for clarity, the appeal will hereinafter be referred to as "*Gray II*").[142] Because *Gray II* affirmed on narrower grounds, the proposed standards in *Gray I* remain merely proposed and have not been adopted into Ninth Circuit law. Because this Note is concerned with the ideal standards for music copyright law, *Gray I* will be the focus of the ensuing discussion, keeping an eye on what the law ought to be beyond its present condition.

C. Comparing These Cases

There are a few important differences to consider between *Williams* and *Gray I*.

First, the *Williams* majority insisted that its opinion would not be used to expand the boundaries of copyright protection, but this has not been borne out in practice. Gray and his co-plaintiffs relied on *Williams* to argue against the narrow protection standard for its ostinato.[143] While this attempt was unsuccessful, it still demonstrates that the language of the *Williams* majority was overbroad for the intentions its authors suggested.

Second, because the 1909 Act governed in *Williams* and the sound recording was not protected by copyright law, the court did not reach the question of similarity in the instrumentation between the two songs (e.g., the use of cowbell and backup vocals over the hook phrase).[144] However, *Gray I* addresses this point in its discussion of timbre.[145] Because the sound of a particular instrument is not copyrightable, the Gayes would have lost on these points had the matter been justiciable.[146] *Gray I*, on the other hand, was not limited because "Joyful Noise" was written after sound recordings were protectable, but the decision is only addressing the

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[141] *Id.* at *12–13.

[142] See Gray v. Hudson, 28 F.4th 87, 96–103 (9th Cir. 2022), for the Ninth Circuit's arguments that the allegedly infringed musical elements in "Joyful Noise" are not protected individually or collectively, and that no further reasoning is required to dispose of this case.

[143] *Gray*, 2020 WL 1275221, at *3 n.2.

[144] Williams v. Gaye, 895 F.3d 1106, 1117, 1121 (9th Cir. 2018).

[145] *Gray*, 2020 WL 1275221, at *7.

[146] *Id.*; *see Williams*, 895 F.3d at 1117 (stating that "[t]he district court also filtered out several unprotectable similarities Dr. Monson identified, including the use of a cowbell, hand percussion, drum set parts, back-ground vocals, and keyboard parts" because the sound of an instrument is not copyrightable).

use of the single ostinato.[147] The narrow framework should apply to both sound recordings with a narrow range of expression and to musical compositions as a category because of the limited potential of the page.[148]

Two additional cases were decided in the Ninth Circuit around the time of *Gray I* in favor of infringement defendants: *Skidmore v. Led Zeppelin*[149] and *Johannsongs-Publishing Ltd. v. Lovland*.[150] *Skidmore*, like *Williams*, were based strictly on the analysis of a registered written copy of the song "Taurus" by the band Spirit in comparison to Led Zeppelin's "Stairway to Heaven."[151] The court held that the disparate elements that the plaintiff claimed were similar were too disparate to be protected.[152] In *Lovland*, the U.S. District Court for the Central District of California held that the portion of "You Raise Me Up" that allegedly infringed on the plaintiff's song "Söknuður" was actually derived from "Danny Boy," which is in the public domain.[153] Both cases are similar to *Gray I* in affording greater protection to music infringement defendants than arises from the *Williams* dicta, though they utilize reasoning independent from the *Gray I* opinion. Though *Williams* remains good law today, these cases bolster the hope that its overly broad standard will one day be abandoned and that the more appropriate standard of virtual identity will be the prevailing standard in cases of written musical compositions and determining the existence of interpolation within a work, even as the Ninth Circuit declined to address this more tailored rule in *Gray II*.[154]

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147 *Gray*, 2020 WL 1275221, at *11.

148 Once again, note that while timbre is not relevant to the question of interpolation-style copying, this finding does imply that the master's rights are not being infringed either. *See* Erickson v. Blake, 839 F. Supp. 2d 1132, 1140 (D. Or. 2012) (finding that even though Mr. Erickson's copyright infringement protection was thin, Mr. Blake's musical work did not infringe on Mr. Erickson's rights).

149 952 F.3d 1051, 1079 (9th Cir. 2020).

150 No. CV 18-10009-AB, 2020 WL 2315805, at *7 (C.D. Cal. Apr. 3, 2020).

151 *Skidmore*, 952 F.3d at 1056.

152 *Id.* at 1075.

153 *Lovland*, 2020 WL 2315805, at *1, *7.

154 *See* Gray v. Perry, No. 2:15-CV-05642, 2020 WL 1275221, at *12 (C.D. Cal. Mar. 16, 2020) (applying a narrow protection standard to music copyright); *see also* Brief of Amici Curiae 212 Songwriters, Composers, Musicians, & Producers in Support of Appellants at 10–16, Williams v. Gaye, 895 F.3d 1106 (9th Cir. 2018) (No. 15-56880), 2016 WL 4592129 [hereinafter Appellate Brief for Plaintiffs-Appellants] (highlighting that there is a bright line test in film, television, and book copyright cases, but not for music, and noting that the effect of *Williams* will deter future songwriters from crediting influence from past songwriters and restrain creativity); Kaseberg v. Conaco, LLC, 260 F. Supp. 3d 1229, 1232–33, 1245 (S.D. Cal. 2017) (using the virtual identity standard in a copyright infringement suit over jokes that were allegedly used on the *Conan* television show because "although the punchlines of the jokes [were] creative, they [were] nonetheless constrained by the limited number of variations").

III. RE-EXAMINING MUSIC COPYRIGHT LAW

A. Copyrighting Every Melody

One recent, thought-provoking reaction to the current state of music copyright law is that of Damien Riehl. Riehl is a lawyer, musician, and computer programmer, and with his collaborator Noah Rubin, he created a program to generate every possible eight-note melody in the Western major scale (which is the typical melodic foundation of many popular songs).[155] He had seen the detrimental effects of the uncertain copyright landscape on musicians and wanted to ease their consciences.[156] The project began with the goal of generating longer melodies over a wider pitch range, but this proved to be cost-prohibitive.[157] Instead, they focused on the simpler work of melodies that are eight notes long and consist of pitches from one tonic to the tonic one octave above (Do-Re-Mi-Fa-So-La-Ti-Do).[158] Once completed, they saved all of these melodies in MIDI format on a hard drive, which satisfies the condition of "fix[ing them] in any tangible medium of expression," subjecting their new melodies to copyright protection.[159] Then Riehl published them all online, placing them in the public domain, so that everyone could have access to those melodies.[160] His work has since extended to longer melodies over broader pitch ranges.[161]

This project was implemented in the wake of *Williams*, but Riehl holds a very different view of music and copyright. His view of music copyright principles is that melodies are too simple to be worthy of copyright protection.[162] It is understandable to have copyright protection for visual art, where there is an infinite number of possible brush strokes or pencil lines, and even still for literary works, though involving a much

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[155] TEDx Talks, *supra* note 120, at 02:50. TEDx Talks, Copyrighting all the Melodies to Avoid Accidental Infringement | Damien Riehl | TEDxMinneapolis, YOUTUBE (Jan. 30, 2020), https://www.youtube.com/watch?v=sJtm0MoOgiU.

[156] *See id.* at 16:55 (explaining how George Harrison stopped writing music for a while after his song "My Sweet Lord" was found to infringe on the Chiffons' "He's So Fine"); *see* Ben Sisario, *'Blurred Lines' on Their Minds, Songwriters Create Nervously*, THE N.Y. TIMES (Mar. 31, 2019), https://www.nytimes.com/2019/03/31/business/media/plagiarism-music-songwriters.html (stating that George Harrison felt a "paranoia about songwriting that had started to build up in [him]"); *see also* Appellate Brief for Plaintiffs-Appellants, *supra* note 154, at 13–16 (arguing that the ruling of *Williams* would repress creativity and discourage songwriters from celebrating influences).

[157] TEDx Talks, *supra* note 120, at 07:07.

[158] *Id.* at 07:25.

[159] *See id.* at 05:11 (stating that they saved every melody on their hard drive); 17 U.S.C. § 102(a) (explaining the qualifications for copyright protection).

[160] TEDx Talks, *supra* note 120,113 at 06:00; *see Creative Commons Zero*, ALL THE MUSIC LLC, http://allthemusic.info (last visited Nov. 26, 2022) (showing the website Riehl used to put the melodies in the public domain).

[161] TEDx Talks, *supra* note 120, at 10:50.

[162] *Id.* at 12:00.

more limited vocabulary of approximately 171,000 words.[163] Music, on the other hand, has a minuscule vocabulary of only seven notes per scale (twelve notes when accidentals are included), usually contained to an octave in range when involving vocal performance.[164] Because options are so limited, and because each melody is ultimately a particular combination of intervals (which can be considered as mathematical abstractions), melodies are in essence mathematical statements.[165] Mathematical statements are facts, and facts are not copyrightable.[166] Therefore, according to Riehl, melodies in and of themselves should not be copyrightable.[167] This concept is in accordance with Judge Learned Hand's statement that "the seven notes available do not admit of so many agreeable permutations that we need be amazed at the re-appearance of old themes, even though the identity extend through a sequence of twelve notes."[168]

This is a strong argument, but it has its weaknesses. First, it only accounts for the melodic element of music without paying consideration to harmony or rhythm. However, if copyright protection does now extend to these ever-narrower aspects of music (a reasonable inference from the language in *Williams*), melody may be a significant enough component to be considered individually. Second, it is unclear whether this construction best considers the melody as a free-standing fact or whether the intervals are best considered to be facts and the melody to be a compilation of those facts. If the latter is the more logical construction, then Riehl's argument may be defeated by the provisions of Title 17.[169]

B. Analyzing Rodrigo's "good 4 u"

With an eye toward the analysis of *Williams* and *Gray I*, the question arises whether Rodrigo's song would meet the Ninth Circuit's extrinsic test. Under the broad protection asserted by the *Williams* majority, it

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[163] Allison Dexter, *How Many Words Are in the English Language?*, WORD COUNTER, https://wordcounter.io/blog/how-many-words-are-in-the-english-language (last visited Oct. 24, 2022); *see* PAMELA SACHANT ET AL., INTRODUCTION TO ART: DESIGN, CONTEXT, AND MEANING 92 (2018) (noting that the "possible combinations in visual art are infinite").

[164] Rory PQ, *Basic Music Theory for Beginners – The Complete Guide*, ICON COLLECTIVE (Aug. 24, 2020), https://iconcollective.edu/basic-music-theory/; *Vocal Types and Ranges*, OER SERVICES, https://courses.lumenlearning.com/suny-musicappreciationtheory/chapter/introduction/ (last visited Nov. 26, 2022).

[165] TEDx Talks, *supra* note 120, at 06:21; *see* OSCAR LEVIN, DISCRETE MATHEMATICS: AN OPEN INTRODUCTION 62–66 (2d ed. 2016) (defining permutation and combination as mathematical techniques to determine possible sequences and providing the formulas).

[166] TEDx Talks, *supra* note 120, at 06:39; *see, e.g.*, Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 344–45 (1991) (summarizing that compilations of facts are copyrightable, but the facts themselves are not).

[167] TEDx Talks, *supra* note 120, at 06:55.

[168] Arnstein v. Edward B. Marks Music Corp., 82 F.2d 275, 277 (2d Cir. 1936).

[169] *See* 17 U.S.C. § 103(a) (stating that a compilation of facts is under copyright protection).

likely would. An expert witness could identify elements of commonality between the two songs, particularly in the choruses. Both have similar melodic contours, like the themes that the Gayes' expert, Finell, emphasized.[170] Both have similar intervals at the end of phrases, like the melismas in "Got To Give It Up" and "Blurred Lines."[171] Under this cavalcade of appreciable comparisons, a court using the broad copyright protection standard would be obligated to say that the song passes the extrinsic test and to leave to a jury the decision in what might be a clear case of non-infringement. Under the narrow protection suggested by *Gray I*, a judge would likely say that it would not meet the test. While the songs are similar and share a genre, much of their similarity stems from a few unprotectable musical building blocks. When viewed with the particularity required by the *Gray I* extrinsic test, they would not be sufficient to establish that the two songs are virtually identical.

Additionally, not every similarity between two songs indicates interpolation. When genuine interpolation is present in a work, previous musicians should receive credit for the use of their work. However, if two melodies are not virtually identical, it is not possible to say, in the absence of direct evidence of copying, that the use of a similar melody in a later work is interpolated from the former. In that case, the new artist has not recontextualized the old melody but has used another that is merely like it.

An interesting facet of these circumstances is the nature of the relationship between Paramore and Rodrigo. According to some sources, the two were in conversation before the song's release and Rodrigo has admitted that she drew inspiration from "Misery Business"[172] (although under *Williams* that would not be a dispositive factor in the infringement analysis[173]). It may be that Rodrigo decided of her own good will to give writing credits and royalties to Paramore because she recognized the band and its song as significant influences on her own work. It may be that she offered it to them first or that they suggested the proposition to her and she accepted. However, it is also possible that Paramore used the threat of litigation to convince her to give the writing credits away when she may

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[170] *See supra* notes 82–84 and accompanying text; *see also* Ahlgrim, *supra* note 6 ("While not identical, the songs' choruses share similar melodies and chord progressions.").

[171] *See supra* notes 82–84 and accompanying text.

[172] *See* Jem Aswad, *Olivia Rodrigo Adds Paramore to Songwriting Credits on 'Good 4 U'*, VARIETY (Aug. 25, 2021, 7:38 AM), https://variety.com/2021/music/news/olivia-rodrigo-paramore-good-4-u-misery-business-1235048791/ (claiming that Rodrigo and Paramore may have agreed to an interpolation before "good 4 u" was released); Ahlgrim, *supra* note 6 (noting that Olivia Rodrigo updated the credits for "good 4 u" to include Paramore to acknowledge her inspiration from "Misery Business").

[173] *See* Williams v. Gaye, 895 F.3d 1106, 1123 (9th Cir. 2018) (asserting that the district court did not place undue weight on writers' statements claiming inspiration from "Got To Give It Up" because there is no scienter requirement as copyright infringement is determined by access and substantial similarity).

not have needed to. There is no known direct evidence in this situation of whether Rodrigo did in fact interpolate Paramore's melody.[174] A system that allows potential defendants to be taken advantage of, even if that may not have occurred in this instance, is a system in need of careful review, reflection, and ultimately reform.

An even more recent example of the direction American copyright jurisprudence can follow is seen in Ed Sheeran's recent win in a copyright suit for his 2017 "Shape of You" in the United Kingdom.[175] In the wake of his victory, Sheeran criticized the litigious "culture" of squeezing money out of artists who don't want the financial and emotional toll of trial; "[i]t's really damaging to the songwriting industry."[176] He also acknowledged that the problems that arise from the legal argument he faced, much like the argument that won in *Williams*, are only exacerbated by the sheer volume of songs released and the very limited vocabulary found in music.[177] Sheeran's case shows the importance of a copyright jurisprudence that promotes the creative process and makes it accessible to newcomers, and the American system would do well to implement this type of jurisprudence.

C. On Behalf of Composers and Musicians

Judge Kozinski's words in *White v. Samsung Electronics America, Inc.* are especially prescient to the current state of music copyright law:

> Private property, including intellectual property, is essential to our way of life. . . . But reducing too much to private property can be bad medicine. Private land, for instance, is far more useful if separated from other private land by public streets, roads and highways. . . .

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[174] *See* P. Claire Dodson, *Olivia Rodrigo at the Crossroads*, TEEN VOGUE (Oct. 5, 2021), https://www.teenvogue.com/story/olivia-rodrigo-october-2021-cover-interview (discussing how Rodrigo claims she wrote "good 4 u" in her shower and that she is disappointed to have her work discredited when "[a]ll music is inspired by each other"); Aswad, *supra* note 172 (disclosing that a "source close to the situation" claimed Rodrigo and Paramore exchanged words before "good 4 u" was released and that Rodrigo's representatives declined to comment on this).

[175] Danica Kirka, *Ed Sheeran Wins Copyright Case Over 2017 Hit 'Shape of You,'* ASSOCIATED PRESS (Apr. 6, 2022), https://apnews.com/article/entertainment-business-europe-music-ed-sheeran-ca7141bb7c01c44eaa991db5727adb83; Sheeran v. Chokri [2022] EWCH (Ch) 827 [308] (Eng.).

[176] Kirka, *supra* note 175; Ed Sheeran @edsheeran, TWITTER (Apr. 6, 2022, 5:08 AM), https://twitter.com/edsheeran/status/1511631955238047751.

[177] *See* Caitlin O'Kane, *Ed Sheeran Wins Copyright Lawsuit Over 2017 Hit "Shape of You,"* CBS NEWS (Apr. 6, 2022, 10:33 AM), https://www.cbsnews.com/news/ed-sheeran-wins-copyright-lawsuit-shape-of-you/ (arguing, that with only twelve notes and 60,000 songs released daily on Spotify, "coincidences like this are bound to happen"); @edsheeran, *supra* note 176 (displaying Ed Sheeran's video about his trial).

> So too it is with intellectual property. Overprotecting intellectual property is as harmful as underprotecting it. Creativity is impossible without a rich public domain. Nothing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before. Overprotection stifles the very creative forces it's supposed to nurture.[178]

This vision of intellectual property protection aligns with the constitutional protections and purpose of the Intellectual Property Clause, the purpose that the Ninth Circuit strayed from in *Williams* and that *Gray I* sparks hope of restoring. However, since the Ninth Circuit declined to adopt the *Gray I* standard in *Gray II*, there is still a strong possibility that musicians whose works are produced either independently or through inspiration not rising to the level of virtual identity will be subject to costly litigation or settlement posturing. At the next opportunity, the Ninth Circuit ought to adopt the narrow protection standard of virtual identity for establishing substantial similarity in cases of claimed interpolation under the extrinsic test, as articulated in Judge Nguyen's dissent in *Williams* and in Judge Snyder's opinion in *Gray I*. Alternatively, although this standard may fall under the present statutory language as an understanding of substantial similarity in the music context, amending the statute or introducing a new federal statute affirmatively establishing this virtual identity standard for cases of musical copyright infringement would provide even stronger protection. Until the proper principle is definitively established, the music copyright landscape will skew in favor of established copyright owners who pursue unmerited interpolation credit, which will disincentivize new musicians from presenting their art in the public sphere. If the law does not encourage innovation and experimentation and inspiration, creativity will stagnate, which isn't good for anyone.

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[178] White v. Samsung Elecs. Am., Inc., 989 F.2d 1512, 1513 (9th Cir. 1993).

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