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THE RELATIVE BARGAINING POWER OF EMPLOYERS AND UNIONS IN THE GLOBAL INFORMATION AGE:

A COMPARATIVE ANALYSIS OF THE UNITED STATES AND JAPAN

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and

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ABSTRACT

In this paper, we examine and compare the impact of American and Japanese labor law on the relative bargaining power of the labor and management within the context of the new global economy based on information technology. We begin by providing a simple economic definition of bargaining power and examining how it can be influenced by economic and legal factors. Next, we discuss the impact of new information technology and the global economy on the employment relationship and how this has decreased union bargaining power relative to management bargaining power. Finally, we compare various facets of American and Japanese labor law that have a significant impact on the parties' relative bargaining power and discuss how one might expect American and Japanese unions to fare in their negotiations with management in the new economic environment.

I. INTRODUCTION

Although implicit or explicit bargaining is a common means for resolving differences among the various stakeholders of the modern corporation, perhaps the quintessential expression of this phenomenon is collective bargaining between representatives of employees and management over the terms and

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conditions of employment. The resolution of disputes through private bargaining has the great benefit of being a decentralized method of problem solving in which the parties who are directly affected by the problem, and know the most about it, determine the solution. Although bargaining solutions are undoubtedly influenced by information and the parties' conceptions of "fairness,"[1] bargaining is not a detached inquiry into either "truth" or "justice."[2] Instead, the determination of issues through bargaining is largely determined by the relative "bargaining power" of the two parties, or their ability to force the other side to accept an agreement on their terms.

The rise of the global economy based on information technology has done much to shift the relative bargaining power of labor and management in favor of management. New information technology has allowed the organization of firms on a global basis for production, sub-contracting and sales. In the United States, "outsourcing" work to lower-paid foreign workers has become not only good business judgment, but a necessary strategy to compete with goods and services from lower wage countries.[3] In this new economic environment, employers place a high premium on flexibility in production and employment, and the employment relationship is subject to the market in ways that have not previously been experienced. This decreases union bargaining power by putting downward pressure on wages and limiting the parties' ability to make long-term contractual commitments.[4]

Law can also influence the relative bargaining power of labor and management. The law can raise labor's bargaining power relative to management's by: facilitating broad organization across industries or the economy; allowing unions a broad array of economic weapons to employ against employers such as strikes, secondary strikes, and consumer boycotts; or limiting employers' ability to respond to a strike by prohibiting discharges and permanent replacements.[5] Alternatively, the law might lower union bargaining power relative to employers' by limiting employee organization and economic weapons or allowing greater employer response or economic weapons.[6]

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1. *See generally* Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace*, 91 MICH. L. REV. 419 (1992) [hereinafter Dau-Schmidt, *A Bargaining Analysis*].

2. NLRB v. Ins. Agents' Int'l Union, 361 U.S. 477, 507 (1960) (finding collective bargaining substitutes "processes of justice for the more primitive method of trial by combat.") (quoting Duplex Printing Press Co. v. Deering, 254 U.S. 443, 488 (1921) (Brandeis, J., dissenting)).

3. PETER CAPPELLI, THE NEW DEAL AT WORK: MANAGING THE MARKET DRIVEN WORKFORCE 74 (1999).

4. *See generally* Kenneth G. Dau-Schmidt, *Employment in the New Age of Trade and Technology: Implications for Labor and Employment Law*, 76 IND. L.J. 1 (2001) [hereinafter Dau-Schmidt, *Employment in the New Age*].

5. Kenneth G. Dau-Schmidt & Arthur R. Traynor, *Regulating Unions and Collective Bargaining*, *in* 2 LABOR AND EMPLOYMENT LAW AND ECONOMICS (Kenneth G. Dau-Schmidt et al. eds., 2009).

6. *Id.*

American and Japanese labor laws have their roots in the same New Deal principles of the American Wagner Act; however, these laws have developed in significantly different ways that influence the parties' relative bargaining power with the adoption of the Taft-Hartley amendments in the United States and various amendments and doctrines in Japan.[7]

This article will examine and compare the impact of American and Japanese labor law on the relative bargaining power of labor and management within the context of the new global economy based on information technology. We will begin by providing a simple economic definition of bargaining power and examine how it can be influenced by economic and legal factors. Next, we will discuss the impact of new information technology and global economy on the employment relationship and how this has decreased union bargaining power relative to management. Finally, we will compare various facets of American and Japanese labor law that have a significant impact on the parties' relative bargaining power and discuss how one might expect American and Japanese unions to fare in their negotiations with management in the new economic environment.

II. BARGAINING POWER

Although bargaining is a very complex phenomenon depending on the underlying cost structures, information, and strategy, economists have sought to develop simple yet useful models of collective bargaining.[8] Almost all of these models focus on bilateral negotiations between the union and an employer over the single facet of wages. Although these models are clearly mere caricatures of the phenomenon, they offer insights into the process of collective bargaining and the concept of bargaining power that are relevant to the impact of economic factors and the law on collective bargaining.

"Bargaining power" has been defined as the ability to induce an opponent to accept an agreement on one's own terms.[9] In economic terms, a party's bargaining power depends on that party's ability to impose costs on the other side for failure to reach agreement while minimizing the party's own costs of disagreement.[10] In collective bargaining, the union's bargaining power depends on its ability to inflict costs on the employer through lost sales from a strike or other collective action while minimizing the costs of the collective action to their membership in lost wages and jobs.[11] The employer's bargaining power

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7. *See generally* 1 THE DEVELOPING LABOR LAW (John E. Higgins, Jr. et al. eds., 5th ed. 2006); KAZUO SUGENO, JAPANESE LABOR LAW (Leo Kanowitz trans., U. of Wash. Press 1992) (1985).

8. *See generally* BRUCE E. KAUFMAN & JULIE L. HOTCHKISS, THE ECONOMICS OF LABOR MARKETS (7th ed. 2005).

9. *See* Neil W. Chamberlain, A General Theory of Economic Process 81 (1955).

10. *See generally* Kaufman & Hotchkiss, *supra* note 8.

11. *Id.*

depends on its ability to minimize its costs from the collective action[12] while maximizing the costs of the collective action on the union members.[13]

Accordingly, in collective bargaining, the parties' relative bargaining power depends on economic factors such as the nature of the firm's product (whether it is perishable or can be stockpiled); the firm's technology of production (whether production requires a lot of workers or great skill or can be done with easily obtainable low skill replacements or a skeleton crew of defectors and managers); general economic conditions (whether there is currently great demand for the employer's good or a small supply of potential replacement workers); the structure of bargaining (large unions can generally support a strike longer than small employers, while large employers can generally resist a strike longer than small unions); and the employees' commitment to collective action (whether employees will defect and cross the picket line).[14] If these factors favor the union and it has relatively greater bargaining power, the union will have a greater ability to negotiate terms and conditions of employment that favor its members. However, if these factors favor the employer and it has relatively greater bargaining power, the employer will have a greater ability to determine the terms and conditions of employment in negotiations.[15]

The relative bargaining power of the parties to collective bargaining will also depend on the laws that govern a country's system of labor relations. A government might enact legislation to try to affect the relative bargaining power of unions and employers in order to raise or lower negotiated wages and achieve a more equitable distribution of the proceeds from production.[16] For example, a government might limit or prohibit the use of permanent replacements if it wants to lower the potential costs of strikes to employees and raise union bargaining power and wages. Similarly, a government might prohibit employer lockouts to lower employers' ability to impose costs on employees for not agreeing, thereby lowering employer bargaining power and raising union wages. Alternatively, if the government thinks unions are too powerful, it might outlaw secondary boycotts to lower the unions' ability to impose costs on employers for not agreeing and lower union bargaining power and wages.[17] This was, in fact, one of the purposes behind the prohibition on secondary boycotts enacted in the Taft-Hartley amendments to the National Labor Relations Act (NLRA).[18] To the extent that a nation's labor laws raise or

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12. An example would be stockpiling their product or operating with replacements.

13. KAUFMAN & HOTCHKISS, *supra* note 8. Examples of employer actions that would increase the costs of collective action on union members would include: discriminating against union supporters and using permanent replacements in a strike.

14. *Id.*

15. *Id.*

16. Dau-Schmidt & Traynor, *supra* note 5.

17. *Id.*

18. *See* Kenneth G. Dau-Schmidt, Martin H. Malin, Roberto L. Corrada, Christopher David Ruiz Cameron, Catherine L. Fisk, Labor Law in the Contemporary Workplace (2009) at 67.

lower union bargaining power relative to employer bargaining power, such regulation will also encourage or discourage employee organizing as it raises and lowers the expected benefits relative to its costs.[19]

Thus, it is inevitable that the recent changes in the global economy and differences in American and Japanese labor law would have an impact on the relative bargaining power of labor and management in these countries.

III. THE GENERAL DECLINE IN RELATIVE BARGAINING POWER FOR EMPLOYEES IN DEVELOPED COUNTRIES IN THE NEW GLOBAL ECONOMY OF THE INFORMATION AGE

During the 1970s, the post-war system of trade and technology that served as the foundation for the system of industrial unionism began to change.[20] With the rebuilding of Europe and the rise of the "Asian tigers," international trade began to make serious inroads into the American economy. The impact of international trade was first felt in low-capital industries such as textiles and shoes, but the oil crisis of the 1970s facilitated significant inroads into even the capital-intensive automotive and steel industries.[21] After the price of oil quadrupled in the 1973 OPEC embargo, the automotive and steel manufacturers in Europe and Asia enjoyed competitive advantages through fuel efficient designs, up-to-date production facilities, superior management, and lower wages.[22] Manufacturing jobs began to migrate to low wage countries or disappear entirely as industry strived to become more efficient.[23] As a result, global trade played a more important role in the economies of all industrialized countries.[24]

During the 1980s, new information technology accelerated globalization and allowed for the efficient horizontal organization of firms. Information technology allowed employers to coordinate production among various suppliers and subcontractors around the world. Employers no longer had to be large and vertically integrated to ensure efficient production; they just had to be sufficiently wired to reliable subcontractors.[25] The "best business practices" became those of horizontal organization, outsourcing, and subcontracting, as firms concentrated on their "core competencies"—or that portion of production or retailing that they did best.[26] In this economic environment, employers sought flexibility in employment; the number of "contingent employees" who

19. Dau-Schmidt & Traynor, *supra* note 5.

20. CAPPELLI, *supra* note 3, at 4-5.

21. Kenneth G. Dau-Schmidt, *The Changing Face of Collective Representation: The Future of Collective Bargaining*, 82 CHI.-KENT L. REV. 903, 912 (2007) [hereinafter Dau-Schmidt, *The Changing Face*].

22. *Id.*

23. *Id.* at 913.

24. *Id.*

25. CAPPELLI, *supra* note 3, 99-100.

26. *Id.*

work part-time or are leased or sub-contracted reached new heights in the American economy.[27] The new horizontal organization of firms broke down the job ladders and administrative rules of the internal labor market, and firms became more market driven. New technology allowed "bench-marking," or the checking of the efficiency of a division of a firm against external suppliers, thus bringing the market inside the firm in a way not previously experienced.[28] Perhaps the most extreme example of a horizontal method of production is the Volkswagen truck plant in Resende, Brazil, where the employees of various subcontractors gather under one roof to assemble trucks using parts manufactured from around the world, and only a handful of actual Volkswagen employees are present to perform quality control.[29]

New information technology also facilitated the rise of the "big box" retailers to a position of unprecedented world-wide economic power.[30] The simple bar code allowed Wal-Mart to master inventory control, coordinate sources of product supply world-wide, and grow into an international economic powerhouse with unprecedented power to determine wholesale prices and employment.[31] This power in the retail market allows the "big box" retailers to determine the wages and employment of production employees, even though they bear no legal relation to those employees.[32] For example, in 1995 when the American firm Rubbermaid sought to raise its prices to cover an increase in the cost of plastic resin, Wal-Mart's refusal to comply resulted in wage cuts and layoffs for Rubbermaid's production workers.[33] Moreover, the "big box" retailers provide an extensive retailing network for foreign producers, facilitating the inroads of foreign production into the American economy and across the world. In the case of Rubbermaid, important parts of the firm's production process were eventually sold to China for employment there.[34]

Finally, in the 1990s, the global labor market experienced a near doubling of the relevant labor force with a concomitant downward pressure on wages and benefits that is yet to be fully felt in the industrialized world. Since 1990, the collapse of communism, India's turn from autarky, and China's adoption of market capitalism have lead to an increase in the global economy's available

27. Karen Winegardner, *Who Are Your Employees? Contingent Workers on the Rise*, THE CAPITAL, Apr. 1, 2001, at 10. For an example of the contingent worker marketplace in action, see Melanie Holmes, Confronting the Coming Talent Crunch (May 15, 2009), http://www.us.manpower.com/webinars/5_15_07_slides.pdf (Manpower placed 4.4 million workers in 2006 alone); Manpower Inc., Profile, http://www.us.manpower.com/uscom/contentSingle.jsp?articleid=297 (last visited Nov. 16, 2009).

28. CAPPELLI, *supra* note 3, at 104.

29. *Id.*

30. Dau-Schmidt, *The Changing Face*, *supra* note 21, at 914.

31. *Id.* at 913-14.

32. *Id.* at 914.

33. *Id.*

34. *Id.* at 914.

35. *Id.*

labor force from 3.3 billion to 6 billion![35] Because these countries were relatively capital poor, their entry into the global economy has brought no corresponding increase in global capital.[36] As a result, the capital-to-labor ratio in the global economy has dropped approximately forty percent.[37] This abrupt change in the ratio of available labor and capital in the global economy has put tremendous downward pressure on wages and benefits in global competition. Low wage competition from elsewhere in the world has contributed to American employers' desire to subcontract work to low-wage countries and to encourage the immigration of low-wage employees from Central and South America.[38] The downward pressure on wages and benefits exists not only in manufacturing, but in any service in which work can be digitalized and sent to qualified people elsewhere in the world.[39]

As a consequence of these changes, unions in developed countries such as the United States and Japan have generally suffered a significant decline in their bargaining power relative to their employers. The efficient organization of firms across the globe has decreased unions' ability to impose costs on recalcitrant employers through collective action and increased the potential costs of such action to employees. If American or Japanese workers go on strike and their work can be subcontracted to low wage workers in other countries, these workers can lose their job even if they are more productive and produce higher quality output. Moreover, as firms have adopted a leaner, more horizontal, form of organization that is more subject to market discipline, and put a higher premium on flexibility in production, there has been less for employees and employers to gain through collective bargaining. In the new economic environment, employers are less interested in negotiating benefits and administrative rules to support a long-term employment relationship, so there is less for unions to achieve and administer through collective bargaining. The result has been a precipitous decline in union bargaining power and activity in both the United States and Japan.

IV. A COMPARATIVE ANALYSIS OF THE IMPACT OF AMERICAN AND JAPANESE LABOR LAW ON THE RELATIVE BARGAINING POWER OF THE PARTIES TO COLLECTIVE BARGAINING

Despite their common heritage, there are several significant differences between American and Japanese labor law and the practice of labor relations in each country that would logically have an impact on the relative bargaining power of labor and management.

36. Richard B. Freeman, America Works: Critical Thought on the Exceptional U.S. Labor Market 128-40 (2007).

37. *Id.* at 130.

38. *Id.*

39. *Id.* at 133.

40. *Id.* at 133-34.

A. The Definition of Employee

In the United States, the NLRA uses the term "employee" to describe the people who enjoy the right to organize and bargain collectively under that statute.[40] Although the NLRA's definition of employee includes "any employee," it expressly exempts "independent contractors," "supervisors," and employees covered by the Railway Labor Act.[41] The United States' National Labor Relations Board and courts have narrowly interpreted the term "employee,"[42] broadly interpreting the exceptions,[43] and adding additional exceptions for "managerial" and "confidential" employees.[44] Under United States' law, many professionals, and even employees with only minimal supervisory responsibilities, are excluded from coverage under the Act.[45]

In contrast, Japanese labor law covers a broader array of economically dependent people. In Japan, the term "workers" is used to describe persons protected by the Labor Union Act (LUA), Japan's primary body of labor laws.[46] The Act defines "workers" as "those persons who live on their wages, salaries, or other equivalent income, regardless of the kind of occupation."[47] Because this standard is not particularly effective in differentiating workers from non-workers, legal commentators and courts often use a substitute standard, asking whether an individual has a "subordinate relationship to an employer."[48] A commission established by the Minister of Labor determined that identifying a worker under this definition includes two factors: "(1) the rendering of service under the direction and supervision of another party; and

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41. 29 U.S.C. § 152(3) (2009).

42. *Id.* For employees covered by the Railway Labor Act, see 45 U.S.C § 151 (2009). The NLRA defines supervisors at 29 U.S.C. § 152(11) (2009). The independent contractor exemption was added with the Taft-Hartley Amendments of 1947, overruling NLRB v. Hearst, in which the U.S. Supreme Court considered workers who were not technically employees, but were nonetheless economically dependent on a business for their livelihoods, as being protected by the NLRA. *See* NLRB v. Hearst Publ'n, Inc., 322 U.S. 111, 131 (1944).

43. NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 113 (1956) (finding NLRA protection available only to employees in the context of their employment with a particular employer).

44. NLRB v. Yeshiva, 444 U.S. 672, 682 (1980) (exempting employees who "formulate and effectuate management policies by expressing and making operative the decisions of their employer") (citation omitted); Oakwood Healthcare, Inc., 348 N.L.R.B. 686, 694 (2006) (exempting certain charge nurses under the 'supervisor' exception).

45. NLRB v. Bell Aerospace Co. Division, 416 U.S. 267 (1974) (exempting managerial employees); NLRB v. Hendricks County Rural Electric Membership Corp., 454 U.S. 170 (1981) (exempting confidential employees).

46. *See* NLRB v. Yeshiva, 444 U.S. 672, 682 (1980); Oakwood Healthcare, Inc., 348, 694 N.L.R.B. 686 (2006).

47. Labor Union Act, Law No. 174 of 1949, *available at* http://www.jil.go.jp/english/laborinfo/ library/documents/llj_law2.pdf. In Leo Kanowitz' translation of Kazuo Sugeno's treatise on Japanese labor law, he uses the term 'Trade Union Law' when discussing the LUA. *See generally* SUGENO, *supra* note 7.

48. Labor Union Act, Law No. 174 of 1949, art. 3, *available at* http://www.jil.go.jp/english/ laborinfo/library/documents/llj_law2.pdf.

49. SUGENO, *supra* note 7, at 425.

(2) the receipt of remuneration in return for the service rendered."[49] Sugeno identifies four factors:

> (1) that the persons perform indispensable work for the enterprise and that they are an essential component of the enterprise; (2) that the content of their contracts are unilaterally decided; (3) that they are supervised with regard to such matters as the date, time and hour, the place, and the method of accomplishing their work; and (4) that they are not free to accept or refuse contracts relating to their employer's business that are tendered by third persons.[50]

Though supervisors are excluded from membership in certified unions, they are nonetheless considered to be "workers" under the Act.[51] Additionally, temporary workers are typically not admitted to unions.[52]

Japanese labor law's broader coverage of economically dependent people favors greater union bargaining power in Japan. With greater coverage, Japanese unions would have a better opportunity to organize a larger percent of employees in a given industry and the nation as a whole. Greater union density helps protect union workers from non-union competition at least within the country's borders. This broader coverage is both more and less important in the new global economy. With the changes in production methods of information technology, production is becoming more decentralized, and more employees work for sub-contractors and exercise some degree of managerial or supervisory skills. In the United States, the narrow definition of employee under the NLRA has led to an ever larger share of the work force who are either excluded from coverage under the NLRA, or left working for "employers" with no economic leverage with the ultimate producer or retailer. On the other hand, with

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50. Ryuichi Yamakawa, *New Wine in Old Bottles: Employee/Independent Contractor Distinction Under Japanese Labor Law*, 21 COMP. LAB. L. & POL'Y J. 99, 104 (1999). The commission further examined the nature of the relationship that qualifies for protection, noting four factors: "(a) absence of freedom to refuse another party's request to engage in service; (b) specific direction and supervision while performing service; (c) restriction in terms of time and place for performing service; and (d) prohibition of delegation of duty to a person other than him/herself ("insubstitutability")." *Id.* Lastly, there are a handful of supplemental factors to consider:

> (a) process of hiring that is virtually the same as that of regular employees; (b) withholding tax treatment as an employee; (c) application of labor insurance through the deduction or contribution of a premium under a scheme of worker's compensation and unemployment insurance; (d) application of rules regarding orders for a workplace or disciplinary actions; and (e) application of provisions regarding severance allowances and fringe benefits.

Id. at 107.

51. SUGENO, *supra* note 7, at 426.

52. T.A. HANAMI, LABOR LAW AND INDUSTRIAL RELATIONS IN JAPAN 37 (1979). Supervisors are simultaneously considered to be "employers." *Id.*

53. *Id.* at 103.

increased international trade, national borders have proven much less important in collective bargaining. Even if Japanese workers are protected under Japanese labor law, they still have to bargain with employers who can shift production to low-wage workers overseas.

B. Exclusive Representation

One of the major differences between U.S. and Japanese unions is the individuals the unions are authorized and obligated to represent. In the United States, a union is considered the "exclusive representative" for the "appropriate bargaining unit" for which it has been certified.[53] The role of a union as the exclusive bargaining representative gives it both special rights and obligations. First, the union is not only authorized, but is also obligated to bargain on behalf of all employees of an employer whose positions fall within that unit,[54] and it must exercise that obligation fairly and without prejudice.[55] Unlike most violations of U.S. labor laws, a union that fails to fairly represent its members may be liable under civil law in addition to the administrative remedies of the NLRB.[56] However, with this responsibility comes the power of exclusive representation. While the union remains certified, no other organization may represent the unit or bargain with the employer on their behalf.[57] Any other union seeking to represent a unit covered by a certified union will be in violation of NLRA section 8(b)(4)(C). Furthermore, at least in states that have not passed "right to work" laws, a certified union is free to bargain for a union security agreement, which requires the payment of union agency fees as a condition of continued employment.[58]

By contrast, Japanese unions are authorized to bargain only on behalf of their members.[59] Additionally, the LUA contains only a limited exclusivity provision, which provides: "When three-fourths or more of the workers of the same kind regularly employed in a particular factory or workplace come under application of a particular collective agreement, the agreement concerned shall also apply to the remaining workers of the same kind employed in the factory concerned or workplace."[60] Similarly,

54. 29 U.S.C. § 159(a) (2009).

55. 29 U.S.C. § 158(d) (2009).

56. *E.g.*, Steele v. Louisville & Nashville R.R., 323 U.S. 192, 203 (1944) (explaining that the bargaining representative has "the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them").

57. Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6, 493 U.S. 67, 84 (1989) (asserting jurisdiction over such matters under 28 U.S.C. § 1337).

58. 29 U.S.C. § 159(a) (2009).

59. 29 U.S.C. § 158(a)(3) (2009); ALVIN L. GOLDMAN, LABOR AND EMPLOYMENT LAW IN THE UNITED STATES 176 (1996).

60. Labor Union Act, Law No. 174 of 1949, art. 6, *available at* http://www.jil.go.jp/english/ laborinfo/library/documents/llj_law2.pdf.

61. *Id.* at art. 17.

> When a majority of the workers of the same kind in a particular locality come under application of a particular collective agreement, the Minister of Health, Labor, and Welfare or the prefectural governor may, at the request of either one or both of the parties to the collective agreement concerned and, pursuant to a resolution of the Labor Relations Commission, decide that the collective agreement . . . should apply to the remaining workers of the same kind employed in the same locality and to their employers.[61]

The absence of an exclusivity or appropriate unit provision in Japanese labor law has resulted in the rise of plural unions. This means that unlike the United States, multiple organizations may arise to represent workers from a single class within a single workplace.

Exclusive representation has proven to be both a blessing and a curse for American unions. Exclusivity simplifies representation and bargaining issues and provides insulation from competitive unions entering the bargaining unit.[62] However, the elections procedure the United States adopted to determine representation in bargaining units has proven to be a significant burden to employee organization.[63] As a result, it is more difficult for U.S. unions to achieve a high level of union density in an industry to "take wages out of competition." This is particularly true given Japan's rule that non-union employees in the same locality or industry are governed by the terms of relevant collective bargaining agreements if the relevant unions achieve majority or two-thirds representation. As a result, the doctrine of exclusive representation probably undermines the bargaining power of American unions in the early stages of labor organization in a region or industry, although it may enhance union bargaining power for well established unions.

C. *Employee Collective Action*

In the United States, the employees' right to engage in collective action to pressure employers to meet their demands and grievances is set forth in the NLRA's section 7.[64] It is from section 7 that employees derive their rights to

62. *Id.* at art. 18.

63. Dau-Schmidt, *A Bargaining Analysis*, *supra* note 1, at 503-04.

64. This has resulted in the recent passage of the Employee Free Choice Act of 2007, H.R. 800, 110th Cong. (as passed by House, March 1, 2007), which permits, among other things, the use of authorization cards to support demands for union recognition. *See id.* at § 2(a)(6). In support of its campaign for the Act, the AFL-CIO claims to have research showing that 60 million U.S. workers would join a union if they could. AFL-CIO, Employee Free Choice Act, http://www.aflcio.org/joinaunion/voiceatwork/efca/57million.cfm (last visited Nov. 5, 2009).

65. 29 U.S.C. § 157 (2009) ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities . . . and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an

unionize and bargain collectively. In addition to these explicit rights, employees have the right to "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."[65]

These broad rights are explicitly bounded by the provisions of sections 8(b) through (g).[66] Prohibited tactics include restraint or coercion of employees' section 7 rights, invidiously causing an employer to discriminate against an employee on the basis of his non-union status, refusal to bargain collectively and in good faith, and the under-taking of "secondary-boycotts" that are aimed at inducing a "secondary employer" to pressure the "primary employer" to recognize or negotiate with a union.[67] In addition to this broad prohibition on secondary boycotts, the NLRB has held that partial work-stoppages or slow-downs are unprotected activities under the NLRA and employees who engage in them can be fired.[68]

In Japan, many labor rights stem from Constitutional provisions. While both the U.S. and Japanese Constitutions guarantee a right to free association, the Japanese Constitution further provides "the right and obligation to work,"[69] and "[t]he right of workers to organize and bargain and act collectively."[70] Furthermore, in Japan there is no section analogous to the NLRA section 8 unfair labor practices for labor organizations; instead, the Japanese employ a concept of "justifiable acts" judged in context.[71] Nonetheless, there are some narrow and specific exceptions.

In Japan, the propriety of disputed acts are generally made on a case-by-case basis.[72] Generally, four elements will be examined in determining whether collection action is justifiable: "(1) their parties, (2) their objectives, (3) their procedures, and (4) their means."[73] Dispute rights must be balanced against the

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agreement requiring membership in a labor organization as a condition of employment as authorized in [29 U.S.C. § 158(a)(3)].").

66. *Id.* Employees also have the ability to refrain from any of these rights. *Id.* For a concise discussion of what is encompassed by these 'protected, concerted activities,' see THE DEVELOPING LABOR LAW, *supra* note 7, at 83-87.

67. 29 U.S.C. §§ 158(b) to (g) (2009).

68. *See id.* § 158(b)(1) (prohibiting restraint or coercion of employees in exercise of section 7 rights); *Id.* at 158(b)(3) (refusal to bargain collectively, and in good faith); *Id.* at § 158(b)(4) (prohibiting the use of 'secondary boycotts').

69. Elk Lumber Co., 91 N.L.R.B. 333, 338 (1950).

70. MEIJI KENPŌ, art. 27, no. 1.

71. *Id.* at art. 28.

72. *See* KEIHŌ, art. 35, *available at* http://www.asianlii.org/jp/legis/laws/pc1907an45o1907133/ ("An act performed in accordance with laws and regulations or in the pursuit of lawful business is not punishable."); Labor Union Act, art. 1, no. 2, *available at* http://www.jil.go.jp/ english/laborinfo/library/documents/llj_law2.pdf ("The provisions of [KEIHŌ, art. 35] shall apply to collective bargaining and other acts of labor unions which are justifiable and have been performed for the attainment of the purposes of the [Act], provided, however, that in no case shall exercises of violence be construed as justifiable acts of labor unions."); *Id.* at art. 8 ("An employer may not make a claim for damages against a labor union or a union member for damages received through a strike or other acts of dispute which are justifiable acts.").

73. SUGENO, *supra* note 7, at 548.

74. *Id.* at 549.

employer's property rights, and violence is always improper.[74] Moreover, a dispute is only justifiable if it has collective bargaining as its object.[75] As a result, political strikes are unjustifiable,[76] as are sympathy strikes.[77] Unions must wait until negotiations have begun before initiating a dispute.[78] Similarly, unions are required to give notice before initiating a dispute.[79] Although Sugeno believes that dispute acts in violation of a no-strike or similar agreement are generally unjustifiable, he acknowledges it to be a case-by-case basis, and that there are opposing views.[80]

Although secondary actions are suspect, the Japanese have a broad definition of what constitutes a primary action. If in the course of an industrial dispute workers appeal to customers and the public not to purchase the products of the struck employer, the action is considered a primary product boycott. Such conduct is proper and justifiable because it is within the scope of the protection accorded the dispute right.[81]

A dispute act is generally justifiable if it involves the total or partial withholding of work.[82] Among the acts Sugeno mentions as being generally permissible are full strikes, partial strikes, "designated strikes," rolling strikes, and limited-duration strikes.[83] This includes concerted vacation/sick-leave, and refusals to come to/leave work at designated times, or refuse overtime.[84] In addition slowdowns that don't involve destruction or damage are permissible.

American labor law provides workers with a smaller array of economic weapons for collective bargaining than Japanese labor law. American workers are unprotected in partial work stoppages or slow-downs, while secondary boycotts are prohibited.[85] In Japan, workers can undertake such collective actions as long as they are "justifiable" under Japan's Constitution and laws.[86] As a result, American workers have fewer options for effectively imposing costs on their employers for failure to agree with them in collective bargaining, and thus less bargaining power than comparable workers under Japanese law.

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75. *Id.* at 556.

76. *Id.* at 550.

77. *Cf.*, *id.* at 550-51 (discussing an influential theory contending that strikes related to legislation and policies concerning core economic interests, like working conditions and organizational rights, are protected).

78. *Cf.*, *id.* at 551-52 (discussing an opposing view that strikes are justifiable if the union has a "substantial interest in the original dispute").

79. *Id.* at 554.

80. *Id.* *But see* Nihon Kōkū, 17 Lab. Civ. Cases 102 (Tokyo Dist. Ct., Feb. 26, 1966) (holding that although the union gave no notice, it may be considered proper because the company could have foreseen its occurrence, immediate notice was given after the strike began, and it was not the type of action that caused general paralysis of the business).

81. SUGENO, *supra* note 7, at 554-55.

82. Fukui Shinbunsha, 19 Lab. Civ. Cases 714 (Fukui Dist. Ct., May 15, 1968).

83. SUGENO, *supra* note 7, at 555.

84. *Id.*

85. *Id.*

86. K. DAU-SCHMIDT ET AL., *supra* note 18, at 574-611.

87, SUGENO, *supra* note 7, at 555.

This advantage in bargaining power for Japanese workers has probably declined with the advent of the global economy. In the global economy, where an employer can sub-contract work abroad, employee collective action of any sort becomes more risky. However, consumer boycotts may be a viable union weapon even in the global economy.

D. Employers' Economic Weapons

Employers in the United States have considerably more freedom to use "economic weapons" as compared with their Japanese counterparts. In the United States, employers are prohibited from firing striking employees. However, under the "MacKay doctrine" economic strikers can be "permanently replaced."[87] Although strikers who have been permanently replaced have a right to recall if openings occur and a right to vote in unit elections for up to one year, permanent replacement has proven to be a very powerful weapon for American employers in resisting and breaking unions.[88] Although permanent replacements were rarely implemented in the years immediately after the adoption of the MacKay doctrine, American employers have shown an increased willingness to resort to permanent replacements since the late 1970s.[89] In addition, U.S. employers are permitted to resort to offensive lockouts as a means of pressuring their employees to accept a collective bargaining agreement on the employer's terms.[90] It is not yet clear whether the U.S. courts will allow employers to lockout their employees *and* replace them.[91]

In Japan, employers have the "freedom to conduct operations" during dispute acts, which grants a limited right to replace striking workers. The Japanese Supreme Court is often quoted on the matter as saying "[e]ven during a strike . . . an employer is not required to suspend the operation of its business, and can take measures that are necessary to continue its operations in response to the workers' dispute acts that seek to obstruct those operations."[92] However,

88. *See* NLRB v. MacKay Radio & Tel. Co., 304 U.S. 333 (1938).

89. *See, e.g.*, Jones Plastic & Eng'g Co., 351 N.L.R.B. 61, 67 (2007) (holding that economic strikers need not be reinstated where the permanent replacements are at-will employees who may be discharged at any time).

90. *See* James J. Brudney, *To Strike or Not to Strike*, 1999 WIS. L. REV. 65, 80-81 (1999) (discussing the success of permanent replacements in the 1980s and 1990s in reducing the number of strikes).

91. Am. Ship Bldg. Co. v. NLRB, 380 U.S. 300, 310 (1965) ("[W]e cannot see that the employer's use of a lockout solely in support of a legitimate bargaining position is in any way inconsistent with the right to bargain collectively or with the right to strike.").

92. *But see* NLRB v. Brown, 380 U.S. 278, 284 (1965) (holding to be lawful the lockout and temporary replacement of workers belonging to a union local where a different employer in a multi-employer bargaining unit was the subject of a strike by that local).

93. SUGENO, *supra* note 7, at 585 (quoting Sanyō Denki Kidō, Sup. Ct., 2nd Petty Bench, Nov. 15, 1978, 32 Crim. Cases 1855). Sugeno also notes that some collective bargaining agreements contain scab-prohibition provisions which would prohibit the employer from hiring

while this principle permits employers to hire replacements, they may only do so temporarily; even those Japanese workers who would be considered "economic strikers" in the United States are entitled to reinstatement at the conclusion of the strike.[93]

In addition to this limited replacement right, Japanese employers may have the right to lockout employees under certain circumstances. In *Marushima Suimon*, the Japanese Supreme Court stated that:

> [I]n a particular labor dispute, the power balance between workers and their employer collapses because of the workers' dispute acts, and the employer is subjected to extraordinarily disadvantageous pressures, the employer can prevent such pressures in light of the fairness principle. The employer's opposing defensive measures which are limited to restoring the power balance between the workers and the employer will be recognized . . . . They will also be approved as an employer's proper dispute acts.[94]

Sugeno's position on the lockout is that it is a purely defensive right allowing employers

> to mitigate the financial burden created by extraordinary adverse pressures produced by the worker conduct that hinders their businesses. As a result, the principal requirement for recognizing a lockout's propriety is that there be worker obstruction of the business which causes unusual harm to an employer, so that the employer will be in an extraordinarily disadvantageous position if it cannot refuse to accept the work of the disputing workers.[95]

In addition, the only proper targets of a lockout are members of the disputing union.

Because American employers are allowed greater resort to economic weapons, they should have greater bargaining power than similarly situated employers under Japanese law. The ability of American employers to permanently replace economic strikers and undertake offensive lockouts in

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replacements at all. *Id.* at 585-86.

94. *Id.* at 585 (see footnote titled "Reinstatement of Strikers").

95. *Id.* at 587 (quoting Sup. Ct., 3rd Petty Bench, Apr. 25, 1975, 29 Civ. Cases 481).

> [A lockout] shall exempt the employer from the duty to pay wages . . . if, in the light of various circumstances such as the attitude taken in . . . negotiations, their progress, the forms of dispute acts engaged in by the union, and the extent of their impact upon the employer, the lockout is viewed, from the perspective of equity in labor-management relations, as a proper means of defending the employer's business against the union's dispute acts.

Id. at 587.

96. *Id.* at 588.

advance of employee collective action allows them to impose costs on employees for not agreeing with them at the negotiating table and thus to wield greater bargaining power in negotiations. An employer's ability to resort to international out-sourcing in the new global economy has, if anything, probably increased American employers' power in this regard.

E. The Structure of Negotiations

Although most of the factors we have discussed so far suggest that Japanese unions should have greater bargaining power than similarly situated American unions, the structure of negotiations in the United States probably favor union power, while the structure of negotiations in Japan probably limits the desire of Japanese employees to exercise the economic power they do have over their employers.

American collective bargaining tends to be organized on an adversarial basis across a larger regional area or national basis. American unions tend to organize by trade or industry on a national basis.[96] Moreover, in the structure of industrial relations, American management is strongly allied with the interests of shareholders and conducts collective bargaining through arms length negotiations with the employees. Under American law, corporate managers owe stockholders a fiduciary duty[97] and generally have strong financial rewards for maximizing returns to shareholders.[98] Because of this, in American corporations it is common for management to identify with shareholder interests and view employee interests with some hostility as an impediment to achieving corporate goals.

As a result of these structural characteristics of American industrial relations, American labor unions tend to be relatively large organizations that have the resources to maintain local unions in conflicts with individual employers. Moreover, American unions do not share a strong community of interest with any particular employer. Although American unions certainly have no interest in bankrupting viable employers since their interests are less often tied to the interests of a single employer, the unions have no problem

97. The largest union federation, the AFL-CIO, contains over fifty trade unions, collectively representing eleven million workers. AFL-CIO, Union Facts, http://www.aflcio.org/aboutus/faq/ (last visited Nov. 5, 2009). The next largest federation, Change to Win, claims six million members through seven trade unions. Change to Win, About Us, http://www.changetowin.org/about-us.html (last visited Nov. 5, 2009).

98. *E.g.*, Koehler v. Black River Falls Iron Co., 67 U.S. (2 Black) 715, 720-21 (1862) ("[Directors] hold a place of trust, and by accepting the trust are obliged to execute it with fidelity, not for their own benefit, but for the common benefit of the stockholders of the corporation."); Richard Posner, *Against Creative Capitalism*, *in* CREATIVE CAPITALISM – A CONVERSATION WITH BILL GATES, WARREN BUFFET, AND OTHER ECONOMIC LEADERS (Michael Kinsley ed., 2008) ("The managers of corporations have a fiduciary duty to maximize corporate profits.").

99. Strong financial rewards often occur through contracts involving the use of performance-based pay or equity options.

employing strikes in whip-sawing strategies to bid up wages, or even driving out inefficient low wage employers for the benefit of the majority of employees in the union.[99]

By contrast, Japanese unions typically organize at the enterprise level. To the extent that industrial organizations exist, they are typically federations of enterprise unions, rather than industry wide unions.[100] These organizations are relatively informal and have little or no power to control their affiliated unions. They may be most effective in serving as a sort of coordinating committee for industry wide strategy.[101] Moreover, in the structure of corporate governance in Japan, shareholders exercise much less control over management and management tends to be promoted from within the ranks of the firm's employees. As a result, Japanese management is more likely to identify their interests with those of their employees and secure capital merely by paying a competitive rate of return in capital markets. This alignment of management interests with employees, rather than shareholders, may account for a number of differences in American and Japanese managerial practices such as the dramatically higher levels of executive compensation in the United States and American management's tendency to focus on short-run profits, even to the long-run detriment of the firm.[102]

As a result, Japanese unions are organized on a smaller basis and owe their allegiance to the interests of one employer. Moreover, the structure of corporate governance in Japan promotes an alignment of management interests with employee interests rather than shareholder interests. This stronger community of interest among Japanese employees and employers is well recognized in the literature.[103] Because Japanese labor organizations are organized on a smaller enterprise basis, this factor suggests that they will exercise less bargaining power relative to their employers than similarly situated American workers because they will not have larger organization to financially support them in their disputes. Furthermore, the alignment of

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100. *See, e.g.*, Michael H. LeRoy, *Lockouts Involving Replacement Workers: An Empirical Public Policy Analysis and Proposal to Balance Economic Weapons Under the NLRA*, 74 WASH. U. L.Q. 981, 1000-02 (1996).

101. HANAMI, *supra* note 51, at 105. The All Japan Seamen's Union (JSU) stands in contrast as a true industrial union that had 150,000 members in 1979. *Id.* The union's website indicates that membership had declined to 40,000 in 1999. *See* All Japan Seamen's Union, What is JSU?, http://www.jsu.or.jp/eng/eng.htm (last visited Nov. 4, 2009).

102. HANAMI, *supra* note 51, at 106. There are a few large national organizations as well. Hanami identified four very large organizations ranging from 500,000 to 2 million workers in 1979 that had been coordinating smaller unions in a 'spring offensive' for two decades. *Id.* at 106-07. The tactics of these organizations varied, but they typically coordinate strategy and plan actions on a national scale. *Id.* at 107.

103. I would like to thank Professor Nokobaku for extending his insightful comments to this paper at the RIETI conference in Tokyo, Japan, held July 15, 2008.

104. *E.g.*, Takashi Araki, *Convergence or Divergence? A Comparative Analysis of Security, Flexibility, and Decentralized Industrial Relations in Japan*, 28 COMP. LAB. L. & POL'Y J. 443, 450-51 (2007).

interests between labor and management within Japanese firms means that collective bargaining is conducted on a less adversarial basis.[104] Even if Japanese workers do have greater access to economic weapons than American workers, they are less likely to have to use them to resolve disputes. Japanese employees who are organized on an enterprise basis certainly have no incentive to engage in whip-sawing strikes among employers to bid up wages or to drive inefficient low wage employers out of the market.

V. CONCLUSION

The balance of bargaining power between labor and management varies according to underlying economic parameters and the laws governing the conduct of collective bargaining. A party's bargaining power, or its ability to induce the other side to accept an agreement on its terms, depends on that party's ability to impose costs on the other side for failing to agree and to avoid or absorb its own costs from failing to agree. Each party's ability to impose and avoid costs depends on economic factors, such as the nature of the firm's product, the firm's technology of production, general economic conditions, the structure of bargaining, and the employees' commitment to collective action. However, the parties' ability to impose and avoid costs also depends on the legal framework for collective bargaining, the legal structure of bargaining and the economic weapons that each side is allowed.

The rise of the global economy and new information technology has significantly decreased the bargaining power of unions relative to employers. New information technology has allowed the organization and distribution of production on a global basis, subjecting all facets of the firm to market discipline and low wage competition in the global economy. This fundamental change facilitates the relocation of production to low wage countries, putting downward pressure on wages in the industrialized countries and raising the possible costs of employee collective action.

The United States and Japan's labor laws also create differences in the relative bargaining power of unions and management. It seems clear that Japan's system of plural unionism facilitates the organization of employees by increasing union density and bargaining power. However, in industries where unions are well established, the United States' system of exclusive representation simplifies representation and bargaining issues and insulates unions from competition. With respect to economic weapons, the United States restricts employee collective action while allowing employers greater latitude in economic warfare. American employees are prohibited from engaging in secondary boycotts and are unprotected in partial work stoppages or slow-downs, while American employers can permanently replace economic strikers and undertake offensive lockouts. In Japan, employees are protected in undertaking "justified" collective action, including boycotts and partial strikes

105. *Id.*

or slow downs, and employers are constrained from making permanent replacement or offensive lockouts. This imbalance in economic weapons suggests that, relative to Japanese employers, American employers can impose greater costs on their employees for refusing to agree and thus enjoy greater relative bargaining power. Finally, and perhaps most importantly from a practical perspective, in the structure of bargaining American employees enjoy larger labor organizations that tend to bargain on a multi-enterprise basis. As a result they can better support local unions in disputes with individual employers. Moreover, the organization of Japanese unions on an enterprise basis and the greater community of interest between labor and management in Japan means that even if Japanese workers enjoy greater legal access to economic weapons, they are less likely to need or want to resort to those weapons to resolve disputes.

IN SEARCH OF A NEW APPROACH OF INFORMATION PRIVACY JUDICIAL REVIEW:

INTERPRETING NO. 603 OF TAIWAN'S CONSTITUTIONAL COURT AS A GUIDE

Chung-Lin Chen*

ABSTRACT

Although information privacy has garnered great attention in recent years, its judicial review issues have not received sufficient attention. This article intends to join the endeavor to advance judicial review techniques employed in information privacy cases.

Currently, American courts largely rely on the reasonable expectation of privacy test when determining whether information should remain private. However, this test has suffered heavy criticism because it is logically problematic and practically ineffective due to a deficient reasoning process and the difficulty arising from the assessment of "reasonableness."

This paper advocates the framework extracted from Interpretation No. 603 of Taiwan's Constitutional Court as an alternative to the test. This alternative framework involves the application of multiple standards and employs the use of principles of information privacy protection, including the constitutionalized purpose specification principle. This framework not only avoids the problems of the reasonable expectation of privacy test, but also promotes a more refined and exquisite approach to judicial review with respect to information privacy cases.

INTRODUCTION

Although information privacy has attracted great attention in recent years, its issues regarding judicial review have failed to receive sufficient consideration. Previous discussion has centered on legislative strategies responding to technological threats to privacy and has devoted less attention to innovation in judicial review of governmental intrusion. In Taiwan, before the controversy leading to Interpretation No. 603, there were few writings that explored judicial review issues of information privacy, even though Taiwan had

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experienced a rich bloom of scholarly works concerning information privacy for ten years. In the United States, although the discourse of the Fourth Amendment has long been a substantial branch of privacy concern, the tradition of relying on the reasonable expectation of privacy test is an unsatisfactory response to State action, and a sufficient replacement test has not been developed. Establishing an adequate framework of judicial review will strengthen judicial performance and subsequently provide more capable protection for privacy and other public interests. Therefore, this article intends to join the endeavor to advance judicial review techniques addressing information privacy cases.

A preferable strategy of judicial review involving information privacy can be developed upon the insights offered by Interpretation No. 603 of Taiwan's Constitutional Court. After deconstructing and reorganizing Interpretation No. 603, a framework emerges. It consists of multiple standards and the application of some independent rules stemming from data protection principles. This framework appears to be more sophisticated, thoughtful, and effective than the "reasonable expectation of privacy" test in addressing information privacy cases where State action is under examination.

I will present my argument in three parts. Part I briefly reviews the developments regarding standards of judicial review in the United States and Taiwan, as well as the interactions between their developments. Part II introduces the background and opinions of Interpretation No. 603. Based on the understanding in Part II, Part III proposes a preferable framework for courts to use in reviewing information privacy cases. The approach of multiple standards constitutes the core of the framework, and the constitutionalized purpose specification principle, as well as other principles of information privacy protection, further accomplishes the framework.

As a preliminary matter, a couple of terminology issues demand clarification. First, are "personal information" and "personal data" equivalent terms? While the use of "personal information" is popular in the United States, the term "personal data," is more frequently used in European literature. Although some argue "information" and "data"[1] are distinguishable, usually the terms "personal information" and "personal data" are used interchangeably in common speech. Therefore, this article treats them as synonymous. Second, in Taiwan, because of a divergent legal heritage, the legal concepts created to protect information privacy vary with scholars. Some scholars introduce and prefer to use the term "right of information self-determination" (informationelles Selbstbestimmungsrecht), which originated in Germany. Others prefer to use the term "right of information privacy," which emerged under the influence of American literature.[2] Despite the terminological

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1. *E.g.*, RAYMOND WACKS, PERSONAL INFORMATION: PRIVACY AND THE LAW 25 (1989).

2. For an introduction of the right of information self-determination developed by German courts and scholars, see Chen-Shan Li, *Lun Zih Syun Zih Jyue Cyuan [On the Right of Information Self-determination]*, *in* REN SING ZUN YAN YU REN CYUAN BAO JHANG 275, 277-81

difference, some have argued that the concepts do not differ.[3] Because the cores of both concepts equally surround the control over personal information, it is redundant to distinguish them and to maintain two different concepts. Therefore, this article refers only to the right of "information privacy" without an implication of the denial of the "right of information self-determination." Third, when referring to the governmental entity possessing the power of judicial review in Taiwan, commentators often called it the "Council of Grand Justices," a direct translation from its Chinese title to English.[4] In contrast, the English version of Judicial Yuan's official website uses the phrase "Constitutional Court."[5] Because the term "Court" more clearly indicates judicial power and is consistent with the official use, this article will refer to Taiwan's judicial review entity as the Constitutional Court.

I. STANDARDS OF JUDICIAL REVIEW IN THE UNITED STATES AND TAIWAN: AN OVERVIEW

A. *The United States*

Categorization and the application of various standards represent a rough pattern of the American approach of judicial review. The approach consists of two steps. The first step requires an analysis and categorization of involved facts or laws. Then, as the second step, courts invoke a specific standard of judicial review according to the consequence of categorization. Although the complete utilization of the approach may not occur in all circumstances, it applies to most cases, including those involving individual rights.[6]

[HUMAN DIGNITY AND PROTECTION OF HUMAN RIGHTS] (2d ed. 2001) (Taiwan). For a brief description of the development of the constitutional right to information privacy in the United States, see DANIEL J. SOLOVE & MARC ROTENBERG, INFORMATION PRIVACY LAW 188-90 (2003).

3. *See, e.g.*, Interpretation No. 603 (Const. Ct., Sept. 28, 2005) (Lin, J., concurring) (Taiwan); Jau-Yuan Hwang, *Wu Jhih Wun Ze Wu Shen Fen Jheng? Huan Fa Guo Min Shen Fen Jheng Yu Ciang Jhih Cyuan Min Na Jhih Wun De Sian Fa Jheng Fen Si [No Fingerprint, No ID? A Constitutional Analysis of Mandatory Fingerprinting as Precondition of National ID Cards]*, *in* MIN JHU, REN CYUAN, JHENG YI [DEMOCRACY, HUMAN RIGHTS, JUSTICE] 461, 470 (International Association of Penal Law, Taiwan Chapter ed. 2005). *See also* Li, *supra* note 2, at 287-89.

4. E.g., Jou-juo Chu, Global Constitutionalism and Judicial Activism in Taiwan, 38 J. CONTEMP. ASIA 515, 516 (2008); Tom Ginsburg, Confucian Constitutionalism? The Emergence of Constitutional Review in Korea and Taiwan, 27 LAW & SOC. INQUIRY 763, 768 (2002); Thomas Weishing Huang, Judicial Activism in the Transitional Polity: The Council of Grand Justices in Taiwan, 19 TEMP. INT'L & COMP. L.J. 1, 2 (2005); Wen-Chen Chang, Transition to Democracy, Constitutionalism and Judicial Activism: Taiwan in Comparative Constitutional Perspective 133 (2001) (unpublished JSD dissertation, Yale Law School) (on file with Law Library, Yale Law School).

5. Judicial Yuan Justices of Constitutional Court, Petitions and Procedures for Interpretation, http://www.judicial.gov.tw/CONSTITUTIONALCOURT/EN/p02_01_01.asp (last visited Nov. 7, 2009).

6. For an introduction to the frameworks guiding analysis of individual rights issues, see

Categorization is a substantial part of constitutional reasoning. It is a common practice in various fields for people to group things or concepts to facilitate the understanding of natural knowledge or development of normative science. In establishing constitutional reasoning, courts and scholars use categorization.[7] For example, a court may first identify a constitutional case as one associated with individual rights and distinguish it from one related to separation of powers.[8] It may then further classify the case as a free speech case according to the type of individual rights implicated. And even after a court has categorized a case as one invoking individual rights to free speech, it will further categorize the case by inquiring whether the law at issue is content-based or content-neutral. For a content-based regulation, the question remains whether the regulation falls into any of the categories of speech such as "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words."[9] This series of inquiries is important because courts have sophisticatedly developed different responses to each different category.

After categorization, the judicial review standard is determined from the following four types: strict scrutiny, intermediate scrutiny, minimal scrutiny, and categorical rules. In 1938, the famous footnote number four in *United States v. Carolene Products Co.* established the theory of double standard of judicial review, which distinguishes cases demanding greater scrutiny, such as legislation restricting political processes or which is directed at discrete and insular minorities, from cases requiring only the rational basis test, such as economic legislation.[10] Later, intermediate scrutiny surfaced in areas such as sexual equality[11] to fill the middle of the spectrum between strict scrutiny and minimal scrutiny. The triple standard review technique is fairly familiar to American lawyers and regarded as basic in constitutional practice and scholarship. Yet, it has not exhausted the possibility of review techniques. A

WILLIAM A. KAPLIN, THE CONCEPTS AND METHODS OF CONSTITUTIONAL LAW 133-35 (1992). *See also id.* at 91-93, 100-03, 110-12.

7. It is worth noting that in this article, categorization simply refers to the method of grouping things or concepts. Naturally, in judicial review, it does not preclude the possibility of connecting the result of categorization with a balancing standard. I explain this point due to the existence of a special use of the "categorization" concept in the debate of "categorization v. balancing," which describes categorization and balancing as a dichotomy. In this latter context, once the category has been determined, the outcome of judicial review follows without any balancing efforts. About the debate of categorization v. balancing, see, e.g., John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975); Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293 (1992). Some scholars have recognized a kind of categorization compatible with balancing standards. *See* Kathleen M. Sullivan & Gerald Gunther, Constitutional Law 995 (15th ed. 2004).

8. *See* KAPLIN, *supra* note 6, at 18, 118.

9. *See e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

10. 304 U.S. 144, 152-53 n.4 (1938). For a classic elaboration of the rationale of footnote four, see JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

11. Craig v. Boren, 429 U.S. 190, 218 (1976); United States v. Virginia, 518 U.S. 515, 568 (1996). For an introduction of the development of judicial review standards associated with sex discrimination cases, see SULLIVAN & GUNTHER, *supra* note 7, at 772-75.

fourth type of judicial review technique is called "categorical judicial review."[12] Categorical judicial review involves *per se* rules rather than legislative purpose inquiries and means-ends tests.[13] In other words, courts form specific constitutional mandates to apply in certain contexts. The violation of those categorical *per se* rules automatically invalidates state actions. In a strict sense, categorical judicial review is not a "standard" like the aforementioned three standards.[14] In sum, with respect to standards of judicial review of constitutional questions, an understanding of court opinions as a whole reveals a triple standard review as a basic framework, and in some contexts the courts have created *per se* rules to apply instead.

This section described how American courts conduct the reasoning of judicial review. Although judicial review varies with specific cases, contexts, and scholarly observations, categorization and multiple standards appear to be a dominant approach. While American lawyers may regard this approach as a universal approach, it is worth noting that different countries develop their ways of judicial review differently. The following section offers a fascinating example which maintains an intimate but divergent relationship with American style of judicial review.

B. Taiwan

As a country transplanting the legal system from the Western world, Taiwan's construction of judicial review is considerably shaped by the constitutional jurisprudence and practice of Western countries, especially Germany and the United States.[15] Though Germany's principle of proportionality generally dominates Taiwanese construction of judicial review, the American style of judicial review has gained increasing influence as more scholars with American doctoral degrees discuss American jurisprudence.

Germany's principle of proportionality has been one of Taiwan's most important constitutional doctrines.[16] Article 23 of the Taiwanese Constitution provides that constitutional rights shall not be restricted unless it is "*necessary* to prevent infringement upon the freedoms of other persons, to avert an imminent crisis, to maintain social order or to advance public welfare."[17]

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12. Robert J. Hopperton, *Standards of Judicial Review in Supreme Court Land Use Opinions: A Taxonomy, an Analytical Framework, and a Synthesis*, 51 WASH. U. J. URB. & CONTEMP. L. 1, 7, 82 (1997).

13. *Id.* at 7.

14. *Id.* at 82 ("In practice, categorical judicial review cannot be described as a standard of judicial review, for it is standardless [sic] in the sense of the varying degrees of scrutiny discussed by this Article.").

15. *See* Huang, *supra* note 4, at 5; *see also* Ginsburg, *supra* note 4, at 771-78.

16. *See* Huang, *supra* note 4, at 23.

17. MINGUO XIANFA [Constitution] art. 23 (1947) (emphasis added). The English version of the Constitution of Taiwan (Republic of China) (1947) is available at Justices of the Constitutional Court, Judician Yuan, The Constitution of the Republic of China, http://www.judicial.gov.tw/CONSTITUTIONALCOURT/en/p07_2.asp?lawno=36.

Scholars universally interpret "necessary" to be equivalent to the principle of proportionality, which consists of three sub-principles: (1) the means adopted by the State must be helpful to the achievement of the intended objectives; (2) where there are several alternative means that would lead to a similar result in achieving the objectives, the one with the least harm to the rights and interests of the people shall be adopted; and (3) the harm that may be caused by the means adopted shall not be clearly out of balance against the interests of the objectives intended to be achieved.[18] The Constitutional Court also regards the principle of proportionality as a part of the Article 23 requirement.[19] However, the specific content of the principle in different decisions is not always consistent. In Interpretation No. 577, the Court did follow the three sub-principles above to review the Tobacco Product Labeling Act.[20] In contrast, most other cases from this court did not specify the principle in detail or did not state the principle in complete accord with the scholarly description above.[21] Despite the inconsistency, the principle of proportionality constitutes the most favored ruling standard of judicial review in Taiwan both academically and practically.

Despite the popularity of Germany's principle of proportionality, the American model of judicial review standard is gaining increasing influence over Taiwan's development of constitutional jurisprudence. The introduction and advocacy of triple standard review techniques by Taiwanese scholars has continued for at least a decade.[22] Because applying three-tiered scrutiny

18. E.g., Zhi-Bin Fa & Bao-Cheng Dong, Sian Fa Sin Lun [Constitutional Law] 65-66 (3d ed. 2006). The three sub-principles of the principle of proportionality can also be found in Article 7 of Taiwan's Administrative Procedure Act of 1999.

19. Interpretation No. 436 (Const. Ct., Oct. 3, 1997) (Taiwan) (this is the first opinion mentioning that the law shall comply with the principle of proportionality under Article 23 of Taiwan's Constitution).

20. Interpretation No. 577 (Const. Ct., May 7, 2004) (Taiwan). *See also* Interpretation No. 575 (Const. Ct., Apr. 2, 2004) (Taiwan).

21. *E.g.*, Interpretation No. 471 (Const. Ct., Dec. 18, 1998) (Taiwan) ("[C]onsidering the means adopted, the objective of prevention and treatment, and the demand of such an objective, [the provisions] violate the principle of proportionality under Article 23 of the Constitution"); Interpretation No. 623 (Const. Ct., Jan. 26, 2007) (Taiwan) ("[The provisions] adopt reasonable and necessary means to achieve the significant public interest that prevents and diminishes sexual transactions with children or juveniles; thus, the provisions do not violate the principle of proportionality under Article 23 of the Constitution."); Interpretation No. 476 (Const. Ct., Jan. 29, 1999) (Taiwan) ("[The laws] do not violate the principle of proportionality if the legislative objective is legitimate, means adopted are necessary, and restrictions are proportionate").

22. For examples of academic works that introduced or advocated the American model of judicial review standard, see Tzu-Yi Lin, *Yan Lun Zih You De Sian Jhih Yu Shuang Guei Li Lun [Restrictions on the Freedom of Speech and The Two-Track Theory]*, *in* YAN LUN ZIH YOU YU SIN WUN ZIH YOU [THE FREEDOM OF SPEECH AND THE FREEDOM OF PRESS] 133, 142-54 (1999); Tzu-Yi Lin, *Yan Lun Zih You Dao Lun [An Introduction to the Freedom of Speech]*, *in* TAI WAN SIAN FA JHIH ZONG PO HENG CIE [ANATOMIZING TAIWAN'S CONSTITUTIONAL LAW] 103, 165-73 (Hong-Shi Lee et al. eds., 2002); Jau-Yuan Hwang, *Li Fa Cai Liang Yu Sih Fa Shen Jha—Yi Shen Jha Biao Jhun Wei Jhong Sin [Legislative Discretion and Judicial Review: Focusing on the Standards of Judicial Review]*, 26(2) SIAN JHENG SHIH DAI [THE CONST. REV.] 156 (2000);

according to different contexts rather than invariably applying one standard takes judicial review into a more sophisticated realm, the academic community appears to be attracted to the American model. Later, it emerged in constitutional decisions as well. A prominent example of this emergence was seen in several Constitutional Court decisions addressing free speech issues that implicitly or explicitly drew on the United States' two-track and/or two-level theory.[23] The United States' theory gradually formed through a series of U.S. Supreme Court cases and scholarly interpretations which systematically reviewed the law at issue by applying different scrutiny levels based on different categories of law or speech.[24] Interpretation No. 603, which confronted an information privacy issue, presented another example of the Constitutional Court's acceptance of triple standard review techniques.[25] This article will illustrate the latter example, Interpretation No. 603, and its approach of judicial review.

Taiwan absorbs nutrients from both the U.S. and European jurisprudence, It results in an interesting hybrid product. First, scholars and the Constitutional Court distorted the language of Article 23 of the Constitution to enjoy the merits of the principle of proportionality.[26] Then the development strode towards a more sophisticated American approach due to the excellence of multiple standards. Currently, while the German principle of proportionality appears in decisions most frequently, Constitutional Court's rulings have been entangled with the American model of judicial review.

C. Interplays

The judicial review techniques of the United States and Taiwan are not, and will not be, developed in isolation of the other. Though American jurisprudence is constantly influencing Taiwanese judicial practices,

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Jau-Yuan Hwang, *Sian Fa Cyuan Li Sian Jhih De Sih Fa Shen Jha Biao Jhun—Mei Guo Lei Sing Hua Duo Yuan Biao Jhun Mo Shih De Bi Jiao Fen Si* [*Judicial Standards of Review for Restrictions on Constitutional Rights: Comparative Analysis of the U.S. Categorized Multiple Tests Approach*], 33(3) TAI DA FA SIAO LUN CONG [NAT'L TAIWAN U. L. J.] 44 (2004).

23. In terms of the two-track theory, see Interpretation No. 445 (Const. Ct., Jan. 23, 1998) (Taiwan) and Interpretation No. 617 (Const. Ct., Jan. 23, 1998) (Lin, J., concurring) (Taiwan). As for the two-level theory, see Interpretation No. 577 (Const. Ct., May 7, 2004) (Taiwan); Interpretation No. 445 (Const. Ct., Jan. 23, 1998) (Taiwan); and Interpretation No. 414 (Const. Ct., Nov. 8, 1996) (Taiwan). *See also* Interpretation No. 577 (Const. Ct., June 20, 2008) (T. Hsu, J., concurring) (Taiwan); Interpretation No. 644 (Const. Ct., June 20, 2008) (Y. Hsu, J., concurring) (Taiwan). It is also worth noting that in Justice Tzu-Yi Lin's concurring opinion for Interpretation No. 644, he argued to apply strict scrutiny by invoking the concept of "prior restraint." *Id.* He also mentioned the U.S. Supreme Court Pentagon Papers case: *New York Times Co. v. United States*, 403 U.S. 713 (1971).

24. Regarding the two-track theory and two-level theory, see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 12-2 to 12-8 (2d ed. 1988).

25. However, American courts themselves do not strike the same path in the context of information privacy.

26. *See* Huang, *supra* note 4, at 25 (noting the gap between the language of Article 23 and the principle of proportionality).

constitutional experiences in Taiwan also have potential for contributing to the jurisprudence of American judicial review.

Through a long history of case law, the United States has accumulated abundant knowledge of judicial review techniques which have been a valuable contribution to the constitutional scholarship and judicial operation in Taiwan. As commentators observed, foreign influence permeates many opinions of Taiwan's Constitutional Court.[27] Particularly, the last section showed that scholars have not only introduced the American approach, but the Constitutional Court has also adopted the approach of categorization and multiple standards in certain contexts. In a sense, the American model of judicial review standard is not completely "foreign" to Taiwan.

Because Taiwan's Constitutional Court inherits the American approach of judicial review in certain cases, the insights provided by those cases will be easily recognizable by American lawyers. Since the transition from authoritarian party-state to democracy, Taiwan's Constitutional Court has played an active role in protecting people's rights in accord with constitutionalism.[28] Their efforts and outcomes have become a great asset for the international community. However, the heterogeneity between legal systems may obstruct incorporating foreign legal understandings. A country with a completely divergent legal development of judicial review may struggle with accepting the judicial review techniques emerging in Taiwan, even if it does appreciate the merits of the techniques. This is probably not the case for the United States. Because some of Taiwan's cases follow a comparable track to United States cases, the obstacles to incorporating Taiwan's techniques in the Unites States is largely diminished.

The transmission of legal experience and knowledge between the United States and Taiwan can be bidirectional. Taiwan has adopted jurisprudence originating in the United States. Now, it may be time for Americans to take advantage of Taiwanese lessons. The latter chapters will offer specific examples of opinions from Taiwan's Constitutional Court which may potentially advance American jurisprudence.

II. INTERPRETATION NO. 603 OF TAIWAN'S CONSTITUTIONAL COURT

A. Background

The dispute arose from the implementation of Article 8 of the Household Registration Act. In early 2005, the Ministry of the Interior (MOI) announced that national identification cards (ID cards) would begin to be renewed on July

27. Ginsburg, *supra* note 4, at 771-78. *See also* Huang, *supra* note 4, at 5.

28. *See* Chang, *supra* note 4, at 392-97, 455, 458-59, 504-05; Chu, *supra* note 4, at 519-26; Ginsburg, *supra* note 4, at 788-89; Huang, *supra* note 4, at 40-54.

1, 2005.[29] Because Article 8 of the Household Registration Act required fingerprinting for people over the age of 14 in order to receive ID cards, the controversy regarding compulsory fingerprinting surfaced.[30] After the Executive Yuan expressed the intention to enforce the statute,[31] eighty-five congresspersons (members of the Legislative Yuan) filed a petition to the Constitutional Court for an interpretation of the Constitution.[32] Simultaneously, they petitioned for a preliminary injunction to suspend Article 8 of the Household Registration Act before an interpretation was delivered.[33]

Before a substantive review, the Constitutional Court issued Interpretation No. 599 that granted the preliminary injunction on June 10, 2005.[34] In Interpretation No. 585, the Constitutional Court outlined a preliminary injunction and its elements.[35] However, Interpretation No. 599 was the first time that the Constitutional Court ever exercised its authority to grant a preliminary injunction. It was disputed whether the Constitutional Court had the authority to issue preliminary injunctions because it was not specified by Taiwan's Constitution or mentioned in any statutes. Therefore, the creation of this authority, by the Constitutional Court's own interpretation, appears to be a milestone towards a more complete judicial power.[36]

On September 28, 2005, the Constitutional Court issued Interpretation No. 603 substantively addressing the constitutionality issue of Article 8 of the Household Registration Act. The general conclusion of this interpretation was met with universal acceptance from the academic community.[37] Although some scholars might still dispute certain minor issues or concepts, it is undoubted that this interpretation lays a cornerstone for Taiwan's constitutional protection of the right of privacy.

B. Opinion of the Court

The opinion first revealed the following important points regarding

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29. Cody Yiu, *New Identification Cards to be Available from July*, TAIPEI TIMES, Jan. 28, 2005, at 3.

30. *See id.* The requirement of fingerprinting was amended to the Household Registration Act in 1997. *Id.*

31. Jimmy Chuang, *Fingerprinting is the Law: Cabinet*, TAIPEI TIMES, May 18, 2005, at 2.

32. Interpretation No. 603 (2005). *See also* Jewel Huang, *DPP Seeking to Halt Controversial Fingerprint Proposal*, TAIPEI TIMES, May 31, 2005, at 2.

33. Interpretation No. 603 (2005).

34. Interpretation No. 599 (Const. Ct., June 10, 2005) (Taiwan).

35. Interpretation No. 585 (Const. Ct., Dec. 15, 2004) (Taiwan).

36. See Tzung-Jen Tsai, Comment, Sih Fa Yuan Da Fa Guan Shih Zih Di Liou Ling San Hao Jie Shih [J. Y. Interpretation No. 603], TAI WAN BEN TU FA SYUE ZA JHIH [TAIWAN L. J.] 121, 121-22 (2005); Chen-Shan Li, Lai Jhe You Ke Jhuei Jheng Shih Ge Ren Zih Liao Bao Hu Wun Ti—Sih Fa Yuan Da Fa Guan Shih Zih Di Liou Ling San Hao Jie Shih Ping Si [Taking Personal Data Protection Seriously: Comment on J. Y. Interpretation No. 603], TAI WAN BEN TU FA SYUE ZA JHIH [TAIWAN L. J.] 222, 222 (2005).

37. *See, e.g.*, Tsai, *supra* note 36, at 121; *id.* at 117 (Jau-Yuan Hwang, commentary); *id.* at 111 (Chen-Shan Li, commentary); *id.* at 126 (Yuan-Hao Liao, commentary).

information privacy and judicial review:

1. "Although it is not specifically enumerated in the Constitution . . . the right of privacy is an indispensable constitutional right and protected under Article 22 of the Constitution."[38] "The right of information privacy regards the autonomous control of personal information," which is covered by the right of privacy.[39]

   [It] is intended to guarantee the people's right to decide whether to disclose their personal information, and to what extent, at what time, in what manner, and to whom they disclose their personal information. It is also intended to guarantee the people's right to know and control how their personal information will be used and right to correct any inaccurate entries regarding their personal information.[40]

2. In determining the constitutionality of the statute at issue,

   [T]he public interests served by the State's collection, use and disclosure of personal information and the harm upon individuals with information privacy should be comprehensively considered and balanced. In addition, different standards of judicial review should be applied to different circumstances according to the characteristics of personal information involved, that is, whether the personal information concerns intimate/confidential/sensitive matters or whether the information, though not intimate/confidential/sensitive, may nonetheless be easily combined with other information and lead to a detailed personal profile.[41]

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38. Interpretation No. 603 (2005). Article 22 of the Republic of China (R.O.C.) Constitution, like the Ninth Amendment of the U.S. Constitution, is considered a roof for all unenumerated constitutional rights. It provides that "[a]ll other freedoms and rights of the people that are not detrimental to social order or public welfare shall be guaranteed under the Constitution." MINGUO XIANFA [Constitution] art. 22 (1947) (Taiwan). Before Interpretation No. 603 came out, it was unclear whether the court recognized the right of privacy as a constitutional right and which provision the constitutional basis of the right of privacy should be, although early in 1992, Interpretation No. 293 had mentioned the right of privacy. *See* Shin-yi Peng, *Privacy and the Construction of Legal Meaning in Taiwan*, 37 INT'L LAW. 1037, 1042-43 (2003).

39. Interpretation No. 603 (2005).

40. *Id.*

41. *Id.*

3. "The State shall ensure that the use of the personal information legitimately obtained by the State reasonably accords with the purpose and that the security of the information be safeguarded. Thus, the purposes of the State's collection of the information must be specifically identified by statutes."[42]

By applying the general principles above to fingerprints and fingerprint databases, the Constitutional Court made the following analysis. First, in terms of the type of information and standard of judicial review, categorized as point two, the Court indicated that "the State's collecting fingerprints and establishing files in association with identity confirmation makes fingerprints sensitive information that enables monitoring individuals."[43] It follows that "[i]f the State collects the people's fingerprint information on a large scale by compulsory methods, the collection is allowed only where it is the mean that causes less harm and is closely related to the achievement of a significant public interest."[44] In other words, "the scope and means of such collection shall be highly necessary and relevant to the achievement of the purposes of such significant public interest."[45]

Second, with respect to the purpose of collection, categorized as point three, the Court required that "the State shall specify the purpose of information collection in a statute"[46] and, moreover, "the statute shall manifestly prohibit any use falling outside of the statutory purpose."[47] Third, in addition to the application of the principles it revealed earlier, the Court further mandated that

> [T]he agency shall take into account the contemporary development of technology to act in the manner that is sufficient to ensure the accuracy and security of the information, and adopt necessary protective measures in terms of organization and procedure as to the files of collected fingerprints . . . .[48]

After reviewing the statute, the Court held the provisions at issue unconstitutional. The Court first criticized that the statute failed to specify the purpose of collection. "The failure of the Household Registration Act to specify the purpose of compulsory fingerprinting and record keeping of such fingerprinting information is already inconsistent with the aforesaid constitutional intent to protect the people's right of information privacy."[49]

42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*

Even considering the purposes asserted during the oral argument by the Executive Yuan regarding compulsory collection of fingerprint information, the Court concluded that

> [T]o pursue the purposes of anti-counterfeit, prevention of false claim or use of an identity card, identification of a roadside unconscious patient, stray imbecile or unidentified corpse, and so on, fails to achieve the balance of losses and gains and is an excessively unnecessary mean, and does not satisfy the requirement of the principle of proportionality.[50]

C. Concurring and Dissenting Opinions

Although a great majority of the Constitutional Court's justices voted for the opinion of the Court, their opinions vary to some extent. Among fifteen justices, four submitted separate concurring opinions, two submitted a joint concurring opinion, one submitted an opinion that concurs in part and dissents in part, and two submitted separate dissenting opinions.

Many opinions debated over the procedural issue of whether the petition met the elements imposed by Article 5-I (iii) of the Constitutional Interpretation Procedural Act. For example, Justice Jen-Shou Yang's and Justice Tsay-Chuan Hsieh's dissenting opinions both focused only on this procedural issue and argued against hearing the case.[51] Because the issue is not related to the right of information privacy, it is not relevant to the argument at hand.

However, the four opinions providing a substantive discussion concerning information privacy demand attention. To a large extent, the concurring opinions of Justice Tzu-Yi Lin's and Justices Tzong-Li Hsu and Yu-Tien Tseng's support the main points of the Court's opinion.[52] To offer additional reasoning or reinforce the arguments of the Court, Justice Tzu-Yi Lin stressed the danger of collecting compulsorily fingerprint information for the purpose of improving public safety/crime prevention and further explained the importance of requiring specific legislative purposes,[53] while Justices Tzong-Li Hsu and Yu-Tien Tseng highlighted how the statute did not specify the purpose of collection and use and did not provide adequate protective measures in terms of organization and procedure to prevent the invasion of third parties.[54] In addition, Justice Lin presented a prominent argument stating that, considering the sensitivity of fingerprint information, reviewing a law that mandates compulsory collection of fingerprints should trigger strict scrutiny rather than

50. *Id.*
51. *Id.* (Yang, J., dissenting) and (Hsieh, J., dissenting).
52. *Id.* (Lin, J., concurring) and (Hsu & Tseng, Js., concurring).
53. *Id.* (Lin, J., concurring).
54. *Id.* (Hsu & Tseng, Js., concurring).

intermediate scrutiny, which the Court applied.[55]

Differently from Justices Lin, Hsu and Tseng, Justice Chung-Mo Cheng widely questioned the opinion of the Court.[56] He deemed fingerprints as neutral information and thus argued that the Court should invoke the minimum standard of judicial review rather than strictly reviewing the provision in terms of the "principle of clarity and definiteness of law."[57] He also claimed that the provision at issue does not necessarily violate the principle of proportionality.[58] An even sharper disagreement with the opinion of the Court appeared in Justice Syue-Ming Yu's concurring and dissenting opinion.[59] In his words, "fingerprints themselves do not implicate the right of privacy."[60] Although acknowledging fingerprints are a kind of personal information, he argued that the Court should dismiss the case procedurally or at most apply the rational basis test.[61] Moreover, in his opinion, public safety as the purpose of the provision at issue is compelling enough to pass even strict scrutiny, while the opinion of the Court did not take crime prevention into account as a legislative purpose.[62]

III. A PROPOSED FRAMEWORK TO REVIEWING INFORMATION PRIVACY CASES: THE UNDERSTANDING IN INTERPRETATION NO. 603 AS A STARTING POINT

A. The Problem of the "Reasonable Expectation of Privacy"

In addressing information privacy cases, American courts extensively rely on the "reasonable expectation of privacy" test. However, this approach is logically problematic and practically ineffective.

In the area of information privacy, the concept of the reasonable expectation of privacy determines the fate of most cases. Since Justice Harlan stated the reasonable expectation of privacy test in his concurring opinion in *Katz v. United States*,[63] numerous court opinions have applied this test.[64] The test inquires whether the person who was intruded by the State has an actual

55. *Id.* (Lin, J., concurring).
56. *Id.* (Cheng, J., concurring).
57. *Id.*
58. *Id.*
59. *Id.* (Yu, J., concurring and dissenting).
60. *Id.*
61. *Id.*
62. *Id.*
63. 389 U.S. 347, 361 (1967) (Harlan, J., concurring) ("My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'").
64. William C. Hefferan, *Fourth Amendment Privacy Interests*, 92 J. CRIM. L. & CRIMINOLOGY 1, n.2 (2001).

privacy expectation which society regards as reasonable.[65] At first glance, the test plausibly presents a plain explanation of whether privacy invasion exists. This makes the test attractive and frequently embraced by courts. Generally speaking, where courts do not find a reasonable expectation of privacy, plaintiffs lose the cases; where courts recognize a reasonable expectation of privacy, the plaintiffs win.

However, the test suffers critical deficiencies. The first problem arises from the incompleteness of its reasoning process. It explains only whether a privacy interest deserving protection exists, but does not consider the balance of all involved interests. A complete reasoning requires weighing various interests after recognizing a privacy interest. Where a reasonable expectation of privacy is present, but is outweighed by other stronger interests, courts cannot help twist the finding to conclude that a reasonable expectation of privacy does not exist. For example, in *Torbet v. United Airlines, Inc.*,[66] the court concluded that the airport security screening procedures at issue were reasonable because the passenger implicitly consented to random search by placing his bag on the x-ray conveyor belt.[67] However, the so-called "consent" here is by no means voluntary because passengers who want to take a flight have no other choice. The contents of our bags are definitely private and the true reason that the court favored the police and the practice of a random search is that the court regarded flight security as a substantial enough to outweigh the passengers' privacy interest, rather than passengers cannot reasonably retain privacy expectation after handing over their bags. It then becomes obvious that the operation of the reasonable expectation of privacy test would hide a part of reasoning that should proceed in front of public eyes.

The second flaw of the test concerns the assessment of "reasonableness." Scholars have criticized the circularity of the reasonable expectation of privacy test because the test defines "reasonable" by "reasonable."[68] If courts possess capable methods to exercise their discretion concerning reasonableness, the term "reasonable" might not be much of a problem. Unfortunately, courts have not yet developed any effective tool or rule to identify a "reasonable expectation" of privacy.[69] As a result, the test equips courts with only a crippled way to address privacy inquiries. Worse yet, courts usually determine the reasonable expectation of privacy by comparing the practice at issue with preexisting practices or environments. As Freiwald put it, the judicial operation

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65. *Katz*, 389 U.S. at 361.

66. 298 F.3d 1087 (9th Cir. 2002).

67. *Id.* at 1089.

68. Susan Freiwald, *First Principles of Communications Privacy*, 2007 STAN. TECH. L. REV. 3, para. 21 (2007) ("The presence of 'reasonable' in both the name of the test and its definition makes the test circular: the reasonable expectations are reasonable."); Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 69 (1988) (describing the reasonable expectation of privacy test as "notorious circularity").

69. *See* Freiwald, *supra* note 68, at para. 23; Heffernan, *supra* note 64, at 1, 32, 37.

of the test "misplaces the focus onto what the target knew or should have known instead of on the intrusive nature of the surveillance itself."[70] For example, in *Kyllo v. United States*,[71] the Court concluded that the use of thermal imaging to measure heat emanating from a home constituted a Fourth Amendment search and is presumptively unreasonable without a warrant. However, according to the Court's holding, the conclusion is valid only where the device "is not in general public use."[72] It follows that if the device is in public use, then use of it will no longer constitute a search, even though its intrusive nature has not changed. By the same logic, in an area where voyeurs frequently appear (and the police fail to sweep them), the police have unfettered discretion to videotape people's movement inside a public lavatory by claiming that one cannot reasonably expect privacy in that circumstance. By the same logic, in an age when investigation agencies arbitrarily wiretap people, the police can legitimately monitor people's phone conversations by claiming that it would not be reasonable for anyone to expect privacy when they talk on the phone. These ridiculous consequences make it obvious that this approach to addressing privacy cases is problematic and unreliable.

Relying only on the reasonable expectation of privacy test is not satisfactory. While the test might be helpful in certain cases, it encounters attacks from both theoretical dissection and practical consideration. Therefore, courts have overlooked better alternatives which avoid the deficiencies that this test contains by blindly following past precedent.

B. The Approach of Multiple Standards

I argue for the approach of multiple standards as an alternative for the reasonable expectation of privacy test. The problems found in the last section do not occur in the use of the proposed approach. Moreover, using a multiple standard approach is consistent with existing American jurisprudence of judicial review and has been put into practice in Taiwan's information privacy cases.

In comparison with the reasonable expectation of privacy test, the approach of multiple standards has the following merits. First, invoking a standard takes care of the balance of involving rival interests. Unlike the reasonable expectation of privacy test that focuses only on whether a reasonable expectation of privacy exists and presents a straightforward zero-sum game, the approach demands that courts not only identify a privacy interest, but also to weigh the privacy interest and rival state interests. For example, when strong privacy interests are involved, the state action burdening the privacy interests

70. Friewald, *supra* note 68, at para. 21.

71. 533 U.S. 27, 40 (2001).

72. *Id.* ("Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant.").

has to be reviewed under stricter standards, meaning that the state action has to be narrowly tailored to pursuing a *compelling* interest.[73] Choosing a specific standard purports that a specific level of state interest, such as a legitimate, important, or compelling interest, is required to justify the restriction of privacy rights.[74] By differentiating the facts and according different standards, the approach is able to strike the balance of privacy interests and rival state interests. As a result, the approach does not draw the logical deficiency that the reasonable expectation of privacy test has suffered. Second, the approach need not address thorny problem of measuring abstract, lack-of-standard "reasonableness." Third, the approach presents a sophisticated framework consisting of multiple review steps and standards, rather than relying only on one single rule. It therefore promotes judicial review to a more thoughtful level in response to complex cases.

Incorporating the approach of multiple standards into judicial review of information privacy would not pose any discord with current practice of American courts. As shown in Part I, American courts maintain a triple standard approach as a basic framework to constitutional issues, except sometimes appealing to categorical *per se* rules. The approach pervades in most constitutional contexts and there is no reason that the information privacy field should be an exception. Further, because of the existing tradition of the multiple standards approach, it would not be difficult to apply the approach to information privacy cases in the United States.

Interpretation No. 603 has exemplified the application of the triple standard approach in the context of information privacy. This interpretation clearly provided that "different standards of judicial review should be applied to different circumstances."[75] Instead of completely following the principle of proportionality, the Constitutional Court invoked another standard: the purpose shall be pursuing a significant public interest and the means shall be highly necessary and closely relevant to the achievement of the purposes.[76] The Court did not specify how many standards it had in mind and did not indicate what level of standard it used in this case. Nevertheless, reading Justice Lin's concurring opinion and Justice Yu's concurring and dissenting opinion together with the Court opinion, it appears that the American three-tier approach profoundly influenced the Court because it applied intermediate scrutiny. When Justice Lin argued for strict scrutiny and Justice Yu supported minimum

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73. To survive strict scrutiny, the law must satisfy two prongs: first, the underlying governmental interests must be compelling; and second, the law must be narrowly tailored to achieve those governmental interests. *See, e.g.*, Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 800 (2006).

74. Passing deferential scrutiny requires only a *legitimate* governmental interest and passing intermediate scrutiny requires an *important* governmental interest. *See, e.g.*, SULLIVAN & GUNTHER, *supra* note 7, at 641, 643.

75. Interpretation No. 603 (2005).

76. *Id.*

scrutiny against the Court opinion's standard, they plainly used the terms "strict scrutiny," "intermediate scrutiny," or "rationality scrutiny."[77] The interpretation evidenced that the approach can be practically useful in addressing the constitutionality issues of information privacy.

Instead of routinely relying on the reasonable expectation of privacy test, courts should consider the alternative approach of using multiple standards. The merits described above sufficiently make the approach prominent in comparison with the reasonable expectation of privacy test. The analysis above also precludes the concern of practicability. While its detail demands it to be further embodied and supplemented, the approach has undoubtedly shown an option that will better serve for the resolution of constitutional cases of information privacy.

C. Invocation of Scrutiny and Other Constitutional Mandates

Establishing a multiple standard approach goes only halfway to comprehensively addressing information privacy issues. The answers to the following questions will further enrich and supplement the approach of multiple standards to complete the proposed framework. First, what factors should courts take into account when determining which standard to apply? Second, in addition to a triple standard approach, is there any other constitutional rule that courts should also have in mind when examining the law?

1. Factors Triggering Different Standards

To complete the multiple standards approach, it is necessary to establish when a specific standard should be triggered; in other words, to establish what factors courts should consider when deciding which standard to invoke. For instance, the level of scrutiny courts use to review regulations on speech is determined by a number of factors, including: whether the regulation is content-based or content neutral and whether the restricted speech is regarded as high-value or low-value speech.[78] But because rationale for protecting information privacy differs significantly from the rationale for protecting the freedom of speech, or other fundamental rights, a framework uniquely designed for protecting information privacy is needed.

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77. Interpretation No. 603 (2005) (Lin, J., concurring) and (Yu, J., concurring and dissenting). It is worth noting that the term that the court used to describe the requirement of the purpose is "jhong da gong yi," the translation of which is debatable. "Gong yi" means a "public interest." As for "jhong da," I translated it as "significant" in order to avoid the implication of a specific standard. Justice Lin probably considered "jhong da" as "important." On the other hand, Justice Yu seemed to regard it as "compelling" and thus criticized that the Court should have used "jhong yao" (important) instead of "jhong da," since the Court intended to state intermediate scrutiny. *Id.*

78. *See generally* TRIBE, *supra* note 24.

In Interpretation No. 603, the court suggested that different types of personal information should trigger different standards of judicial review. The court clearly stated that different standards of judicial review should be applied to different circumstances according to the characteristics of personal information involved; that is, whether the personal information concerns intimate/confidential/sensitive matters or whether the information, though not intimate/confidential/sensitive, may nonetheless be easily combined with other information and lead to a detailed personal profile.[79] Where sensitive personal information is involved, there is a greater danger of a privacy invasion. For this reason, the European Union Data Protection Directive generally prohibits the processing of certain categories of personal data, including "personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life."[80] Following this idea, scholarly works create an even more sophisticated classification of personal information according to the levels of sensitivity.[81] The understanding that the extent of a privacy threat differs depending on the sensitivity of the personal information involved should not matter only to the regulatory policy, but should also effect the level of scrutiny of judicial review - as it did in Interpretation No. 603.

In addition to the involvement of sensitive personal information, the aforementioned statement of the court describes the other scenario in which stricter scrutiny should be triggered; that is, where the "information, though not intimate/confidential/sensitive, may nonetheless be easily combined with other information and lead to a detailed personal profile."[82] Modern data processing technologies, such as computer databases and data mining tools, are able to easily accumulate, analyze, and interpret personal information, and to subsequently reveal individuals' behavior patterns and psychological profiles.[83] Thus, the sensitivity of a single piece of personal information is not the only concern. The combination of information also presents a privacy alert. Accordingly, a law allowing the databases of different agencies to connect with each other, even containing no sensitive personal information, should receive strict judicial examination.

The sensitivity of personal information and the likelihood of the exposure of a detailed personal profile through combining bits of personal information do not necessarily exhaust all possible factors that courts should consider. For

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79. Interpretation No. 603 (2005).

80. Council Directive 95/46, Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of such Data, art. 8, 1995 O.J. (L 281) 31 (EC), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:EN:HTML [hereinafter Council Directive 95/46].

81. For example, Wacks categorizes more than three hundred types of personal information into three levels of sensitivity—high sensitivity, moderate sensitivity, and low sensitivity. WACKS, *supra* note 1, at 227, 229-38.

82. Interpretation No. 603 (2005).

83. SOLOVE & ROTENBERG, *supra* note 2 at 49.

instance, the likelihood and the scale of disclosure of personal information might play a role as well, because larger-scale disclosure causes greater privacy harm. It follows that a freedom of information law opening people's personal information held by governments to the public without weighing privacy interests and withholding certain personal information would appear constitutionally suspicious and should trigger stricter scrutiny, because this law may lead to wide dissemination of personal information.[84]

By speculating about potential privacy interests in various circumstances, a couple of factors triggering judicial review standards have emerged. The two factors unearthed from Interpretation No. 603, the sensitivity of personal information and the likelihood of the exposure of a detailed personal profile, should have an effect on the choice of standards. And in addition to the two factors borrowed from Interpretation No. 603, further variables, such as the scale of the disclosure of personal information, should be considered.

2. *The Principle of Specificity of Purposes*

In addition to triple standards, I suggest introducing the principle of specificity of purposes to the constitutionality examination. Where the right of information privacy is involved, vagueness/specificity of law becomes a more considerable point in judicial review. While the rule of law requires laws to be as specific as possible to provide certainty and predictability, allowing vagueness in a law's language may offer flexibility and efficiency of enforcement. In consideration of these conflicting interests, the courts in both the United States and Taiwan differentiate cases and respond with divergent degrees of strictness in terms of vagueness/specificity of laws. The context of information privacy may provoke a higher requirement in this regard, especially under the "purpose specification principle," a widely accepted principle of data protection.

As a general principle, vagueness/specificity of law affects a law's constitutionality. In Taiwan, the "principle of clarity and definiteness of law" is universally regarded as a constitutional principle, because excessively vague provisions would destroy the predictability of the application of the law and impose undue restrictions on the people.[85] While the principle has a far-reaching territory of application, it is worth noting that in a case involving the freedom of assembly, the court seemed to heighten the requirement of the principle to invalidate the provisions that might be considered constitutional in contexts other than the freedom of expression.[86] In the United States, the

84. The Freedom of Information Act in the United States establishes several exemptions, including "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" to balance the right to access governmental information and the right to privacy. 5 U.S.C. § 552(b)(6) (2009). The Freedom of Information Act in Taiwan provides a similar exemption in Article 18.

85. *See* Interpretation No. 432 (Const. Ct., July 11, 1997) (Taiwan).

86. Interpretation No. 445 (1998).

vagueness doctrine primarily arises in First Amendment cases, while it has implications on the notice requirement of procedural due process as well.[87] Similar to the development in Taiwan, the impact of vagueness on the constitutionality of law varies. As Justice Powell said in *Smith v. Goguen*,[88] "Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts."[89] In summary, courts tend to more strictly scrutinize the law when the freedom of speech is involved due to the potential for a chilling of legitimate speech by citizens. The current divergent responses to free speech cases imply that although the principle concerning vagueness/specificity of law universally applies to all areas, the teeth of the principle may vary with contexts.

In the area of personal information protection, the "purpose specification principle" has long been identified as one of its basic principles.[90] Early in 1980, the OECD began to require that

> The purposes for which personal data are collected . . . be specified not later than at the time of data collection and the subsequent use limited to the fulfilment [sic] of those purposes or such others as are not incompatible with those purposes and as are specified on each occasion of change of purpose.[91]

Other influential international instruments, such as the European Union Data Protection Directive[92] and the Asia-Pacific Economic Cooperation (APEC) Privacy Framework,[93] also made similar points. Moreover, the domestic legislation of many countries embodies this principle. Taking Taiwan's Computer-Processed Personal Data Protection Act as an example, Articles 7 and 18 of the Act require that for collection or computer processing of personal information, government organizations or non-government organizations must have a specific purpose. In other words, the principle has become not only a desired practice, but also a statutory mandate in many countries.

The developments described above confront us with the question of

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87. SULLIVAN & GUNTHER, *supra* note 7, at 1347-48.

88. 415 U.S. 566 (1974).

89. *Id.* at 573.

90. *See, e.g.*, WACKS, *supra* note 1, at 208.

91. *Id. See also* Org. for Econ. Co-operation & Dev [OECD], *OCED Guidelines on the Protection of Privacy and Transborder Flows of Personal Data*, art. 9 (1980), *available at* http://www.oecd.org/document/18/0,3343,en_2649_34255_1815186_1_1_1_1,00.html.

92. Council Directive 95/46, *supra* note 80, at art. 6.

93. Asia-Pacific Econ. Cooperation [APEC], APEC Privacy Framework, art. 15 (Nov. 17-18, 2004), *available at* http://www.apec.org/apec/news___media/2004_media_releases/201104_apecminsendorseprivacyfrmwk.MedialibDownload.v1.html?url=/etc/medialib/apec_media_library/downloads/ministerial/annual/2004.Par.0015.File.v1.1 [hereinafter APEC].

whether the level of specificity of the collection purpose should meet higher criterion in order to avoid an unconstitutional judgment. Interpretation No. 603 has taken into account the understanding that I presented in the last two paragraphs. In my analysis, Interpretation No. 603 incorporated the purpose specification principle into the principle of clarity and definiteness of law as it mandated that the "purposes of the State's collection of the information must be specifically identified by statutes."[94] It is not enough that the government discovers the purposes from the legislative history or unilaterally asserts those purposes.[95] In a later paragraph, the Constitutional Court stressed that "the State shall specify the purpose of information collection in a statute" as one of requirements for collecting fingerprints on a large scale and storing them in a database.[96] In short, the Court has promoted the purpose specification principle as a constitutional mandate in the context of information privacy or at least in the context of fingerprint databases.[97] Reasoning through the path of the vagueness doctrine in special contexts, the purpose specification principle as one of major information privacy principles, or the combination of them, would reach the same conclusion. That is, the specificity of the purpose of information collection in the law at issue should be considered as an element determining the constitutionality of the law.

In addition to reviewing the law through the approach of triple standards, courts should also examine the law in terms of the specificity of collection purpose. While vagueness/specificity of law matters in all areas, information privacy demands higher protection in this regard. According to the principle of specificity of purposes, which in my view has emerged in Interpretation No. 603 as a constitutional rule, courts should invalidate a law that authorizes the gathering of large-scale personal information without specifying the purpose of information collection.

3. *Principles of Data Protection*

In addition to the purpose specification principle, should any other data

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94. Interpretation No. 603 (2005). Justice Chung-Mo Cheng, in his concurring opinion, also construed the opinion of the court in the way similar to my understanding. *Id.* (Cheng, J., concurring). In his view, the court strictly reviewed the statute at issue in term of the "principle of clarity and definiteness of law" because the court regarded fingerprints as sensitive personal information. *Id.* Different from the opinion of the court, he argued to review the statute at issue in term of the "principle of clarity and definiteness of law" by a lower standard. *Id.*

95. Interpretation No. 603 (2005). On the contrary, Justice Syue-Ming Yu, in his concurring and dissenting opinion argued that the court can discover legislative purposes through the legislative history or even come up with legislative purposes by itself. *Id.* (Yu, J., concurring and dissenting). And, in this case, he thought the legislative history had sufficiently suggested what the purposes are. *Id. See also id.* (Cheng, J., concurring).

96. Interpretation No. 603 (2005).

97. In addition to the opinion of the court, Justices Tzong-Li Hsu and Yu-Tien Tseng's concurring opinion also supported the idea that the statute must clearly state the purpose of collecting and using people's personal information. *Id.* (Hsu & Tseng, Js., concurring).

protection principles be incorporated into the interpretation of the Constitution? Current discussion focuses on the role of those principles in legislative policies and largely overlooks the significance of the issues regarding constitutional implications of data protection principles. While the purpose specification principle has been discussed above, other widely accepted principles of data protection and their potential constitutional implications are subject to exploration in this section.

The following influential international instruments respectively established several general principles of data protection. The OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data declare eight basic principles of data protection, including the collection limitation principle, data quality principle, purpose specification principle, use limitation principle, security safeguards principle, openness principle, individual participation principle, and accountability principle.[98] Articles 6 to 11 of the European Union Data Protection Directive reveal its seven groups of data protection principles.[99] The APEC Privacy Framework also announces its information privacy principles under the following subjects: preventing harm, notice, collection limitation, uses of personal information, choice, integrity of personal information, security safeguards, access and correction, and accountability.[100] The principles proclaimed in different international or domestic instruments are by no means identical. Yet, in many points, they do overlap or possess similar ideas. The principles that receive extensive acknowledgement represent common consensuses regarding what should be done about personal information protection.

The courts may acknowledge the implication of those principles of data protection in judicial review. Interpretation No. 603 has taken a substantial step towards transforming the principles of data protection into constitutional mandates. As shown in the prior section, the purpose specification principle entered the Constitution through the existing "principle of clarity and definiteness of law" in the interpretation. It displays the possibility that courts can adopt certain data protection principles to be constitutional rules in reviewing information privacy cases.

Other principles of data protection deserve attention as well. The purpose specification principle deals with only the justification of collection of personal information. After taking care of the justification of collection, the issues of storage, use and disclosure of the information remain unaddressed. Other rules are needed to ensure sustained protection in reducing privacy risk. Interpretation No. 603 again provided a good example. It has established the

98. OECD, *supra* note 91, at pt. 2.

99. Council Directive 95/46, *supra* note 80, at art. 6-11. Solove and Rotenberg give titles to those seven groups of principles required by Articles 6 to 11 of the Directive. *See* SOLOVE & ROTENBERG, *supra* note 2, at 726-28.

100. APEC, *supra* note 93, at pt. 3.

constitutional mandates that obviously stem from the use limitation principle[101] and security safeguards principle.[102] With respect to the use limitation principle, the Constitutional Court made it clear that the "State shall ensure that the use of the personal information legitimately obtained by the State reasonably accords with the purpose" and that "the statute shall manifestly prohibit any use falling outside of the statutory purpose."[103] As to the security safeguards principle, the Court required that "the security of the information be safeguarded."[104] Moreover, the Court noted the importance and the changing nature of technology. Therefore, it further provided that "the agency shall take into account the contemporary development of technology to act in the manner that is sufficient to ensure the accuracy and security of the information, and adopt necessary protective measures in terms of organization and procedure as to the files of collected fingerprints."[105] For the Court, the use limitation principle and security safeguards principle have become not only the criteria of good practices, but also constitutional rules.

Interpretation No. 603 has by no means thoroughly addressed constitutional effectiveness of *all* data protection principles. For example, it did not particularly elaborate the role of the "individual participation principle"[106] in judicial review.[107] I suggest that granting the right of individuals to access and correct their personal information should also be a

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101. "Personal data should not be disclosed, made available or otherwise used for purposes other than those specified in accordance with Paragraph 9 except: a) with the consent of the data subject; or b) by the authority of law." Council Directive 95/46, *supra* note 80, art. 10. *See also id.* at art. 6; APEC, *supra* note 93, at art. 19.

102. "Personal data should be protected by reasonable security safeguards against such risks as loss or unauthorised access, destruction, use, modification or disclosure of data." OECD, *supra* note 91, at art. 11. *See also* Council Directive 95/46, *supra* note 80, at art. 17; APEC, *supra* note 93, at art. 22.

103. Interpretation No. 603 (2005).

104. *Id.*

105. *Id.* Justices Tzong-Li Hsu and Yu-Tien Tseng in their concurring opinion further elaborated the State's obligation to adopt adequate protective measures. *Id.* (Hsu & Tseng, Js., concurring). On the contrary, Justice Chung-Mo Cheng in his concurring opinion questioned the activism of the court in forming such a detailed discussion directing the legislature. *Id.* (Cheng, J., concurring).

106. "An individual should have the right: a) to obtain from a data controller, or otherwise, confirmation of whether or not the data controller has data relating to him; b) to have communicated to him, data relating to him within a reasonable time; at a charge, if any, that is not excessive; in a reasonable manner; and in a form that is readily intelligible to him; c) to be given reasons if a request made under subparagraphs(a) and (b) is denied, and to be able to challenge such denial; and d) to challenge data relating to him and, if the challenge is successful to have the data erased, rectified, completed or amended." OECD, *supra* note 91, at art. 13. *See also* Council Directive 95/46, *supra* note 80, at art. 12, (discussing the protection of individuals with regard to the processing of personal data and on the free movement of such data); APEC, *supra* note 93, at art. 23.

107. Nevertheless, it does mention the right to know how their personal information will be used and the right to correct any inaccurate entries regarding their personal information as a part of the content of the right of information privacy. Interpretation No. 603 (2005).

constitutional mandate, because the rights of access and correction have been widely considered as a core mechanism concerning data protection and, moreover, because the Court in Interpretation No. 603 has deemed it as an aspect of the right of information privacy. The principle is significant enough to function in the realm of constitutional law. In Taiwan, the Computer-Processed Personal Data Protection Act has created the rights to access, acquire copies of, amend and correct personal information in Article 4 and therefore meets the requirement. However, if any new legislation extremely restricts individuals' right to access and correct personal information or eliminate it altogether, it should encounter great difficulty surviving the constitutional challenge.[108]

CONCLUSION

This article reveals an alternative framework to the reasonable expectation of privacy test in examining the state actions that invade the right of information privacy. By understanding the jurisprudence of judicial review in both the United States and Taiwan, this article is able to dissect Interpretation No. 603 of Taiwan's Constitutional Court and reorganize it so it is in line with preexisting jurisprudence. The resulting framework consists of the approach of multiple standards and certain independent rules. To be more specific, the approach of multiple standards constitutes the core of the framework, and the constitutionalized purpose specification principle as well as other principles of information privacy protection further accomplishes the framework.

The framework appears to be more sophisticated, thoughtful, and effective than the reasonable expectation of privacy test in addressing many information privacy cases in which state action is subject to examination. As I have pointed out, the reasonable expectation of privacy test is logically problematic and practically ineffective because of the deficiencies in its reasoning process and the difficulties arising from the assessment of "reasonableness." The framework I proposed, based on an analysis of Interpretation No. 603, not only avoids these problems, but also promotes a more refined and exquisite approach of judicial review with respect to information privacy.

While Interpretation No. 603 has provided a solid foundation for developing a preferable strategy of judicial review involving information privacy, its analysis in this article does not end the need for further advancement in the field. First, after accepting the approach of triple standards, efforts can be made to seek additional factors implicating the determination of which scrutiny should be triggered. For example, I have suggested the

108. It has raised controversy that the draft of Taiwan's Biobank Act contains a provision precluding the rights to access, acquire copies, amend, and correct personal information. Article 5 of the draft of the Biobank Act, submitted by the Department of Health to the Administrative Yuan, Jan. 5, 2009 (on file with author).

likelihood and the scale of disclosure of personal information to be one of the potential factors that should be taken into account in addition to those that have been considered in Interpretation No. 603. Second, because certain data protection principles reflect strong hints of common consensuses regarding required information practices, it is worthwhile to deliberate whether some principles, in addition to those that have been acknowledged by Interpretation No. 603, are vital enough to be considered as constitutional mandates. For example, I have suggested the individual participation principle to be a principle of such.

As the proposed framework would not only further strengthen courts' performance on the subject, but also facilitate future intellectual efforts advancing the scheme, it is time to make a turn away from completely reliance on the reasonable expectation of privacy test.

OFFSHORE OIL DRILLING IN THE UNITED STATES AND THE EXPANSION OF CUBA'S OIL PROGRAM:

A DISCUSSION OF ENVIRONMENTAL POLICY

Jillian L. Genaw*

I. INTRODUCTION

Dating back to the mid-nineteenth century, environmental advocacy in the United States is certainly nothing new. However, the modern environmental movement did not take hold in the United States until the 1970s.[1] Up until the 1970s, followers of the environmental movement consisted only of wealthy political elitists advocating mainly for conservation.[2] The modern environmental movement, on the other hand, began as a social movement garnering deeper concern and more popular support.[3] The oil spill that occurred in 1969 off the coast of Santa Barbara, California devastated the American public and spawned modern environmental advocacy in the United States, especially as related to water pollution and offshore oil drilling in its coastal waters.[4] In January of 1969, a natural gas blowout on an oil platform owned by Union Oil Co. , located six miles off the coast of Santa Barbara, created a huge hole in the oil pipeline.[5] Oil workers struggled for nearly two weeks attempting to repair the rupture.[6] During that time 200,000 gallons of crude oil rose to the surface of the ocean and spread across thirty-five miles of California coastline.[7] The spill devastated the environment and tarnished the reputation of the oil industry.[8]

Oil spills continued to occur at alarming rates in the years following the

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1. *See* Wisconsin Historical Society, *The Modern Environmental Movement*, (2007), *available at* http://www.dnr.state.wi.us/org/caer/cea/media/articles/WHSessay.pdf.
2. Nationmaster.com, *Environmental Movement in the United States*, para.13, http://www.nationmaster.com/encyclopedia/Environmental-movement-in-the-United-States (last visited Nov. 24, 2009).
3. *Id.*
4. Santa Barbara Wildlife Care Network, *Santa Barbara's 1969 Oil Spill*, para. 1, http://www.sbwcn.org/edu/spill.php (last visited Nov. 24, 2009).
5. *Id.* at para. 1.
6. *Id.* at para. 2.
7. *Id.* at para. 2.
8. *Id.* at para. 13.

1969 tragedy and peaked in the late 1970s.[9] The International Tanker Owners Pollution Federation ("ITOPF"), a non-profit organization involved in responding to ship-source oil spills, has studied and provided statistics regarding the frequency of oil spills on an international scale.[10] According to the studies conducted by ITOPF, between 1970 and 1979 there was a yearly average of 25. 2 oil spills.[11] As a result of the alarming frequency of oil spills during the 1970s, public sentiment against offshore oil drilling near the coastal areas of the United States reached its peak as well. In response, Congress adopted the Outer Continental Shelf ("OCS") Moratorium in 1981.[12] However, the latest study conducted by ITOPF found the average number of oil spills per year has decreased dramatically since the 1970s.[13] For example, between 2000 and 2007 an average of 3.4 oils spills occurred per year.[14] This dramatic decrease in the frequency of oil spills indicates that there is less reason for public concern about the coastal environment and supportive of the OCS Moratorium.

As enacted in 1981, the OCS Moratorium only restricted drilling off the coast of California, but it has been extended several times since enactment. In its current form, the OCS Moratorium prevents the leasing of waters for fossil fuel development off the Atlantic and Pacific coasts and Alaska's Bristol Bay.[15] In 1990, the Bush Administration extended the OCS Moratorium once again to include the coasts of Florida, California, and New England.[16] Since its passage in 1981, Congress has annually renewed the Moratorium.[17] However, the ban has recently been threatened and has become the topic of heated political debate.[18] Those in favor of lifting the OCS Moratorium argue that it would solve the "energy crisis" in the United States.[19] Proponents argue further that lifting the drilling ban would allow for greater energy independence and would

9. The Mariner Group, *Oil Spill History*, http://www.marinergroup.com/oil-spill-history.htm (last visited Jan. 1, 2010).

10. ITOPF, *About ITOPF*, para.1,http://www. itopf. com/about/ [hereinafter ITOPF] (last visited Jan. 1, 2010). The International Tanker Owners Pollution Federation was established in 1968 to administer the voluntary compensation agreement which assured the adequate and timely payment of compensation to those affected by oil spills. *Id.* ITOPF now devotes considerable effort to a wide range of technical services, of which the most important is responding to spills of oil and chemicals. *Id.*

11. ITOPF, *Data & Statistics*, at Figure 1, http://www.itopf.com/information-services/data-and-statistics/statistics/index.html [hereinafter ITOPF Study] (last visited Jan. 1, 2010).

12. Tom Valtin, *Offshore Drilling Moratorium Threatened*, Sierra Club, para. 3., http://www.sierraclub.org/planet/200603/offshore.asp (last visited Nov. 24, 2009).

13. ITOPF Study, *supra* note 11.

14. *Id.*

15. Valtin, *supra* note 12, at para. 3.

16. PlanMyGreen.com, *Offshore Drilling Resistance Evaporating*, para. 1, http://www.planmygreen.com/?p=171 (last visited Nov. 24, 2009).

17. Valtin, *supra* note 12, at para. 3.

18. *See id.*

19. PlanMyGreen.com, *supra* note 16, at para. 3.

drive down gas prices.[20] Opponents, on the other hand, argue that the miniscule impact that lifting the ban would have on gas prices would not be worth all of the negative effects on the environment that would result from drilling in coastal waters.[21] However, the environmental arguments against offshore oil drilling in the Gulf Coast have recently been weakened by Cuba's plan to expand its oil program.

The expansion of Cuba's oil program is a major threat against the OCS Moratorium. Throughout history, oil production in Cuba has been very limited and confined to the lands around Havana and the neighboring Matanzas province.[22] Recently, Cuba has begun to significantly expand its oil program into the waters that separate it from the United States.[23] Although a 1977 treaty[24] between Cuba and the United States limits the proximity of Cuba's oil wells to the United States, Cuba can still legally build offshore wells within a mere fifty miles of the coast of Florida.[25] The 1977 treaty divided the Florida straits in order to preserve the economic rights of each country, including access rights to extensive oil and gas fields on both sides of the divide.[26] Cuba's ability to legally build offshore oil drilling wells within fifty miles of the coast of Florida is concerning because this close distance will not protect Florida from suffering the ill effects associated with Cuban offshore oil exploration.

While the environmental laws in the United States prohibit drilling within at least 100 miles of its coasts, there is little the United States can do to control how Cuba utilizes its portion of the water rights acquired by the 1977 treaty. Currently Cuba does not have the economic capacity to exploit the oil and gas fields in these waters. However, Cuba plans to sell rights to its fifty-nine offshore leasing blocs to various international partners who will then extract the oil and gas and give Cuba a share in the profits.[27] In fact, Cuba has already

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20. *Id.*

21. Valtin, *supra* note 12, at para. 5.

22. David J. Lynch, *Cuba's Known for Cigars Now, but Oil Could Change that*, USA TODAY, Feb. 22, 2007, *available at* http://usatoday.com/money/world/2007-02-22-cuba-usa.tx.htm.

23. *Id.*

24. Exchange of Letters Constituting an Agreement on a Modus Vivendi Relating to Maritime Boundary, U.S.-Cuba, No. 18222 (Apr. 27, 1977), *available at* http://untreaty.un.org/unts/60001_120000/2/34/00003673.pdf. This treaty, establishing the maritime boundary between the United States and Cuba, was as a result of the enactment of Public Law 94-265 by the United States Government on April 3, 1976 and by the Government of Cuba of Decree-Law No. 2 on February 24, 1977. *Id.* The treaty was signed at Washington on December 16, 1977. U. S. DEPT. OF STATE, Treaties Pending in the Senate, Sept. 26, 2008, http://www.state.gov/s/l/treaty/pending.

25. Michael Janofsky, *Cuba Plans Offshore Wells Banned in U. S. Waters*, N. Y. TIMES, at para. 1, (May 9, 2006), *available at* http://www.nytimes.com/2006/05/09/washington/09drill.html.

26. *Id.*

27. Paul Hooson, *Big Oil Could Fuel End To Embargo On Cuba*, para. 4, http://wizbangblue.com/2008/08/04/big-oil-could-fuel-end-to-embargo-on-cuba.php (last visited

sold the rights to approximately one-third of its offshore leasing blocs to foreign nations that have agreed to cover their own fossil fuel exploration costs and to share the profits of any production with Cuba.[28] Foreign nations, including India and China, hope to develop the 9. 3 billion barrels of crude oil and 21. 8 trillion cubic feet of natural gas that were recently found in the North Cuban Basin by a U. S. Geological Survey.[29] Given that the United States has historically been very dependent on foreign oil, U.S. Chief Executive Officers ("CEOs"), oil companies, and much of the American public alike have begun to urge Congress to lift the OCS Moratorium and allow the United States to become more self-sufficient.[30] In the alternative, U. S. oil companies have urged Congress to end the economic embargo against Cuba so that they can at least compete with other foreign nations for rights to Cuba's offshore leasing blocs.[31] Although economic arguments in favor of lifting the OCS Moratorium in the United States play some role, environmental arguments remain central to the debate over offshore drilling near the coasts. The coastal waters surrounding Florida are especially at issue because the expansion of Cuba's oil program so close to the Florida coast would yield the same environmental detriments that would result if the United States were doing the drilling itself.[32] Thus, if the United States is going to suffer negative environmental effects anyway, it might as well take advantage of the economic gains associated with expanded offshore oil drilling.

The purpose of this Note is threefold. First, this Note will discuss the arguments in favor of lifting the OCS Moratorium in the United States. Second, this Note will compare environmental and energy policy in the United States to that of Cuba. Examination and comparison of the history and current state of environmental law in both nations will provide insight as to why offshore oil drilling is such a contested issue in the United States but not in Cuba. Third, this Note will offer recommendations regarding how the environmental laws and policies of the United States and Cuba could be amended in order to allow for the safest possible means for expanding oil production.

Specifically, Part I of this Note provides a historical background of environmental law and policy in the United States and discusses how laws and policies against OCS oil drilling developed. This Part of the Note also discusses the sentiment of the American public toward offshore oil drilling.

Part II discusses arguments for and against lifting the OCS Moratorium in the United States as well as a discussion, in greater detail, of the environmental arguments provided in opposition to the expansion of offshore drilling in the United States. This Part also discusses recent developments in technology

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Jan. 1, 2010).

28. LatinBusinessChronical.com, *Cuba's Oil Partners*, (Jan. 1, 2010), http://www.latinbusinesschronical.com.

29. Hooson, *supra* note 27, at para. 3.

30. *Id.*

31. *Id.*

32. Janofsky, *supra* note 25, at para. 1.

associated with offshore oil drilling.

Part III of this Note provides a historical background of environmental law and policy in Cuba and analyzes those laws and policies. In this Part of the Note, environmental law in the United States will be compared to environmental law in Cuba. A discussion of environmental interest group activity will also be provided in this section. The aim of the comparative analysis provided in this part of the Note is to explain why obstacles to offshore drilling exist in the United States but not in Cuba. This section of the Note seeks to explain why the United States has had a moratorium on offshore drilling for nearly twenty-eight years and remains apprehensive to expand its oil program despite the many economic and political arguments in support of doing so.

Part IV of this Note provides recommendations regarding how environmental policy could be adjusted in order to yield the optimum result in both the United States and Cuba. Included in these recommendations is a discussion of the possible repercussions of maintaining the status quo in both of these nations. This Part of the Note also discusses the possible impacts of these recommendations to the United States and Cuba and collateral effects on other nations.

Part V of this Note provides a brief conclusion of the arguments surrounding the issue of the OCS Moratorium in the United States and how the laws and policies associated have influenced those arguments. This part also examines how the laws and policies could be changed to provide for a better solution and a conclusive proposal is offered regarding the best approach to the problems surrounding the offshore oil drilling.

II. A BACKGROUND OF ENVIRONMENTAL LAW AND POLICY IN THE UNITED STATES

Many wonder why there is such strong environmental advocacy against offshore oil drilling in the United States yet very little in Cuba and other nations. The exploration blocs to be leased out by Cuba will be developed just as close, if not closer, to Cuba as to the United States.[33] Therefore, Cuba would suffer the same environment effects that the United States is so concerned about. This Part of the Note focuses on environmental law and advocacy in the United States in detail, and this discussion will be expanded further in Part III with a comparative analysis in an attempt to answer the question posed above.

A. The Emergence of the Modern Environmental Movement

The modern environmental movement in the United States did not actually take hold until the mid 1970s, but Congress laid some of the

33. *See supra* Introduction.

foundation in the decades prior.[34] In 1948, Congress first showed interest in and concern about water pollution by passing the Federal Water Pollution Control Act[35]. In 1972, Congress expounded upon the Federal Water Pollution Control Act and enacted the Clean Water Act ("CWA")[36] which is currently the primary federal law in the United States governing water pollution.[37] It aims to eliminate the release of high amounts of toxic substances into bodies of water in and surrounding the United States.[38] Following two of the most catastrophic oil spills in United States history, discussed in the introduction of this Note, two very significant environmental protection measures were adopted: the Environmental Protection Agency ("EPA") and Earth Day.[39] The adoption of Earth Day symbolized the new found commitment and dedication to protecting the environment.[40] The creation of the EPA is notable because it is now the agency with the primary responsibility of generating and enforcing environmental regulations.[41]

Essentially, the EPA implements the environmental laws written by Congress by writing them into regulations.[42] The EPA also awards grants to state agencies to fund their environmental programs, studies environmental issues, educates the public about environmental issues, and sponsors partnerships for protecting the environment.[43] The National Environmental Policy Act ("NEPA")[44] is one source from which the EPA is granted regulatory authority.[45] In general, "NEPA requires federal agencies to integrate environmental values into their decision making process by considering the environmental impacts of their proposed actions and reasonable alternatives to those actions."[46] To meet NEPA requirements, federal agencies must prepare a detailed statement describing a proposed action and outlining the action's anticipated effects on the environment—this statement is known as the Environmental Impact Statement ("EIS").[47] The EPA has promulgated these

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34. Water Encyclopedia, *Role of Water in the Environmental Movement*, para.13, http://www.waterencyclopedia.com/Da-En/Environmental-Movement-Role-of-Water-in-the.html (last visited Oct. 25, 2009).

35. 33 U.S.C. §1251 (2008).

36. Water Encyclopedia, *supra* note 34, at para.13.

37. U.S. Envtl. Prot. Agency, Introduction to the Clean Water Act (CWA), http://www.epa.gov/watertrain/cwa (last visited Nov. 24, 2009).

38. *Id.*

39. Water Encyclopedia, *supra* note 34, at para. 17. The EPA was created and Earth Day was adopted in 1970. *Id.*

40. *See id.*

41. U.S. Envtl. Prot. Agency, What We Do, http://www.epa.gov/epahome/whatwedo.htm [hereinafter EPA.gov] (last visited Nov. 24, 2009).

42. *Id.*

43. *Id.*

44. 42 U.S.C. § 4321 (2008).

45. U. S. Envtl. Prot. Agency, National Environmental Policy Act (NEPA), para. 1, http://www.epa.gov/Compliance/nepa/ (last visited Nov. 24, 2009).

46. *Id.*

47. *Id.*

general requirements as proactive steps to prevent environmental degradation.

In 1990, Congress took additional steps to combat environmental disasters specifically tied to offshore oil drilling by enacting the Oil Pollution Act ("OPA")[48]. The OPA was enacted following the infamous 1989 Exxon Valdez oil spill that was detrimental to the ecosystems in the waters surrounding Alaska.[49] The OPA strengthens the requirements and penalties related to accidents resulting from offshore oil exploration.[50] The OPA, together with NEPA, the Clean Water Act of 1972,[51] Clean Air Act of 1970,[52] and the Coastal Zone Management Act of 1972,[53] "implement[s] controls on the discharge of water and air pollution applicable to the offshore industry."[54] Specifically, the Coastal Zone Management Act "coordinates environmental and other programs between federal and state governments and provides states with monetary grants and technical assistance in implementing environmental management programs."[55] Thus, the United States has several statutes in place which are designed to address any collateral damage caused during offshore oil drilling exploration. In fact, offshore drilling activity and the marine industry in the United States have been regarded, by attorneys and other professionals, as highly regulated.[56]

However, it is argued that the enforcement efforts behind these strict regulations could be stronger in the United States. The EPA is the primary entity responsible for regulating offshore oil drilling and issuing sanctions for non-compliance with environmental regulations.[57] In the past, the EPA has monitored oil companies and often imposed heavy sanctions on those companies when they failed to comply with environmental laws and regulations.[58] For example, in August of 2008, the EPA slapped Exxon Mobil with a 2.64 million dollar penalty after Exxon ignored a polychlorinated biphenyl ("PCB") leak for two years.[59] The leak allowed 400 gallons of PCB to seep into the Pacific Ocean in violation of the Federal Toxic Substances Control Act ("TSCA").[60] The TSCA mandates that the "EPA may issue a civil administrative complaint" which "may impose a civil penalty, including

48. 33 U.S.C. § 2701 (2008).

49. Michael J. McHale, *An Introduction to Offshore Energy Production-A Florida Perspective*, 39 J. MAR. L. & COM. 571, 585 (2008).

50. *Id.*

51. 42 U.S.C. § 7401 (2008).

52. 33 U.S.C. § 1251 (2008).

53. 16 U.S.C. § 1451 (2008).

54. McHale, *supra* note 49, at 583.

55. *Id.*

56. *Id.* at 585.

57. EPA.gov, *supra* note 41, at para. 1.

58. *Id.*

59. ContractorMisconduct.org, *Federal Contractor Misconduct Database*, para. 23, http://www.contractormisconduct.org/index.cfm/1,73,221,html?ContractorID=23&ranking=42 (last visited Nov. 24, 2009).

60. *Id.*

recovery of any economic benefit of non-compliance, and may also require correction of the violation" by any "manufacturer, processors, distributors, or users of the chemical substance."[61] Many argued that the 2.64 million dollar penalty, which is under one percent of the $11.68 billion in profits earned by Exxon Mobil in just one quarter alone, was just a slap on the wrist and that the EPA exercised only a small fraction of the enforcement authority it is afforded under the TSCA.[62] In addition to violations found under the TSCA and other statutes purporting to control the release of toxic substances, accidents that have occurred during offshore drilling have led to oil companies being found guilty of violations of the Clean Water Act.[63] For example, in 1992, Chevron USA pled guilty to sixty-five violations of the Clean Water Act and paid a total of eight million dollars in fines for illegal discharges from the company's production platform located off the California coast.[64] Although these multi-million dollar fines appear harsh to the layperson, experts argue that the fines are not strict enough to serve as a deterrent. The argument in favor of deterrence, however, can be countered by the argument that deterrence is only effective with regard to intentional violations of these environmental acts. The majority of these major chemical spills are as a result of accidents.[65]

Although environmentalists argue that enforcement of environmental regulations could be strengthened, it cannot be argued that environmental regulations and public awareness of environmental issues is completely lacking in the United States. As compared to environmental regulations in Cuba, regulations in the United States have proved to be much more organized and much easier to interpret and implement in practice.[66]

B. Environmental Interest Group Activity

Recently, environmental advocacy groups have been capitalizing on the public's growing interest in global warming and other environmental issues, as well as the "Green Movement" that has permeated the nation.[67] Increased energy use by developing countries, like China, has increased the world's demand for and dependence on fossil fuels. Energy use has also affected the amount of toxins released into the environment.[68] Environmental groups, who advocate the development of alternative fuel sources and cleaner energy, have

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61. U.S. Envtl. Prot. Agency, TSCA Statute, Regulations, and Enforcement, http://www.epa.gov/compliance/civil/tsca/tscaenfstatreq.html (last visited Nov. 24, 2009).

62. ContractorMisconduct.org, *supra* note 59.

63. Change.org, Committee Against Oil Exploration, para. 7, http://www.culturechange.org/caoe.html (last visited Nov. 24, 2009).

64. *Id.*

65. ITOPF.com, *supra* note 10.

66. *See infra* Part III.

67. Chantelle Marcelle, *Green Movement Continues to Grow in U.S.*, INDEP. FLA. ALLIGATOR, para. 2, July 31, 2008, *available at*, http://www.alligator.org/articles/2008/07/31/news/features/080731_green.txt.

68. *Id.* at para. 8.

highlighted the risks associated with the increased dependence on fossil fuels and increased production of oil.[69] This has helped raise awareness about environmental issues and has caused many more Americans to become a part of the Green Movement.[70] Without the presence of such staunch environmental advocacy groups in the United States, many Americans would not even be aware of current environmental issues.[71] Most Americans still have little personal knowledge of environmental issues and this creates an opportunity for manipulation. The average American's lack of knowledge allows environmental interest groups, with help from the mass media, to easily instill fear in American citizens and sway their opinions toward favoring additional environmental protections.[72] Thus, it is important to pinpoint the source of any current opposition to offshore drilling because negative attitudes could be based on media hype rather than studies and facts.

C. Recent Congressional Proposals and Resolutions Regarding Offshore Oil Drilling

After President George W. Bush lifted the executive ban on oil and gas development in the Outer Continental Shelf, pressure mounted on Congress to follow the President's footsteps and lift the legislative ban as well.[73] President Bush had previously stated that he would only lift the executive ban after Congress did so legislatively; but after stagnation from Congress, President Bush finally decided to take action.[74]

Congress has recently considered several proposals and resolutions which have included offshore drilling provisions packaged with other, more environmentally friendly, provisions.[75] In September of 2008, the United States House of Representatives passed H. R. 6899, more commonly known as the "Comprehensive American Energy Security & Consumer Protection Act."[76] The Bill would have allowed drilling 100 miles off of the Atlantic, Florida Gulf, and Pacific coasts.[77] And it would have provided coastal states with the

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69. *Id.* at para. 10.

70. *Id.*

71. *Id.*

72. *Id.* at para. 25.

73. *See generally* Marc Humphries, *CRS Report for Congress-Outer Continental Shelf Leasing: Side by Side Comparison of Five Legislative Proposals*, Sept. 16, 2008, http://opencrs.com/document/RL34667/2008-09-16/.

74. *Id.*

75. Kate Sheppard, *Where There's a Drill, There's a Way*, GRIST, para. 6, Sept. 16, 2008, http://gristmill.grist.org/story/2008/9/16/195746/709.

76. *Id.* On September 16, 2008, the United States House of Representatives passed the Comprehensive American Energy Security & Consumer Protection Act by a vote of 236 to 189. Nine representatives did not vote on the bill. Govtrack.us, H.R. 6899: Comprehensive American Energy Security and Protection Act, (Dec. 21, 2008), http://www.govtrack.us/congress/bill.xpd?bill=h110-6899 (last visited Oct. 11, 2009).

77. Sheppard, *supra* note 75, at para. 7.

option of reducing the buffer zone to just fifty miles.[78] But to balance the scales, the Bill also included a number of environmentally friendly provisions, such as tax credits for using renewable sources of energy, in an attempt to foster bi-partisan support.[79] Since the Bill was introduced in a previous session of Congress, no more action can be taken on it.[80] Still, a discussion of the Bill illustrates the nature of the political environment surrounding offshore drilling and provides an example of the types of proposals that are likely to be seen in the effort to expand offshore oil drilling in the United States.

At first glance, it appears that the Comprehensive American Energy Security & Consumer Protection Act would have imposed major changes on America's offshore oil drilling program. Contrary to the beliefs of many environmentalists, however, the Bill would not have actually changed the current state of offshore drilling in the coastal waters surrounding the United States.[81] Opponents of the Bill have questioned it: "How could a 'comprehensive' energy bill be introduced one day and voted on the next with almost no debate or discussion? Because it [is not] a comprehensive energy bill at all, but rather a ploy by the liberals to limit drilling to areas farther than fifty miles from shore."[82] The contention surrounding this Bill, like many other bills attempting to settle the offshore oil drilling issue, might be based on mere confusion over what exactly the Bill even says. It is important that legislation regarding offshore drilling be clear and concise, rather than clouded by exceptions and earmarks.[83]

Furthermore, in a Statement of Administrative Policy, the Office of Management and Budget (OMB) strongly opposed the Bill for several reasons.[84] According to the OMB, "though H. R. 6899 would open the OCS to oil and gas exploration in some circumstances, it would do so only in combination with other provisions rendering this opening ineffective...this bill does not allow for revenue sharing with the states, eliminating a critical incentive for them to permit exploration off their shores."[85] The OMB also stated that President Bush's advisors would have recommended that the bill be

78. *Id.*

79. *Id.* at para. 6.

80. Govtrack.us, *supra* note 76.

81. Tom Myers, Letter: *No Solution At All*, CAP. J., (Topeka, KS), Sept. 26, 2008, at para. 2, *available at* http://cjonline.com/stories/092608/opi_337021841.shtml.

82. *Id.*

83. *Id.*

84. OFFICE OF MGMT. AND BUDGET, STATEMENT OF ADMINISTRATIVE POLICY, Sept. 16, 2008, http://www.whitehouse.gov/omb/legislative/sap/110-2/saphr6899-h.pdf. [hereinafter OMB Statement]. The OMB is the White House Office that is responsible for devising and submitting the President's annual federal budget proposal to Congress. The OMB evaluates the effectiveness of agency programs, policies, and procedures, assesses competing funding demands among agencies, and sets funding priorities. For more information on the Office of Management and Budget, see OFFICE OF MGMT. AND BUDGET, *About OMB*, http://www.whitehouse.gov/ omb/organization_role/ (last visited Nov. 24, 2009).

85. OMB Statement, *supra* note 84.

vetoed.[86] H. R. 6899, if it had passed, would not really have helped the United States become less dependent on foreign oil and would not have solved the issue regarding the coastal areas of Florida that would be affected by Cuba's leasing program anyway. Still, the fact that this and many other pieces of legislation have recently been put on the table indicates the importance of the issue of offshore oil drilling. Rather than focusing on legislation that will never be enacted, the OMB suggested that Congress:

> (1) lift the current legislative ban on exploration of the OCS, which could eventually produce the equivalent of [ten] years of the Nation's current annual oil production (the President lifted the executive ban in July); (2) lift the current restriction on oil shale leasing to allow the development of this vast resource that, if fully realized, could produce the equivalent of more than a century's worth of oil imports at current levels; and (3) extend and improve existing renewable energy tax credits by creating a single tax incentive program that would be carbon-weighted, technology-neutral, and long-lasting.[87]

The discussions surrounding the Bill illustrate that the contentious issue of offshore drilling in the OCS does not seem to be going anywhere anytime soon. The suggestions offered by the OMB will be discussed in greater detail in Part IV of this Note.

D. United States Federal Court Decisions

Federal court decisions have also impacted and intensified the offshore oil drilling debate in the United States. For example, in June of 2008, the United States Supreme Court handed down a decision[88] reducing the punitive award against Exxon Mobil for the damage it caused in the 1989 oil spill off of the coast of Alaska.[89] The Court held that "punitive damages should roughly match actual damages from the environmental disaster. . ."[90] The decision was considered a victory for big business.[91] The decision indicated that the Supreme Court is unwilling to award excessive punitive damages awards against oil companies. While the court recognized that the oil spill was harmful, it refused to award excessive damages to the plaintiffs, likely because the reality is that the United States is still heavily dependent on the oil companies and still needs those companies to thrive economically. The

86. *Id.*
87. *Id.*
88. Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2634 (2008).
89. CNN, *High Court Reduces Exxon Oil Spill Damages*, para. 1, June 25, 2008, http://money.cnn.com/2008/06/25/news/companies/SCOTUS_exxon/index.htm?cnn=yes.
90. *Id.* at para. 2.
91. *Id.* at para. 17.

decision also indicated that courts have, perhaps due to the shift in public sentiment, become less concerned about environmental risks associated with oil spills.

III. ARGUMENTS IN FAVOR OF LIFTING THE OCS MORATORIUM IN THE UNITED STATES

A. Public Sentiment Arguments

Public sentiment favoring environmental protection drove Congress to pass the OCS Moratorium in 1981.[92] However, the American public is now much less concerned about the potential environmental effects that offshore oil drilling has on the environment.[93] In fact, a recent public opinion poll showed that as many as sixty-seven percent of voters were in favor of resuming offshore oil drilling off the coast of Florida and other states.[94] Recently, offshore oil drilling has garnered greater support due to the struggling U. S. economy and rising energy costs.[95] Thus, one argument that must be considered in support of lifting the OCS Moratorium is that it was largely driven by public sentiment that no longer exists. This is not to say that Americans are no longer concerned about the environment, in fact, the Green Movement has swept the nation.[96] Rather, technological advancement and other factors have offset these concerns.[97]

B. Economic Arguments

Another argument made by proponents of lifting the OCS Moratorium is that doing so will stimulate the economy. Approval is still needed from state governments for offshore drilling to take place within a certain proximity to coastlines.[98] However, gaining state approval is unlikely to persist as an obstacle.[99] There are many incentives for states to follow suit and allow offshore drilling near their coasts. For example, "new drilling in Florida would

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92. Melissa Nelson, *Drillers Begin Quest for Oil, Gas Off Coast of Florida*, L.A. TIMES, at para. 7, (July 5, 2008), *available at* http://articles.latimes.com/2008/jul/05/business/fi-drilling5.

93. Rasmussen Reports, *67% Support Offshore Drilling*, para. 1, June 17, 2008, http://www.rasmussenreports.com/public_content/politics/general_politics/67_support_offshore_drilling_64_expect_it_will_lower_prices.

94. *Id.* at para. 2.

95. *See id.* at para. 4.

96. Marcelle, *supra* note 67, at para. 2.

97. *See infra* note 111.

98. *See* Ben Arnoldy & Amy Green, *On U.S. Coasts, a Rethinking on Oil Drilling*, CHRISTIAN SCI. MONITOR, Jun. 20, 2008, at para. 6, *available at* http://www.csmonitor.com/2008/0620/p02s02-usgn.html.

99. *Id.* at para. 12.

add jobs and infuse the state economy with oil leasing money."[100] For these reasons, Florida Governor Charlie Crist now supports lifting the Moratorium.[101] The stances of politicians in coastal states and their constituents were once a major obstacle to lifting the OCS Moratorium.[102] However, an increasing number of politicians are changing their minds about offshore drilling and have become more willing to consider allowing offshore drilling near their coasts.[103] U. S. CEOs are also urging that Congress lift the OCS Moratorium for economic reasons.[104] CEOs of leading American corporations cite fuel costs as "among the highest cost pressures they face."[105] The Business Roundtable[106] argues that increased production of oil is the main solution to such cost pressures: "Production will shrink further unless we take steps to increase it. Moreover, the U. S. cannot credibly advocate increased production elsewhere in the world while refusing to increase its own domestic supply."[107] Most forecasts suggest that the United States will rely on oil and natural gas as its primary energy sources for at least the next thirty years.[108] Thus, lifting the OCS Moratorium would allow the United States to increase domestic production of oil, provide jobs, and ease the fuel demands of domestic corporations.

In response to the alleged economic benefits, opponents to lifting the ban have argued that increasing production would have no impact on the domestic energy market in the United States for at least ten years.[109] However, if the United States had lifted the ban ten years ago it would not be in its current predicament. The United States continues to become more and more dependent on foreign oil and will need to take action. The political battle over the issue has pervaded for years, continues to stagnate economic progress, and is unlikely

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100. *Id.*

101. *Id.* at para. 9.

102. *Id.* at para. 11.

103. *See id* at para. 10, 12.

104. Bill Loveless, *U. S. CEO's Ask Congress to Follow Bush By Lifting OCS Moratorium*, PLATTS, para. 1, Sept. 4, 2008, *available at* http://www.platts.com/Natural%20Gas/News/6947091.xml?src=Natural %20Gasrssheadlines1.

105. *Id.* at para. 6.

106. The "Business Roundtable is an association of chief executive officers of leading U.S. companies with more than $5 trillion in annual revenues and nearly 10 million employees. Member companies comprise nearly a third of the total value of the U. S. stock markets and pay nearly half of all corporate income taxes paid to the federal government." Business Roundtable, *About Us: Overview*, para. 1., http://www.businessroundtable.org/about (last visited Nov. 24, 2009). The Business Roundtable serves as a catalyst, stimulating business leaders to take an active role in public policymaking and to influence members of Congress. *Id.* at para. 9.

107. Loveless, *supra* note 104, at para. 6. Although the world's largest consumer, domestic production has steadily declined since the 1980s. *See id.* at para. 2.

108. Energy Tomorrow, OCS Moratoria Fact Sheet, para. 3, http://www.energytomorrow.org/energy/OCS_Moratoria_Fact_Sheet.aspx. (last visited Oct. 11, 2009).

109. *Id* at para. 2.

to disappear without a major change.[110]

C. Environmental Arguments

The strongest arguments for maintaining the OCS Moratorium have revolved around environmental concerns. However, these arguments have been weakened by news of Cuba's plan to expand its oil program. Environmentalists argue that we cannot allow offshore drilling near our coastlines because it would be detrimental to coastal ecosystems and tourism. However, these same environmental effects will be felt regardless when lessees of Cuba's exploration blocs begin operating their offshore wells as close as fifty miles to the Florida coast.[111] Because the United States cannot regulate how Cuba utilizes or exploits its own territory, the United States simply cannot prevent Cuba from taking advantage of offshore oil. Given Cuba's close proximity to Florida and other states bordering the Gulf Coast, the OCS Moratorium provides no actual protection over this area. Effectively, the expansion of Cuba's oil program makes the OCS Moratorium a lose-lose situation for the United States. The United States is at risk for environmental disasters without attaining any benefit from offshore drilling.

In the age of modern technology, it should be possible to engage in offshore oil drilling exploration with minimal negative environmental effects. Steps have already been taken in the United States to improve the technology associated with offshore oil drilling, which has already made the industry much safer.[112] Continued research and development will help improve technology even further.[113] "With the appropriate government oversight and regulation, it may be possible to drill off the coasts of Florida and California without covering the beaches with sludge and killing thousands of seabirds."[114] This is a goal worth working toward. The safety systems now required to be implemented by oil companies have greatly improved and in recent years the oil industry has had a good safety record.[115] Additional regulations will be mandated in the near future as well. For example, beginning in 2015 all tankers

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110. *See* Tyler Priest, *If the Great Debate Over Offshore Drilling Sounds Vaguely Familiar-It Should-But Its Time For a Happier Ending*, HISTORY NEWS NETWORK, para. 5, May 30, 2007, *available at* http://hnn.us/articles/54465.html (stating that "The political polarization over offshore drilling is reminiscent of the debate between Eisenhower and Stevenson fifty-six years ago regarding coastal state versus federal control over the Outer Continental Shelf. Both sides had hardened and compromise was impossible. ").

111. Rush PRNews, *Offshore Drilling is an Ugly Reality*, para. 4, Aug. 15, 2008, http://www.rushprnews.com/2008/08/15/offshore-drilling-is-an-ugly-reality.

112. Kent Garber, *Oil Drilling Debate Rages on, 20 Years after the Valdez Spill*, U.S. NEWS, (Mar. 24, 2009), *available at* http://www.usnews.com/articles/news/energy/2009/03/24/oil-drilling-debate-rages-on-20-years-after-the-valdez-spill.html.

113. *Id.*

114. Andrew Leonard, *Slick John McCain and the Offshore Oil Ruse*, SALON, para. 7, June 25, 2008, http://www.salon.com/tech/feature/2008/06/25/mccain_offshore_oil.

115. Garber, *supra* note 112.

in United States' waters will be required to be double-hauled vessels which are designed to prevent spills if an accident occurs.[116]

Moreover, the ITOPF has conducted studies and found that it is the accidental causes; such as collisions and groundings that give rise to the larger, more catastrophic oil spills.[117] In fact, eighty-four percent of the large oil spills are attributed to these causes.[118] According to Bruce Bullock, Director of the Maguire Energy Institute at Southern Methodist University in Dallas, in the context of offshore drilling near Florida, "[t]here's probably more of a risk of an incident from a tanker going down the coast to get into the Gulf or vice versa than there is putting a well in 1,000 feet of water."[119] And Bullock also points out that the nation's worst spill on record—the Exxon Valdez spill—involved a tanker rather than an offshore drilling platform.[120] Thus, it cannot be said that offshore drilling platforms are the main contributors to the environmental degradation caused by the oil industry.

D. Oil Consumption in the United States & Foreign Relations

Recent statistics reveal that the United States consumes 19.6 million barrels of oil per day.[121] This comprises more than one quarter of the world's total oil consumption and much more than Cuba consumes.[122] Demand for oil in the United States is expected to continue to steadily increase.[123] This growing demand has contributed to foreign dependence on oil and has led to increased global conflict.[124] Recently, the U.S. Council on Foreign Relations established an independent task force to examine the consequences of the dependence on foreign oil in the United States and to compile its findings in a report.[125] In its Report, the task force has identified five reasons why dependence on foreign oil is a concern for U. S. foreign policy:

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116. *Id.*

117. ITOPF, *supra* note 10, at Table 4.

118. *Id.*

119. Bob Keefe, *Modern Technology Makes Offshore Drilling Cleaner, Industry Claims*, ATLANTA J. CONST. , AUG. 1, 2008, at para. 25, *available at* http://www.ajc.com/services/content/shared/news/stories/2008/07/TECH_DRILLING01_AUS.html?cxntlid=inform_artr.

120. *Id.* at para. 24.

121. MarkTaw.com, Global Oil Production and Consumption, para. 3, http://www.marktaw.com/ culture_and_media/politics/GlobalOil.html (last visited Nov. 24, 2009).

122. *Id.*

123. *Id.*

124. Robert Bryce, *After Invading One of the Most Petroleum Rich Countries on Earth, the U. S. Military is Running on Empty*, THE AM. CONSERVATIVE, Mar. 10, 2008, at para. 5, *available at* http://www.amconmag.com/article/2008/mar/10/00006/.

125. Press Briefing, Council on Foreign Relations, National Security Consequences of U.S. Oil Dependency, at xi, (2006), *available at* http://www.cfr.org/content/publication/11777/national_security_consequences_of_us_oil_dependency.html.

> (1)[T]he control over enormous oil revenues gives exporting countries the flexibility to adopt policies that oppose U. S. interests and values. . . (2) oil dependence causes political realignments that constrain the ability of the United States to form partnerships to achieve common objectives. . .(3) high prices and seemingly scarce supplies create fear. . .that the current system of open markets is unable to ensure secure supply. . .(4) revenues from oil and gas exports can undermine local governance. . .(5) a significant interruption in oil supply will have adverse political and economic consequences in the United States and in other importing countries.[126]

As a result of these foreign policy concerns, the Task Force "encourage[s] supply of oil from sources outside the Persian Gulf."[127] It would seem that increasing domestic production of oil would integrate foreign policy objectives and energy policy objectives. Lifting the OCS Moratorium is the key to obtaining oil supply from sources outside the Persian Gulf without simply becoming dependant on alternative foreign nations.

IV. A HISTORICAL BACKGROUND OF ENVIRONMENTAL LAW AND POLICY IN CUBA AND A COMPARATIVE ANALYSIS OF THE DIFFERENCES IN ENVIRONMENTAL POLICY IN THE UNITED STATES AND CUBA

The United States is deeply concerned with the expansion of Cuba's oil program because of the possible ill effects it will have on the environment surrounding the coast of Florida.[128] Given that the partitioned offshore blocs that Cuba plans to lease and exploit are located equidistant to Cuban and American coasts, it is not easily understood why Cuban environmental policy has not been an obstacle to expanded offshore drilling in Cuba.

A. Background of Environmental Policy in Cuba

As a signatory of several international accords for environmental conservation and protection, Cuba has created an external image for itself as a country with strong environmental policy.[129] However, environmental law in Cuba has long been criticized for lacking teeth to ensure compliance.[130] During

126. *Id.* at 26-29.

127. *Id.* at 31.

128. *Cf.* Jeremy Morrison, *Drilling Might Stay Away from the Florida Coast*, NEWS HERALD, Sep. 15, 2008, *available at* http://www.newsherald.com/news/panama-68155-city-florida.html.

129. *See* Gilberto Romero Jr. (Jose Valdes trans.), *Cuba's Environmental Crisis*, CONTACTO MAGAZINE, 1994-96, para. 1, *available at* http://www.fiu.edu/~fcf/enviromental.crisis.html.

130. PAMELA STRICKER, TOWARD A CULTURE OF NATURE: ENVIRONMENTAL POLICY AND SUSTAINABLE DEVELOPMENT IN CUBA 81(Lexington Books 2007) (2007).

Cuba's colonial period, environmental law was essentially non-existent because it was "largely ignored and rarely enforced."[131] Even in the "institutionalization stage," there were countless violations of established environmental regulations by government institutions and their officers.[132] Six milestones characterize the "institutionalization stage" in environmental law, which were developed beginning in the 1970s through the early 1990s.[133] The six milestones identified by Cubans are as follows: (1) Article 27 of the Cuban Constitution of 1976, amended in 1992, which called generally for the protection of the environment and linked it with the concept of sustainable economic development; (2) Law 1323 establishing the National Commission for the Protection of the Environment and Conservation of Natural Resources ("COMARNA") in 1976; (3) Law 33 on the protection of the environment and the rational use of resources in 1981; (4) Decree-Law 118, establishing the National System for the Protection of the Environment and charging the National Commission for the Protection of the Environment and Rational Use of Resources with the responsibility for developing environmental policies at the national level and overseeing compliance; (5) the establishment of the National Environment and Development Program in 1993 which aligned with acceptance of the United Nations' Agenda 21; and (6) the creation of the Ministry of Science, Technology, and the Environment in 1994.[134] Soon after these milestone environmental policies were established, Cubans identified several problems with them.[135] For example:

> Roberto Acosta, an expert in oil and hydrocarbon pollution who served on COMARNA and the National Environmental Commission pointed in particular to a contradiction in the former management structure of environmental policy in the country, in which certain ministries were administrators of environmental matters of the same resource that they exploited in order to fulfill their productive objectives. As a consequence of this situation, these administrators played the roles of "judge" and "party to the action" simultaneously, which led, on occasion, to faulty decisions and to little enforcement of the conditions established in the environmental evaluations that had been developed.[136]

Thus, even as late as the 1990s, the environmental protections in place in Cuba were effectively meaningless because of conflict of interest problems.

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131. *Id.* at 68. The colonial period in Cuba dates from 1492 to 1898. *Id.*
132. Romero, *supra* note 129, at para. 3.
133. STRICKER, *supra* note 130, at 70.
134. *Id.* at 70-71.
135. *Id.* at 73.
136. *Id.*

These six milestones eventually led to the passing of the Framework Law on the Environment (Law Number 81) of 1997 by the Cuban government.[137] Law 81 strengthened the environmental impact assessment procedures.[138] The law requires "a detailed description of the characteristics of a planned project or activity, including a description of its technology, which is submitted for approval through a process of environmental impact assessment. Well-founded information must be provided. . ."[139] The law still allows, however, for projects that could have significant environmental effects and for projects that require certain controls in order to meet the standards of the law as long as an environmental license is issued by the Ministry of Science, Technology, and the Environment.[140] Thus, it appears to remain relatively easy to move forward with a project that would negatively impact the environment in Cuba.

Oliver A. Houck[141], Professor of law and director of the Environmental Law Program at Tulane University, argues that Law 81:

> is more ambitious in its goals and its details than any comparable legislation in the United States or Western Europe because, among other reasons, it was started relatively *de novo*. Its 163 separate articles embrace what would be, in the United States and the European Union, separate programs. . .It is hard to think of a significant environmental issue omitted—which makes the task ahead, the implementation of these provisions, all the more daunting.[142]

Furthermore, Law 81 has been described as a collection of expressions of political will and government officials have struggled to translate these expressions into rules and regulations that can be practically carried out.[143] Therefore, although Cuba's environmental policy appears to be more stringent than that of the United States, it is actually weaker due to inability of the Cuban

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137. *Id.* at 70.
138. *Id.* at 75.
139. *Id.*
140. *Id.* at 76.
141. Professor Oliver A. Houck is a professor of law at Tulane University Law School and teaches several courses in the environmental law discipline. *See* Tulane University Law School, Faculty, Oliver A. Houck, http://www.law.tulane.edu/tlsfaculty/profiles.aspx?id=430&vpubcat =General% 20Publications#menu (last visited Nov. 24, 2009). Professor Houck received his Juris Doctorate from Georgetown University. For additional biographical information, see *Id.* Professor Houck participated in an environmental law exchange with the Cuban government from 1997-2000. STRICKER, *supra* note 130, at 79; Professor Houck has authored additional articles on environmental law in Cuba. *See generally e. g.*, Oliver A, Houck, *Thinking About Tomorrow: Cuba's "Alternative Model" for Sustainable Development*, 16 TUL. ENVTL. L. J. 521 (2003); Oliver A. Houck, *International Tourism and the Protection of Cuba's Coastal and Marine Environments*, 16 TUL. ENVTL. L. J. 533 (2003).
142. STRICKER, *supra* note 130, at 78-79.
143. *Id.* at 81.

agencies to implement and enforce such a comprehensive initiative.

One aspect that Cuba has recognized as a problem with respect to implementation of its environmental policies is the environmental education sector.[144] In the same year that Cuba devised Law 81, it also promulgated its national environmental education strategy with the goal of educating students, professionals, and the public at large about the environmental laws in place.[145] Under the strategy, an environmental dimension school system is introduced in order to educate students; and workers and professionals are educated through programs at the sectoral level.[146] The public at large would be educated through public campaigns and mass media coverage.[147] Since environmental education has been "generally viewed as divorced from the historical social, political, and economic realities of Latin America," the process of educating and empowering Cubans will likely take place slowly.[148] However, the fact that Cubans are beginning to recognize the root of the implementation problem denotes progress.[149] Still, in comparison to America, Cuba is far less sophisticated with regard to education about environmental issues and the Green Movement.[150]

B. The Cuban Economy as a Factor

The economic situation in Cuba is a contributing factor to the sluggish development of its environmental policy.[151] After the United States declared an economic embargo against Cuba, Cuba developed a relationship with the former Soviet Union and relied upon the Council of Mutual Economic Assistance rather than focusing on becoming more self-sufficient.[152] As a result, research about agricultural and renewable energy sources and other advancements did not occur until the socialist bloc collapsed and Cuba suffered an all-out economic and political crisis.[153] Since the collapse, Cuba's economy has suffered and Cuba has been forced to rely mainly on foreign investment as a source of capital accumulation.[154] For example:

> The Cuban government has entered into a variety of pacts with foreign investors in creating co-owned enterprise . . . [w]hile certain social service-related industries are not permitted to be

144. *Id.* at 93.
145. *Id.* at 95.
146. *Id.*
147. *Id.*
148. *See id.* at 97-98.
149. *Id.* at 98.
150. Marcelle, *supra* note 67, at para. 2.
151. STRICKER, *supra* note 130, at 122.
152. *Id.*
153. *Id.*
154. *Id.* at 123.

> owned by foreign investors[;] two of Cuba's largest industries, tourism and mining (and the most potentially environmentally destructive), fall within the public-foreign ownership sector.[155]

The expansion of Cuba's oil program is consistent with this heavy reliance on foreign investment. Because Cuba is too economically poor to exploit the oil found in the OCS, it seeks foreign partners who will purchase leasing blocs and drill the oil and then share the profits with Cuba.[156] Many economists in the United States urge that the economic embargo be lifted against Cuba in the alternative if Congress refuses to lift the OCS Moratorium here.[157]

C. *Energy Policy in Cuba*

The future of Cuba's current energy sector looks dismal. In the 1970s and 80s, Cuba depended on a single foreign source with contractual payment terms and subsidized pricing for over fifty percent of its oil supply.[158] This is still true.[159] Similar to the United States, Cuba must also achieve energy independence in order to make a transition and improve its economic situation. As of 2006, Cuba had a domestic demand for approximately 160,000 barrels of crude oil per day.

Due to the absence of heavy oil refining, the 68,250 barrels per day produced by Cuba's present onshore/coastal efforts is used directly as boiler fuel for its electric, nickel, and cement industries.[160] To make up for the 90,000 barrels per day shortfall, Cuba imports from Venezuela's national oil company.[161] According to economists, if Cuba makes a transition to a market economy, its oil consumption would more than double.[162] These Economists suggest that Cuba's future energy plan be focused on modernization of energy infrastructure and on a balanced sourcing of oil, natural gas, and ethanol.[163] If Cuba becomes oil self-sufficient and a net crude oil exporter it may change U. S. economic policy toward Cuba.[164]

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155. *Id.* at 123-24.
156. *See supra* Part II.
157. *See supra* Part II.
158. Jorge R. Pinon, *Cuba's Energy Future*, Cuba Transition Project-Institute for Cuban-American Studies, University of Miami, at para. 11, (May 2007), *available at* http://ctp.iccas.miami.edu/ FOCUS_Web/Issue85.htm.
159. *Id.*
160. *Id.* at para. 8.
161. *Id.* at para. 9.
162. *Id.* at para. 10.
163. *Id.* at para. 15.
164. *Id.* at para. 16.

D. *Comparative Analysis*

In the last decade, Cuba has made some effort to reform its environmental law and educate its public about environmental issues. However, Cuba's environmental and economic policies remain stages behind the United States and other industrialized nations. This accounts for the vast differences in policy between Cuba and the United States specific to the issue of offshore oil drilling.

1. *Implementation of Environmental Laws*

In comparison to the United States, Cuba got a much later start to developing an effective system of environmental laws.[165] Although Cuba began enacting environmental laws in the 1970s, the same time that the modern environmental movement took hold in the United States, these laws were largely ineffective.[166] Cuba did not reform its environmental laws until the late 1990s, and implementation remains an obstacle.[167] This obstacle persists because, as experts argue, Cuba's main environmental initiative, Law 81, is an "over-ambitious sweeping policy."[168] Cuban lawmakers threw everything they could possibly think of into Law 81 in an attempt to make up for years of stagnation in environmental law. This has made Cuba appear to be an aggressive protector of its environment, but in reality even attributing meaning to many of the Law 81 provisions has proven to be a struggle.[169] Implementation, then, is an even bigger struggle if clear rules and regulations cannot even be extracted from the sweeping text of the law. In contrast to having one sweeping environmental law as a cornerstone, the United States has separate initiatives geared toward more specific environmental issues; for example, one act focusing on air pollution, another on water pollution, and so forth.[170] As a result, it has been much easier for environmental agencies in the United States to determine the intent behind the statutes and effectively implement them. This is not to say that the United States is without its enforcement problems. As previously discussed in Part I of this Note, sanctions for non-compliance have been criticized as being the equivalent of a slap on the wrist. Still, the organization of environmental laws in the United States in more conducive to effective implementation compared to Cuba's sweeping initiative.

Furthermore, even substantively speaking, Cuba's environmental policy is much more tolerant of industrial projects which would negatively impact the environment. Cuba's history of economic impoverishment further contributes to this higher tolerance. As previously discussed, although Law 81 seems to

165. *See supra* Part III.A.
166. *See supra* Part III.A.
167. *See supra* Part III.A.
168. *See supra* Part III.A.
169. *See supra* Part III.A.
170. *See supra* Part I.A.

strictly require environmental impact statements for any project, a further read indicates that a project that degrades the environment will likely still be allowed to proceed upon obtaining of an environmental license.[171] Thus, it is much easier to move forward with projects that would have negative environmental effects in Cuba than in the United States. Based on the economic situation in Cuba,[172] projects that would greatly stimulate the Cuban economy would be allowed to proceed despite their impact on the environment. In contrast, as an economically prosperous nation, the United States is less tolerant. Typically, the United States has the means to create environmentally friendly substitutes for projects that would have too great a negative effect on the environment. This comparison explains why the Cuban government is willing to expand its oil program in the Gulf Coast, and why the United States government has been apprehensive.

2. Public Sentiment

Public sentiment first prompted the United States Congress to take a closer look at offshore oil drilling and its impact on the environment.[173] Several devastating oil spills presented the American public with images depicting deceased marine animals and wildlife—much like an act of genocide.[174] These images elicited an emotional response and American constituents demanded that Congress tighten the leash on oil companies. Oil spills of such a magnitude did not impact Cuba; thus, such strong public sentiment against offshore oil drilling did not arise early on.[175] The most recent notable oil spill near the coast of Cuba occurred in March of 1998 in Matanzas Bay.[176] The spill occurred when two oil tankers collided.[177] Although the spill polluted Cuba's coastline, a BBC News correspondent in Cuba reported that "so far the white sand beaches and crystal blue waters seem to have escaped any pollution."[178] Thus, the Cuban people have not yet seen the full extent of the harm that an oil spill can do to a coastline. Perhaps if the oil spill had impacted Cuba's tourism industry to a great extent the Cuban people would have pushed for more restrictions on offshore oil drilling.

Public sentiment in Cuba regarding offshore oil drilling has never been strong one way or another because historically the Cuban public has not been very educated on environmental issues.[179] Although Cuba has taken strides

171. *See supra* Part III.A.
172. *See supra* Part III.B.
173. *See supra* Part II.
174. *See supra* Part II.
175. BBC News, *Oil Spill on Cuba's Northern Coast*, para. 2, Mar. 28, 1998, http://news.bbc.co.uk/2/hi/americas/70779.stm.
176. *Id.*
177. *Id.* at para. 1.
178. *Id.* at para. 5.
179. *See supra* Part III.A.

toward educating its citizens, it has a long way to go before its citizens will be able to fully understand environmental issues and their global impact.[180] This lack of environmental education among Cuban citizens is an impediment to compliance with the regulations set forth in Law 81.[181] If Cubans had a better understanding of their environmental laws and an appreciation for the purpose behind the laws, they would have more of a desire to comply with the laws.[182] In turn, they may even begin to demand stricter regulations much like United States' citizens have done in the past. Therefore, public pressure regarding the offshore oil drilling issue in Cuba will not be as prevalent as it is in the United States. Because public sentiment seems to be a major driving force behind environmental laws in the United States, lawmakers have a much more difficult time trying to relax environmental policy.[183] Such a hurdle does not exist in Cuba. This helps to explain why the issue of offshore oil drilling and the effects it can have on the environment is much less contentious in Cuba as compared to the United States.

V. RECOMMENDATIONS FOR APPROACHING THE FUTURE OF OFFSHORE OIL DRILLING

Commentators on both sides of the political spectrum have weighed in on the issue, with environmentalists arguing to keep the status quo and the pro-energy independence side urging Congress to lift the ban. Thus far, such extreme positions have yielded little action. This Part of the Note will offer suggestions and assess the possibility of finding a middle ground.

A. Recommendations Offered by the Office of Management and Budget

After former President George W. Bush lifted the executive ban on offshore drilling in July of 2008, Congress considered several resolutions related to the legislative ban.[184] These resolutions, which included countless earmarks, proved to be very contentious and ultimately failed.[185] Commentators noted that, in considering these resolutions, Congress was simply wasting time on legislation that did not stand a chance of becoming enacted.[186] In response to Congress's stagnation, the OMB issued a statement making recommendations for how best to confront the OCS drilling issue.[187]

Foremost, the OMB recommends that Congress lift the legislative ban on

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180. *See supra* Part III.A.
181. *See supra* Part III.A.
182. *See supra* Part III.A.
183. *See supra* Part I.
184. Nicole Daigle, *President Bush Lifts Executive Moratorium on Drilling in OCS*, WASH. REP., para. 1, July 15, 2008, *available at* http://www.ipaa.org/news/wr/WR-2008-07-15.pdf.
185. *See supra* Part I.C.
186. *See supra* Part I.C.
187. *See* OMB Statement, *supra* note 84.

OCS offshore drilling.[188] Based on the arguments set forth in Part I of this Note, and the consideration of the environmental effects that the expansion of Cuba's oil program will have on the United States, this is the best course of action. As previously discussed, the most persuasive arguments against lifting the OCS Moratorium are environmental.[189] These arguments, however, no longer hold up because Cuba's oil leasing program would result in the same environmental degradation that opponents claim would result if the United States were to allow offshore drilling in the OCS. Even if the threat of Cuba's expansion did not exist, the environmental arguments are still weak. Although opponents of lifting the OCS Moratorium argue that offshore drilling contributes to global warming, risks oil spills, and releases toxic chemicals into the ocean, these arguments are outdated and have been confronted by recent studies showing that the environmental footprint of offshore oil drilling is negligible.[190] Furthermore, offshore oil drilling may actually decrease the occurrence of oil spills in the coastal waters surrounding the United States.[191] As discussed in Part II of this Note, the majority of oil spills are a result of tanker accidents.[192] If the United States keeps the OCS Moratorium in force, it will mean more oil will need to be transported to the United States via oil tankers.[193] Since the United States is one of the top oil consuming nations, oil tanker traffic will remain the same or even increase around the United States.[194] Thus, keeping the OCS Moratorium intact does not serve as a preventative for oil spills at all; rather, it may even increase the odds for major oil spills surrounding the United States.

Studies have shown that the environmental effects of offshore drilling are insignificant.[195] Other nations, such as Canada and Norway, known for being far more environmentally friendly in comparison to the United States, allow offshore drilling.[196] "Offshore oil and natural gas production operations have a

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188. *Id.*

189. *See supra* Part I.

190. Suzanne Sitherwood, *Let Coastal States Drill Offshore if they Want to*, J. CONST., July 17, 2008, at para. 5, *available at* http://www.ajc.com/opinion/content/opinion/stories/2008/07/17/gased.html.

191. *See An Outdated Ban*, WASH. POST, June 28, 2008, at A24, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/06/27/AR2006062701646.html.

192. *See id; see also supra* Part II.

193. *See An Outdated Ban*, *supra* note 192.

194. *See id.*

195. *See* Sitherwood, *supra* note 191.

196. *See* Frank T. Manheim, *U. S. Offshore Oil Industry: New Perspectives on an Old Conflict*, GEOTIMES, Dec. 2004, *available at* http://www.geotimes.org/dec04/feature_Norway.html (discussing the approaches to offshore oil drilling taken by nations known for being more environmentally friendly). "Norway has evolved toward integrated systems that foster continuously increasing standards and efficiency and an environmentally aware public...its economic and technical success...provides new perspectives that may help the United States break out of the historic clash between industry and environmentalists." *Id.* Since the early 1980s, Norway made a decision to develop offshore sources of oil rapidly rather than conserve reservoirs for the future. *Id.* To rationalize this, part of the profits from exports were

long history of environmentally sensitive and safe performance. No other nation in the world has such fertile offshore resources yet rules them off limits."[197] If limitations are placed on offshore drilling, it can be done in an environmentally safe manner. Proponents of lifting the OCS Moratorium, including the OMB, are not simply suggesting that the ban be lifted and that oil companies be allowed to drill free from any regulations. Rather, the ban can be lifted and offshore drilling can be coupled with aggressive renewable energy policies or specific types of drilling technology can be required.[198] For example, the OMB recommends that Congress extend and improve existing renewable energy tax credits in addition to lifting the OCS Moratorium.[199] This would allow the United States to begin producing oil domestically while still encouraging increased use of renewable energy sources.

B. Limitations and Regulations Upon Lifting the OCS Moratorium

Proponents of lifting the OCS Moratorium altogether have proposed other limitations and regulations on offshore drilling so that drilling can be done in the safest manner possible. As previously stated, if the United States will suffer the negative environmental effects from Cuba's exploration anyway, it can cut its losses by lifting its own ban and imposing the regulations chosen by its agencies.[200] As compared to Cuba and the foreign nations that Cuba plans to lease exploration blocs to, the United States is in a better position and has a greater incentive to make certain that offshore drilling surrounding its coasts is operated in the safest possible manner.[201] One option is for the United States Congress to lift the OCS Moratorium but mandate that "directional drilling" be the method used to develop the offshore oil resources.

Directional drilling, often referred to as slant drilling, is the practice of drilling non-vertical wells.[202] This drilling method has many benefits. Using the directional drilling technique, oil companies can drill a number of wells from a single starting point.[203] This decreases the number of well pads required to drain an oil or gas field, and thus, decreases the overall surface disturbance caused by offshore drilling.[204] Directional drilling is also beneficial because it

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allocated to a fund which was designed to help transition to the time when offshore resources eventually become depleted. *Id.*

197. *See* Sitherwood, *supra* note 191.

198. Dan Eggan & Steven Mufson, *Bush Rescinds Father's Offshore Oil Ban*, WASH. POST, July 15, 2008, at A08, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/07/14/AR2008071401049.htmlhtml?nav=rss_email/components&sid=ST2008071401842&pos=& s_pos=.

199. OMB Statement, *supra* note 84.

200. *See supra* Part II.B.

201. *See supra* Parts II, III.

202. Gerson Lehrman Group, Definition: Directional Drilling, http://www.glgroup.com/Dictionary/EI-Directional-Drilling.html (last visited Nov. 24, 2009).

203. NaturalGas.org, Directional and Horizontal Drilling, at para. 2, http://www.naturalgas.org/naturalgas/extraction.directional.asp (last visited Nov. 24, 2009).

204. Earthworks, Directional Drilling, at para. 2, http://www.earthworksaction.org/

allows oil companies to divert wells away from sensitive ecosystems; and companies can access oil by drilling a well that is miles away from the intended site.[205] Although this drilling method is more expensive than the traditional method of drilling vertical wells, according to the EPA, "[I]ncreased costs of directional drilling are often more than offset by increased production and the reduced need for drilling multiple wells."[206] Reducing the number of wells reduces the number of sites where oil drilling discharge might be released or where other accidents might occur.

Another option that can be coupled with lifting the OCS Moratorium is to update current infrastructure. Current oil platforms and infrastructure are out of date and have not kept up with technological advancements. For example, Platform B, located off of the coast of Santa Barbara, has barely changed since it was placed in the ocean forty-one years ago. This was the platform involved in one of the most devastating oil spills in history.[207] In recent years, high-tech computers, automatic shut-off valves, and tougher building materials on oil platforms have been developed to make drilling much safer.[208] However, given that most of the platforms surrounding the United States have remained unchanged for approximately the past forty years, these technological advancements have not been utilized and the industry is not as clean possible.[209] Thus, simply implementing the technology that has already been developed would be an easy way to make offshore drilling safer.

Along with updating the oil platforms, an extensive training program for workers on oil rigs and platforms should be mandated. This would help target those spills that occurred due to human error.[210] In addition, the platforms should be inspected in regular intervals to ascertain that they are in full operating condition and that the imposed technological advancements are present and in working order.[211] While these measures are costly, they attack the main concern surrounding offshore drilling, which is the environmental impact.[212]

The OMB has also recommended that the current restriction on oil shale development in parts of the Mountain West be lifted because doing so would produce a century's worth of oil imports for the United States.[213] This

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bpdirectionaldrilling2.cfm (last visited Nov. 24, 2009).

205. *Id.* at para. 4.

206. *Id.* at para. 6.

207. Zeke Barlow, *Drilling, Controversy Since 1969: Environmental Movement 40 Years Old*, VENTURA COUNTY STAR (California), Feb. 1, 2009, at para. 1-2, *available at* http://www.venturacountystar.com/news/2009/feb/01/political-will-and-public-sentiment-seem-to-ebb/.

208. Keefe, *supra* note 119, at para. 10-14.

209. *Id.*

210. Matthew Donatoni, Offshore Drilling, http://cseserv.engr.scu.edu/StudentWebPages/MDonatoni/ResearchPaper.htm (last visited Nov. 24, 2009).

211. *Id.*

212. *See supra* Part II.B.

213. JAMES T. BARTIS, ET. AL., OIL SHALE DEVELOPMENT IN THE UNITED STATES: PROSPECTS AND POLICY ISSUES 48, (2005), *available at* http://www.rand.org/pubs/monographs/2005/

recommendation indicates that the OMB is not just relying on offshore drilling in the OCS as the sole means of increasing domestic oil production. However, oil shale development in the Mountain West has been very controversial because America's most vast and cherished national parks are located in this region. Environmentalists are also concerned about the amount of water and energy it would require to extract from the oil shale, and where the water would come from. Recently, the Obama Administration blocked more Bush-era oil shale development leases.[214] This recommendation by the OMB, thus, seems to be even more contentious than lifting the OCS Moratorium. This makes sense considering that the major concern associated with offshore drilling in the OCS is the negative impact on coastal environments surrounding the United States; and oil shale development actually brings oil extraction inland. Although the risk of major oil spill accidents is slim with regard to oil shale development, the high levels of air and water pollution inland bring environmental risks closer to home and outrage environmentalists. Environmentalists claim that oil shale development "releases more greenhouse gases than traditional fuels."[215] Thus, increased oil shale development seems to be a less favorable option than opening up the OCS to offshore drilling.

C. Sanctions

Increasing sanctions against oil companies is another option that could be coupled with lifting the OCS Moratorium. If oil companies do not comply with the mandated drilling methodology or fail to adopt the technological advancements that make offshore drilling safer, they must be subject to harsh sanctions. However, because oil companies often turn such great profits, imposing a fine on the companies may not serve as a strong enough deterrent. For example, the $2.64 million dollar penalty imposed against Exxon Mobil in August of 2008 following a massive PCB leak in the Pacific Ocean, was under one percent of the $11. 68 billion in profits earned by Exxon Mobil last quarter alone.[216] While these relatively small punitive awards do not have a big financial impact on the oil companies, media coverage of the judgments can be damaging to the reputations of the companies. This contributes to

RAND_MG414. pdf. This report was prepared for the National Energy Technology Laboratory of the United States Department of Energy. *Id.* For more information on oil shale development studies, *see generally* EDWARD W. MERROW, CONSTRAINTS ON THE COMMERCIALIZATION OF OIL SHALE (1978), *available at* http://www.rand.org/pubs/reports/2006/R2293.pdf.; JAMES T. BARTIS, ET. AL., NEW FORCES AT WORK IN MINING: INDUSTRY VIEWS OF CRITICAL TECHNOLOGIES (2001), *available at* http://www.rand.org/pubs/monograph-reports/2007/MR1234.pdf.

214. Jim Tankersley & Nicholas Riccardi, *Administration Blocks More Bush-era Oil Shale Development Leases*, L.A. TIMES, Feb. 26, 2009, at para. 2, *available at* http://articles.latimes.com/2009/feb/26/nation/na-oil-shale26.

215. Ayesha Rascoe, *U. S. Interior Scraps Bush Research Oil Shale Leases*, REUTERS, Feb. 25, 2009, at para. 5, http://www.reuters.com/article/environmentNews/idUSTRE51O78020090225.

216. *See supra* Part I.

deterrence.[217] If combined with other recommendations discussed above, the deterrent effect of sanctions has the potential to become greater yet. For example, if more frequent and thorough inspections of oil rigs and platforms are ordered, oil companies are at risk for more frequent imposition of sanctions.

D. Middle Ground

Allowing offshore drilling in the OCS, together with heightened safety regulations and other clean energy mandates, is the optimal solution because it reaches a middle ground. In the past, this issue has been addressed with extreme polarity. Political debate has turned the issue into a game with winners and losers rather than fostering discussion of all options and encouraging compromise. Amidst the 2008 presidential election, politicos and policymakers were even more reluctant to suggest more moderate solutions. This has been referred to as the "everywhere versus nowhere" trap:[218]

> The "everywhere versus nowhere" trap results when aggressive energy developers demand the unconstrained right to drill everywhere while environmental extremists assert that drilling can occur nowhere. This is the stalemate we currently have in the United States, with disastrous consequences. Emotion trumps science. Regulation blocks innovation. And sound methods of achieving energy independence are overlooked and underdeveloped.[219]

It is suggested that the United States develop a policy in which environmental concerns are carefully balanced with energy needs. Some areas could be off limits for offshore drilling, and drilling could be carefully circumscribed in other areas. It is argued that environmental concerns should inform the oil and gas industry rather than preempt it.[220]

Lifting the OCS Moratorium and directing oil companies to abide by heightened environmental and safety regulations is the appropriate compromise and allows the United States to finally climb out of the "everywhere versus nowhere" trap. If offshore drilling can be done in the OCS with minimal negative impact on the environment then there is not any reason for environmentalists to be concerned. Lifting the OCS Moratorium will allow U. S. oil companies to turn profits and will lessen the United States' reliance on

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217. *See generally* Kenyon Fields, *The Painful Effects of Oil Dependency: Exxon's Human Toll* WHATCOM WATCH ONLINE, Jan. 2002, http://www.whatcomwatch.org/old_issues/v11i01.html.

218. Newt Gingrich, *Report from Norway: Why They Don't Have an Energy Crisis and We Do*, HUMAN EVENTS, June 10, 2008, at para. 2, http://www.humanevents.com/article.php?id=26931.

219. *Id.* at para. 3.

220. *See id.*

foreign nations for oil. Complying with the heightened regulations will not be too burdensome on the industry. Therefore, it is possible for industry and environmentalism to compromise.

D. Transition Fund

Another recommendation worth considering, aimed at comforting those who wonder what will happen when offshore drilling resources in the OCS become depleted, is for the United States to establish a fund with money reserved for the transition from offshore resources (once depleted) to another resource.[221] Other nations have used profits from exporting oil obtained from the offshore resources to build such a fund.[222] Establishing a transitional fund[223] is a wise back up plan. Several other nations are also considering establishing such a fund premised on the idea that it is important to invest in the "urgent, widespread transition to a sustainable energy system," to "ensure that future generations would benefit once the oil was gone," and to "tackle climate change."[224] Thus, the United States should still consider and plan for alternative energy sources while pursuing offshore drilling so that it does not end up in an energy crisis upon the depletion of offshore drilling resources.

E. Relations with Cuba

As an alternate option to the United States' lifting its OCS Moratorium, policy analysts have suggested that the United States keep the Moratorium in place but lift the economic embargo against Cuba in order to enable the United States to bid on the offshore blocs that Cuba plans to lease out to foreign nations.[225] While a discussion of the economic embargo goes well beyond the scope of this Note, it is important to take notice that it is an option that has been placed on the table. Even without a full discussion of this option, the main concerns with it can shed some light on its viability. As discussed in Part I of this Note, it makes little sense for the United States to lift an economic embargo, which has been in place since 1962, just to lease Cuban offshore drilling blocs that are so close to the U. S. coast that they would subject the United States to the same risks of environmental degradation.[226] Granted, lifting the economic embargo on Cuba would be beneficial in other areas of

221. This is modeled after a fund created in Norway. *See supra* note 196 and accompanying text.

222. *Id.*

223. *See* New Economics Foundation, '*Windfall Tax' Call on Oil Companies As Profits Announced*, para. 6, http://www.neweconomics.org/gen/hookedonoil_231006.aspx. (last visited Nov. 24, 2009). These transitional funds are often referred to as "Oil Legacy Funds." *Id.*

224. *Id.* at para. 6-9.

225. *See supra* Part II.

226. Doug Palmer, *Business Urges Obama to Loosen Cuban Embargo*, REUTERS, Dec. 4, 2008, para. 7, http://www.reuters.com/article/vcCandidateFeed2/idUSTRE4B37912008 1204.

trade, but if the primary motive for lifting the embargo is offshore oil drilling related then it makes very little sense.[227] There are much more accessible, less controversial avenues for allowing offshore drilling in the United States. By lifting the OCS Moratorium the United States would achieve the same benefits as it would if it leased drilling blocs from Cuba, but would also achieve greater control and oversight over the industry.[228]

VI. CONCLUSION

If the United States does not take action and lift the OCS Moratorium, in combination with imposing the other recommended environmental and safety regulations, it will remain heavily dependant on foreign nations for oil. Even more daunting, the United States will be forced to sit back and watch as Cuba and other nations reap the economic benefits of a substantial supply of oil so close to its own coastline. After years of debate amongst extremists on both sides of the political spectrum, the issue of offshore drilling in the OCS has been stagnated. In light of Cuba's plans to expand its oil program and with the introduction of improved technology, the environmental arguments, once convincing against offshore drilling, are now weak. After all, lifting the OCS Moratorium does not give oil companies free reign; American oil companies will be subject to strengthened technological and safety regulations, more frequent inspections, and more severe sanctions in the event of non-compliance. Because there is little the United States can do to prevent Cuba from leasing out offshore exploration blocs, located within forty-five miles of the U. S. coastline, it is wise for the United States to be proactive. If offshore drilling is to be done so close to the United States, it should be done the United States' way. As discussed in Part III of this Note, environmental policy in Cuba has historically lacked enforcement and the public has little knowledge of and appreciation for the environmental risks associated with offshore drilling.[229] Thus, the regulations over offshore drilling imposed by the Cuban government would likely be much less stringent than regulations imposed by the U. S. Government.

The American public, American businesses, and even some environmentalists have become increasingly supportive of opening up the OCS for offshore oil drilling.[230] Drilling technology and methodology have made major advancements, and the oil industry's reputation has become cleaner since the 1980s when the OCS Moratorium was first enacted. The United States' economy would be stimulated by participation in offshore oil drilling. The benefits are growing, and the risks have minimized. Thus, the optimal solution would be for the United States to lift the OCS Moratorium, with the directional

227. *Id.* at para. 2.
228. *See supra* Part I.
229. *See supra* Part III.
230. *See supra* Part II.

drilling method mandated where possible, increase the frequency of inspections, strengthen enforcement, make sanctions more severe, and create an "oil legacy" fund in preparation for a transition into more sustainable energy development.[231] The United States should continue to research other renewable, alternative energy sources as well. Taking these steps will allow the United States to remain competitive in the international marketplace, develop a self-sufficient energy sector, solve a political battle that has been looming for years, and minimize any negative impact associated with Cuba's offshore exploration bloc leasing program.

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231. *See supra* Part IV.

HERE I STAND:

AN ASSESSMENT OF PRESIDENT GEORGE W. BUSH'S CALL FOR INTERNATIONAL RELIGIOUS FREEDOM IN A 21ST CENTURY PEOPLE'S REPUBLIC OF CHINA

Jonathan A. Knoll*

I. INTRODUCTION

Throughout his administration and, in particular, his foreign policy initiatives, President George W. Bush[1] pushed for the spread of freedom throughout the world. President Bush believed that in order to combat the evil of tyranny and terrorism, the United States and the Western world must advocate the spread of democracy.[2] One of the aspects of this agenda was the promotion of international religious freedom,[3] whereby nations allow their citizens the opportunity to have the freedom to practice religion and worship without fear of government retribution.[4] By allowing religious freedom, democracy is reinforced and non-democratic nations are put on the path to becoming free from the grip of terror groups and tyranny.[5] Thus, religious freedom leads to prosperity amongst citizens and creates a safer and more secure world.[6]

One significant country where Bush implemented this policy was in the

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1. George Walker Bush, the 43rd President of the United States of America; 2001-2009.

2. George W. Bush, President, President Bush's Second Inaugural Address (Jan. 20, 2005) (transcript *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2005/01/20050120-1.html) [hereinafter Second Inaugural Address].

3. *See generally* George W. Bush, President, President Bush Honors the 10th Anniversary of the International Religious Freedom Act (July 14, 2008) (transcript *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2008/07/20080714-1.html) [hereinafter 10th Anniversary]. In honor of the Religious Freedom Act, Bush called on all nations to promote religious freedom, in order to benefit all of society. *Id.*

4. *See infra* Part II.A.

5. *See id.*; *see generally* Second Inaugural Address, *supra* note 2.

6. *See* Second Inaugural Address, *supra* note 2.

People's Republic of China.[7] In various speeches, policy initiatives, and visits to China, Bush repeatedly called on Chinese President Hu Jintao[8] and the Chinese Communist Party[9] to lift restrictions on the practice of religion and to allow the Chinese people to practice religion with the same freedoms and opportunities enjoyed by citizens of the Western world.[10] In essence, Bush demanded that China end its state-run religious policies and enable Chinese citizens to congregate and worship freely without fear of retribution from the Chinese government.[11]

While China has made great strides toward modernization, attention continues to focus on its documented human rights violations.[12] In particular, the Chinese government under the controlling Chinese Communist Party[13] continues to control "official" churches and places of worship.[14] While China constitutionally allows for the freedom of religion,[15] this policy remains subservient to other governmental policies in accordance with preserving "social harmony."[16] This means that other non-state controlled and international religious organizations and places of worship, while allowed to operate, remain subject to the rules of the government and, in some cases, open to governmental abuse.[17]

As recently as the 2008 Summer Olympic Games in Beijing, Bush urged

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7. *See infra* Part II. References to China or Chinese in this Note shall refer to the People's Republic of China or the PRC, unless otherwise noted. While much of Bush's focus has been on the Middle East, his freedom agenda has also extended to China.

8. Hu Jintao became the President of the People's Republic of China in 2003 and was re-elected as President in 2008. Hu Jintao, http://www.gov.cn/english/2008-03/15/content_922944.htm (last visited Oct. 10, 2009) [hereinafter Hu Jintao]; *Hu Jintao Reelected Chinese President*, CHINA DAILY, Mar. 15, 2008, *available at* http://www.chinadaily.com.cn/china/2008npc/2008-03/15/content_6539302.htm.

9. The Chinese Communist Party is the ruling political party in the country. The Communist Party of China, http://www.gov.cn/english/2007-10/22/content_923081.htm (last visited Nov. 7, 2009).

10. Traditionally, the Chinese government, while allowing its citizens to practice religion, has restricted and even persecuted believers if these practices disrupted governmental order. *See infra* Part I.A-B, E.

11. *See infra* Part II.

12. *See infra* Part I.E. and note 201.

13. It should be noted that the author agrees that due to the repressive nature of the Chinese government (*see infra* Part I.E.), political reform is needed in China. The author believes this would ensure freer elections, independent political parties, and a more democratic, capitalistic system. However, this Note will only pertain to China's religious policies.

14. *See infra* Part I.A-B, E.

15. *See infra* Part I.A.

16. *See* Edward Cody, *China's Leader Puts Faith in Religious: Hu Sees Growing Spiritual Ranks as Helpful in Achieving Social Goals*, WASH. POST, Jan. 20. 2008, at A21, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/01/19/AR2008011902465_pf.html. Cody notes that the idea of social harmony arose under Hu Jintao, and that in theory, "The concept, in effect an appeal for good behavior, was designed to replace the moral void left when the party long ago jettisoned historical Chinese values and, more recently, loosened the zipped-tight social strictures of communism under Mao Zedong." *Id.*

17. *See infra* Part I.C, E.

China to allow true religious freedom, i.e., one that is free from government intrusion.[18] Through his speeches, visits to Chinese churches, and meetings with President Hu Jintao, Bush remained adamant that for China to become a truly free and modern society, and thus a more influential member of the international community, it must allow its citizens to practice religion in freedom.[19] While Bush has made progress for better American-Chinese relations in regard to promoting religious freedom and an increase of awareness in China, the debate remains as to whether China internally, as well as publically, will fully heed Bush's call for religious freedom as a natural right, rather than a political tool.[20]

As the Obama administration[21] began in 2009, China continued to remain at odds with the United States over issues such as the role of the Dalai Lama and the Vatican.[22] In addition, while the world heard Bush's call for religious freedom, its remains questionable whether Hu has fully heeded those calls.[23] Because the Chinese government controls the media,[24] it also remains debatable whether the Chinese people fully know the extent to which America has been pressuring China to allow religious freedom.[25]

Thus, while Bush's efforts to modernize China's religious practices affected American-Chinese relations throughout the entire eight years of the Bush administration, China continues to face pressure from the United States and the West to become a more open society.[26] This issue of religious freedom will continue to be relevant for President Barack Obama.

This Note will examine the effect of the Bush administration in shaping Chinese religious policy and provide recommendations to continue to promote religious freedom in China. Part I presents a brief overview of the history of modern Chinese religious policy. Beginning with constitutional and recent statutory regulations on the freedom of religion, this Note continues with an examination of how the government interacts with international religious organizations.

In addition, Part I outlines recent American policy actions towards the promotion of religious freedom under the International Religious Freedom

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18. *See infra* Part II.D.

19. *See infra* Part II.B-D.

20. *See infra* Parts II.A, C., III.

21. President Barack Hussein Obama, the 44th President of the United States of America; 2009 through present.

22. *See* Mark Magnier, *China Fuming Over Bush's Visit with the Dalai Lama*, L.A. TIMES, Oct. 17, 2007, at A3, *available at* http://articles.latimes.com/2007/oct/17/world/fg-tibet17; *See also infra* Part II.B-C.

23. *See infra* Part II.C.

24. Traditionally, the Chinese government restricts the content of the print and TV media in China. *See* Carin Zissis & Preeti Bhattacharji, *Media Censorship in China*, COUNCIL ON FOREIGN REL., Mar. 18, 2008, *available at* http://www.cfr.org/publication/11515/.

25. *See infra* Part II.D.

26. *See infra* Parts I.D-E and II.D.

Act.[27] Beginning with a brief description of its purpose and elements, this Note provides an analysis of Bush's view on the Act in the context of American foreign policy.[28] Finally, Part I offers an assessment of the Act's effectiveness on China's religious policy, with statistics of where China stands in terms of religious freedom, practices, and abuses from the beginning to the end of the Bush administration.[29]

Part II outlines Bush's doctrine of religious freedom, focusing on the different efforts and strategies employed by the Bush administration to increase religious freedom in China. Part II begins by discussing Bush's view of religion in foreign affairs and his policy of religious freedom in regards to China.[30] It outlines strategies used by Bush to encourage religious freedom in China, such as visits with Chinese churches and religious leaders.[31] Specifically, Part II documents Bush's visits to China in 2005 and 2008 where he promoted religious freedom.[32] During the 2008 visit, as international pressure mounted on Bush to boycott the opening ceremonies of the Beijing Olympics, Part II examines Bush's decision to attend the ceremonies and in doing so, use the opportunity to promote religious freedom.[33]

In addition, Part II also presents an analysis of Bush's interaction with Chinese President Hu Jintao and Hu's views on religious freedom.[34] It focuses on how Bush's push for religious freedom influenced the Chinese president and how American policies on subjects such as the Dalai Lama and the Vatican impacted China's relationship with the United States and the Western world on other international issues.[35]

After analyzing the impact Bush's efforts had on both Chinese religious practices and American-Chinese relations, Part III offers an early assessment of Bush's legacy on promoting religious freedom in China. Part IV concludes by offering recommendations for ways the Obama administration can build on Bush's efforts and more effectively pressure China to become more open to religious freedom, with the hope that it will further China's integration as a free and peaceful member of the international community.

Like President Bush, this Note argues that a freer and more democratic China with respect to religious freedom will ensure a more prosperous and safer world. While President Obama must remain vigilant on this issue, in the end the Chinese government and its people must be willing to embrace religious freedom. Nonetheless, the Obama administration must remember that in order for true freedom around the world to occur, religious freedom must be a central

27. *See infra* Part I.D.
28. *See infra* Part I.D.
29. *See infra* Part I.E.
30. *See infra* Part II.A.
31. *See infra* Part II.B-D.
32. *See infra* Part II.B-D.
33. *See infra* Part II.D.
34. *See infra* Part II.C.
35. *See infra* Part II.C-D.

part. Hence, America should continue to engage the Chinese closely to ensure that the Chinese people one day have true religious freedom.

II. A BRIEF OVERVIEW OF THE ROLE OF RELIGION IN MODERN CHINA

A. The Role of Religion under the 1982 Chinese Constitution

It is important to know the current state of religion and religious freedom in a 21st century China. The current Chinese constitution[36] includes a limited reference to religious freedom. Under Article 36 of the current Chinese constitution, the Chinese people have the freedom to practice religion.[37] The constitution states, "No state organ, public organization or individual may compel citizens to believe in, or not to believe in, any religion; nor may they discriminate against citizens who believe in, or do not believe in, any religion."[38] Thus, the Chinese government constitutionally grants to its people the freedom to practice or not to practice religion.[39]

In addition, while the Chinese people may practice religion, the government retains authority to restrict religious practices, including restricting the content of worship activities and media. For example, the constitution states, "The state protects normal religious activities. No one may make use of religion to engage in activities *that disrupt public order*, impair the health of citizens or interfere with the educational system of the state."[40] Finally, religious practices remain under state sovereign control and not under the control of any foreign governments or agencies.[41]

Thus, the Chinese constitution grants freedom of religion and a right to be free from religion.[42] However, the right to practice religion remains under the control of the state in accordance with "public order," a phrase open to interpretation and a phrase that grants the government great latitude to guard against religious practices that it perceives as disruptive to the public, which in many cases has led to religious abuses.[43]

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36. Since the development of the People's Republic of China under Mao Zedong (1949 to present), China has had four constitutions: 1954, 1975, 1978, and its current constitution of 1982. Microsoft Encarta Encyclopedia Standard 2003, China: Constitution, copyright 1993-2002 Microsoft Corporation.

37. XIAN FA [Constitution] art. 36 (1982) (P.R.C.), *translation available at* http://www.gov.cn/ english/2005-08/05/content_20813.htm.

38. *Id.*

39. *Id.*

40. *Id.* (emphasis added).

41. *Id.* This regulation affects how international churches and places of worship relate to Chinese citizens. *See infra* Part I.C.

42. XIAN FA [Constitution] art. 36 (1982) (P.R.C.).

43. For example, the government arguably uses this power to silence and abuse religious leaders the government does not approve of. *See infra* Part I.E.

B. Recent Chinese Statutory Provisions Affecting Religion

While its constitution does not expressly detail the extent of religious freedom, recent statutory regulations in China provide more guidance. In 2006, the State Council[44] enacted regulations on religion "in accordance with the [Chinese] constitution."[45] These regulations discussed issues such as the right to religion, assembly, religious education, publication, and clergy. More importantly, these regulations highlight the restrictive nature of religion in China.

For example, Article 5 states, "The religious affairs department of the people's government at or above the county level shall, in accordance with the law, exercise administration of religious affairs that involve State or public interests. . . ."[46] This means the Chinese government has delegated its authority to regulate religious activity at its local and county levels.[47] However, while one may believe that this would allow for the people of each region and county to set religious policy, Communist party officials appointed by the National People's Congress control the local governments and provinces.[48] As such, the local governments remain linked to the policies of the national government, with seemingly little flexibility on religious issues.[49]

In terms of religious publications, the State Council implemented strong restrictions on the content and types of religious materials. For example, Article 7 states:

> Publications involving religious contents shall comply with the provisions of the Regulations on Publication Administration, and shall not contain the contents: (1) which jeopardize the harmonious co-existence between religious and non-religious citizens; (2) which jeopardize the harmony between different religions or within a religion; (3) which discriminate against or insult religious or non-religious citizens; (4) which propagate religious extremism; or (5) which contravene the principle of independence and self-governance in respect of religions.[50]

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44. The State Council is the PRC's main administrative agency and is referred to as the Central People's Government. The State Council, http://www.gov.cn/english/2008-03/16/content_921792.htm (last visited Dec. 23, 2009).

45. Regulations on Religious Affairs (Promulgated by the State Council of the People's Republic of China; Effective as of March 1, 2005), *reprinted in* 5 CHINESE J. INT'L L. 475 (2006) [hereinafter Regulations on Religious Affairs].

46. *Id.*

47. *Id.*

48. *See* Local People's Congresses and Their Standing Committees, http://www.gov.cn/english/ 2005-09/02/content_28452.htm (last visited Nov. 7, 2009).

49. *See* Regulations on Religious Affairs, *supra* note 45, art. 5.

50. *Id.* art. 7, §§ 1-5.

Like the constitution, this regulation emphasizes the protection of the social harmony and order of the country.[51] It again illustrates the broad latitude the government has for restricting religion should it desire to do so. Thus, local and county government officials may make arbitrary decisions on matters such as conveying religious beliefs and the extent of religious belief. While there is the authority to make religious publications, the government seems to discourage such activity by placing arbitrary restrictions, lest one risks being labeled an extremist or against "social harmony."[52]

These arbitrary regulations also affect religious buildings and the appointment of clergy. Article 14 states:

> A site for religious activities to be established shall meet the following conditions: (1) it is established for a purpose not in contravention of the provisions of Articles 3 and 4 of these Regulations; (2) local religious citizens have a need to frequently carry out collective religious activities; (3) there are religious personnel or other persons who are qualified[53] under the prescriptions of the religion concerned to preside over the religious activities; (4) there are the necessary funds; and (5) it is rationally located without interfering with the normal production and livelihood of neighboring units and residents.[54]

These conditions again indicate the desire of the national government to place strong regulations on religious activities.[55] By allowing government officials to determine who is qualified to lead religious activities, the government effectively has nationalized religion[56] in that it has determined who may serve as clergy and where religious services and meetings may take place.[57]

Coinciding with those regulations, Article 23 states, "A site for religious activities shall prevent against the occurrence, within the site, of any major accident or event, such as breaking of religious taboos, which hurts religious feelings of religious citizens, disrupts the unity of all nationalities or impairs

51. *Id.* art. 1; *see also* XIAN FA [Constitution] art. 36 (1982) (P.R.C.).

52. Regulations on Religious Affairs, *supra* note 45, art. 1, 7.

53. The State Council also regulates who may serve as clergy or conduct religious activities. Article 27 states, "Religious personnel who are determined qualified as such by a religious body and reported for the record to the religious affairs department of the people's government at or above the county level may engage in professional religious activities." *Id.* art. 27. Thus, the national government has also delegated the qualifications for religious clergy and personnel to these local governments. *Id.* Yet because these local governments are arms of the Communist party, it is unlikely the Chinese people themselves dictate who may lead their religious services or activities. *See id.* art. 5.

54. *Id.* art. 14, § 1-5.

55. *Id.*

56. *Id.* art. 5, 14, 27.

57. *Id.* art. 14, §§ 1-5: art. 27.

social stability."[58] Again, while the Chinese people enjoy the right to practice religion, by including language such as "religious taboos" and "hurts religious feelings," Article 23 allows government officials to place subjective regulations on religion and enables groups who oppose a particular religious practice a greater ability to prevent a religious activity.[59] By enacting these arbitrary regulations on issues such as religious publications, sites, and religious officials, the Chinese government appears to emphasize so-called social harmony and order, rather than a true freedom to practice religion.[60]

Therefore, the religious leaders and buildings in China are under government control, which places religious denominations and national churches under the control of the Chinese government.[61] In contrast, there are many religious churches and places of worship known as "underground/house church[es]."[62] The government does not control these churches and they often exist, with many members, despite Chinese laws.[63] As such, membership in these churches comes at one's own risk, because should the government deem a "house church" illegal, its facilities could be destroyed and its members could be imprisoned, abused, or punished.[64]

C. Chinese Government Regulations and International Places of Worship

In addition, China legally permits international religious organizations. While the content of their services and publications are unrestricted, the government does restrict their memberships. For example, the Beijing International Christian Fellowship is a Christian organization that conducts services, Bible studies, and outreach in the Beijing area.[65] However, the government restricts this organization by permitting only foreign passport holders to legally participate in worship services.[66] Thus, while the organization reaches as many as seventy nationalities, it remains subject to Chinese membership controls.[67]

Despite these restrictions, the Fellowship is still able to reach many Chinese citizens. For example, according to John Davis, a senior elder at the

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58. *Id.* art. 23.

59. *Id.* art. 23. This coincides with the right to be free from religion. *See* XIAN FA art. 36. However, this latitude has also led to rampant religious abuses. *See infra* Part I.E.

60. *See* Regulations on Religious Affairs, *supra* note 45, art. 1, 5, 14, 23, 27.

61. *Id.* arts. 5, 14, 23, 27.

62. *See* Betty L. Wong, Note, *A Paper Tiger? An Examination of the International Religious Freedom Act's Impact on Christianity in China*, 24 HASTINGS INT'L & COMP. L. REV. 539, 543-44 (2001).

63. *See id.*

64. *See infra* Part I.E.

65. Beijing International Christian Fellowship, http://www.bicf.org/home.cfm (last visited Nov. 25, 2009).

66. *Id.*

67. Tim Ellsworth, *At Beijing Church, 'All Nations' Worship*, BAPTIST PRESS, Aug. 11, 2008, *available at* http://www.bpnews.net/printerfriendly.asp?ID=28659.

Fellowship, "[A]bout 60 percent of the congregation is ethnic Chinese. Some may be people who were born in other countries and who now live in China. Others are native-born Chinese who left the country to travel abroad, got a green card and have since returned."[68] Moreover, the Fellowship has said the relationship with the Chinese government has been positive because while the government asks for a general idea of what the Fellowship does, it has not restricted the content of the sermons of the Fellowship's services.[69] Thus, in at least this one instance, the Chinese government has been open to non-governmental run organizations, even with their potential influence on the Chinese citizenry.

D. International Religious Freedom Act

The International Religious Freedom Act also gauges the extent of religious freedom in China.[70] Enacted during the Clinton administration,[71] the Act renewed a global commitment by the United States to monitor and promote international religious freedom as a "universal human right and fundamental freedom."[72] The Act outlines a number of American policies, including the condemnation of religious abuses, a concerted effort with other free nations to promote religious freedom, and assisting governments that have historically violated religious freedom.[73]

The Act also exhibits a commitment that extends beyond American foreign policy and into the realms of American education and economic policies, as well as relationships with non-profit organizations.[74] Additionally, the Act explicitly details the definition of a violation of religious freedom. The Act states that a "violation of religious freedom" includes arbitrary governmental prohibitions or restrictions on a person or group's freedom to assemble, speak, possess and distribute religious materials, and family religious practices.[75]

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68. *Id.*

69. *Id.* Additionally, John Davis said the Chinese government does ask for the Fellowship "to give them an overview of what our activities are, and are quite happy for us to remain in this venue . . . I think part of that's for safety. But as far as what's preached, doctrine, finances or anything like that, there's no interference." *Id.*

70. *See* International Religious Freedom Act of 1998, 22 U.S.C. § 6401-6471 (1998).

71. President William Jefferson Clinton, the 42nd President of the United States of America; 1993-2001.

72. 22 U.S.C. § 6401(a)(2). This part of the Act also states Congress' desire to act in a concerted effort with other prominent international declarations on religious freedom, such as the Helsinki Accords and Article 18 of the Universal Declaration of Human Rights. *See* 22 U.S.C. § 6401(a)(2)-(3).

73. *See* 22 U.S.C. § 6401(b).

74. The Act notes that the United States shall use all "appropriate tools in the United States foreign policy apparatus, including diplomatic, political, commercial, charitable, educational, and cultural channels, to promote respect for religious freedom by all governments and peoples." 22 U.S.C. § 6401(b)(5).

75. *See* 22 U.S.C. § 6402(13)(A)(i-v). The Act also forbids the following solely on

To aid Congress and the President in monitoring international religious activity, the Act created an Office on International Religious Freedom within the United States Department of State.[76] Headed by an Ambassador at Large appointed by the President,[77] the office's duties are to advise the President and Secretary of State and to represent them internationally on religious affairs.[78] Furthermore, the Ambassador annually prepares a report for the Secretary of State, including the status, restrictions, and abuses of religious freedom in every foreign country, as well as American policy towards each foreign country's religious freedom.[79] Hence, religious freedom has become a cabinet level policy concern.[80] More importantly, by reporting on every foreign county,[81] Congress has vastly extended American international involvement for the preservation of religious freedom.[82]

In terms of the Act's influence in the realm of Chinese religious freedom, critics held that prior to Bush's ascension to the presidency the Act had little influence in China, at least in the area of Christianity in China. For example, one author in 2001 cited a history of Christian persecution in China that while China had become more open to Christian activities, there were still vast regulations put on Christian activities such as through Chinese state-run churches and the government's prohibition against "house/underground church[es]."[83] In addition, in the first two reports prepared by the Office of International Religious Freedom, China was listed as one of the most repressive governments against the practice of Christianity and other religions, yet the

account of one's religious beliefs, "detention, interrogation, imposition of an onerous financial penalty, forced labor, forced mass resettlement, imprisonment, forced religious conversion, beating, torture, mutilation, rape, enslavement, murder, and execution." 22 U.S.C. § 6402(13)(B).

76. 22 U.S.C. § 6411(a).

77. 22 U.S.C. § 6411(b).

78. *See* 22 U.S.C. § 6411(c).

79. *See* 22 U.S.C. § 6412. "The International Religious Freedom report is submitted to Congress annually by the Department of State in compliance with Section 102(b) of the International Religious Freedom Act (IRFA) of 1998." U.S. DEP'T ST., INTERNATIONAL RELIGIOUS FREEDOM, http://www.state.gov/g/drl/rls/irf/ (last visited Oct. 11, 2009). While this Note will discuss reports from this office, the Act also created a separate United States Commission on International Religious Freedom that also monitors international religious freedom. However, the Commission only focuses on a select few countries, whereas the International Religious Freedom Report prepared by the Office on International Religious Freedom provides a country-by-country analysis of religious freedom. *See* United States Commission on International Religious Freedom, Frequently Asked Questions, http://www.uscirf.gov/index.php?option= com_content&task=view&id=337&Itemid=44#2 (last visited Oct. 11, 2009).

80. *See* 22 U.S.C. § 6411.

81. *See* U.S. DEP'T ST., INTERNATIONAL RELIGIOUS FREEDOM REPORT 2008, (Sept. 19, 2008), *available at* http://2001-2009.state.gov/g/drl/rls/irf/2008/108404.htm [hereinafter 2008 ANNUAL REPORT]. For purposes of this Note, this citation links directly to the section of the report on China.

82. *See* 22 U.S.C. § 6401(b)(5).

83. Wong, *supra* note 62 at 544.

Chinese government did not seem concerned.[84] As such, while the Act was a positive step, it was still too early to affect Chinese religious policy, at least during the end of the Clinton administration.[85]

Conversely, at the time of Bush's last year in office, the Act had reached its ten-year anniversary. In his commemoration speech, Bush stated that he believed this Act had served as important legislation and had made progress in expanding religious freedom not just in China but also around the world.[86] More importantly, Bush also believed this Act "placed religious liberty where it belongs -- at the center of U.S. foreign policy."[87] Thus, at least according to Bush, the Act has been a positive contribution because not only has it helped promote religious freedom, but it has also placed religious freedom as a core tenet of American foreign policy.[88]

To illustrate his point, Bush cited the progress in Chinese religious freedom by the work of Muslim leaders and said, "I've also had the honor of meeting those who attend underground churches in China. And we also honor the courage of the Dalai Lama, and the Buddhists in Tibet."[89] Bush also noted a meeting he had with a Chinese Protestant dissident who had served time in prison over religious issues.[90] The President used this speech to deliver a strong message to Hu by stating, "And my message to President Hu Jintao, when I last met him, was this: So long as there are those who want to fight for their liberty, the United States stands with them."[91] Hence, while Bush believed that the Act in its first ten years has had a real effect on international religious freedom, more work needed to be done in China.[92]

E. Status of Religion and Religious Freedom in China since President Bush took Office

Statistics concerning religion and Chinese religious freedom have remained relatively unchanged since Bush took office and the Clinton administration implemented of the International Religious Freedom Act. According to the 2008 Annual Report on International Religious Freedom, the Chinese government continues to only "officially recognize[] five main religions: Buddhism, Taoism, Islam, Catholicism, and Protestantism."[93] This

84. *Id.* at 558. Wong provided an example of Chinese government resistance towards religious freedom by stating that in 1999, when President Clinton met with the United States Commission on International Religious Freedom, Chinese officials arrested the pastor of a non-official house church and destroyed one of its shelters. *See id.* at 558-59.

85. *Id.* at 560.

86. 10th Anniversary, *supra* note 3.

87. *Id.*

88. *See id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. 2008 ANNUAL REPORT, *supra* note 81 at § 1.

recognition by the government of only five official religions and religious groups has remained the same since 2001.[94] Alarmingly, while the government purports to grant the freedom of religion, it should not be necessary to state which religions are "official," as a person should be able to practice any religion or religious belief under the freedom of religion.[95] By recognizing only five religions, China offers a limited freedom to its people.

In terms of those citizens practicing religion, statistics show a slight increase among the five "official" religions for citizens practicing religion between 2001 and 2008. As of 2008, there were approximately 200,000 Buddhist monks and nuns and 25,000 Taoist priests and nuns.[96] Next, there were approximately 20,000,000 Muslims.[97] Finally, there were 57,000,000 Christians; 20,000,000 worshipping in state-run Protestant churches; 300 underground/house churches; 5,000,000 registered Catholics; and an estimated 12,000,000 more in unregistered Catholic churches.[98]

In contrast, according to the 2001 Report, Chinese governmental figures reported approximately "100 million Buddhists . . . 13,000 Buddhist temples and monasteries and more than 200,000 nuns and monks."[99] There were also over "10,000 Taoist monks and nuns."[100] Finally, in 2001, there were 20,000,000 Muslims; 10,000,000-15,000,000 officially registered Protestants; and 5,000,000-10,000,000 Catholics.[101] Thus, there appears to be a slight increase in citizen religious identification and/or practice.[102]

In terms of religious abuses and restrictions on religious freedom, much like its counterpart in 2001, the 2008 Report cited numerous religious abuses.[103] For examples, the 2008 Report noted that the Chinese government continued to "harass unregistered religious and spiritual groups."[104] Specifically, "security

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94. U.S. DEP'T ST., 107TH CONG., ANNUAL REPORT ON INTERNATIONAL RELIGIOUS FREEDOM, at 123 (2001), *available at* http://www.state.gov/documents/organization/9001.pdf [hereinafter 2001 ANNUAL REPORT].

95. For example, the Chinese government does not recognize major religions such as Judaism, Hinduism, and the spiritual movement Falun Gong as official religions. *See* 2008 Annual Report § 1, *supra* note 81; *see also* Tim Johnson, *Quest to Pray with Bush ends in Hiding: Chinese Christian Pastor's Run-in with Authorities Underscores Limits on Freedom of Religion*, CHI. TRIB., Aug. 13, 2008, *available at* http://archives.chicagotribune.com/2008/aug/13/nation/chi-china-religion_13aug13.

96. 2008 ANNUAL REPORT, *supra* note 81 at § 1.

97. *Id.*

98. *Id.*

99. 2001 ANNUAL REPORT, *supra* note 94, at 123.

100. *Id.* The Report notes that at the time, there were no estimates for the number of Taoists. The figures pertaining to the number of Taoist priests and nuns were from a "1997 government publication." *Id.*

101. *Id.* at 123-24.

102. *See* 2008 ANNUAL REPORT, *supra* note 81 at § 2.

103. *See id.*; *see also* 2001 ANNUAL REPORT, *supra* note 94 at 129-32. These pages note the numerous religious abuses committed by the Chinese government in 2001.

104. 2008 Annual Report *supra* note 81 at § 2. Examples of harassed groups include Protestants, Catholics, Muslims and Buddhists who did not "register" with the Chinese

authorities used threats, demolition of unregistered property, extortion, interrogation, detention, physical attacks, and torture to harass leaders of unauthorized groups and their followers."[105] Moreover, the Chinese government continued to abuse both Christians who worshipped in places unauthorized by the government and religious leaders, as well as expelled foreign Christians prior to the 2008 Summer Olympics.[106]

Additionally, these abuses extended into the legal and business communities. For example, the 2008 Report cited the 2007 detention of Christian lawyer Gao Zhisheng for writing letters to a foreign government and his previous 2006 conviction for writing letters to Hu. In both incidents, he outlined religious abuses committed by the Chinese government.[107] Also in 2007, the Chinese government sentenced Christian Wusiman Yiming, an American company employee, to two years in a reeducation camp,[108] which typically results in hard labor.[109]

Compared to the 2001 Report, the 2008 Report stated that the Chinese government might also have contributed to an increase in tension between religious groups. Unlike in 2001 where the reported tensions between religious groups appeared to be over doctrinal matters between and within religions,[110] in 2008, religious groups began to experience societal discrimination.[111] Moreover, the 2008 Report noted that "[t]here were reports that the Government's vilification of the Dalai Lama led to increased anti-Tibetan Buddhist sentiment throughout the country."[112]

On a positive note, as was the case in 2001, the 2008 Report stated that there were no forced religious conversions.[113] The Chinese government also continued to allow both domestic and international religious organizations to promote "religious education and [perform] charitable work."[114] Finally, the Chinese government allowed the increase in published government approved religious books.[115]

As such, from 2001 through 2008, statistics remain relatively unchanged

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government, as well as members of the Falun Gong. *Id.*

105. *Id.*

106. *Id.* Additionally, the Report cited numerous reports of the detention of worshippers at "house churches." *Id.*

107. *Id.* Alarmingly, the whereabouts of the lawyer was unknown at the time the report was published. *Id.*

108. *Id.* Notably, the owner of such company, an American Christian, was subsequently expelled. *Id.*

109. *Id.*

110. *See* 2001 ANNUAL REPORT, *supra* note 94 at 132. For example, The 2001 Report cited tension among Christian churches over issues such as doctrine and membership. *Id.*

111. In contrast to the 2001 Report, the 2008 Report cited tension in Tibet for Buddhists and Muslims for religious, societal and cultural matters. 2008 Annual Report, *supra* note 81.

112. 2008 ANNUAL REPORT, *supra* note 81 at § 3.

113. 2008 ANNUAL REPORT, *supra* note 81 at § 2. *See also* 2001 ANNUAL REPORT, *supra* note 94 at 132.

114. 2008 ANNUAL REPORT, *supra* note 81 at § 2.

115. *Id.*

for issues such as the amount of reported religious abuses.[116] At the same time, many Chinese citizens continue to participate in religious activities.[117] Likewise, Chinese policy towards allowing religious groups to promote religion in education, literature, and charities has also improved.[118] While these positive developments appear to be relatively minor compared to the high number of reported abuses, there is hope that the government will refrain from abusing its people as religious influence increases in the society and as reports of these abuses continue to become more public. While it is unclear how much of an impact Bush's policies had towards the increased cooperation and presence among international and domestic religious organizations, Bush's push for religious liberty at least provided these organizations a powerful ally in the struggle for religious freedom in China.[119]

III. PRESIDENT BUSH'S RELIGIOUS FREEDOM DOCTRINE AND HIS PURSUIT OF CHINESE RELIGIOUS FREEDOM

A. Religious Freedom and its Connection to Bush's Foreign Policy

One of the main goals of Bush's presidency was the pursuit of not only religious freedom but the expansion of freedom and democracy throughout the world. In his Second Inaugural Address, Bush underscored the importance of freedom by stating:

> We go forward with complete confidence in the eventual triumph of freedom. Not because history runs on the wheels of inevitability; it is human choices that move events. Not because we consider ourselves a chosen nation; God moves and chooses as He wills. We have confidence because freedom is the permanent hope of mankind, the hunger in dark places, the longing of the soul.[120]

According to Bush, central to a free society and a freer, better world is the opportunity for people to freely practice religion. Prior to his Second Inaugural Address, he remarked, "[T]he greatest freedom we have or one of the greatest freedoms is the right to worship the way you see fit."[121] A Christian,[122] Bush

116. *Id.*
117. *See id.*
118. *See id.*
119. *See infra* Part II.
120. Second Inaugural Address, *supra* note 2.
121. James G. Lakely, *President Outlines Role of His Faith*, WASH. TIMES (Jan. 11, 2005), available at http://www.washingtontimes.com/news/2005/jan/11/20050111-101004-3771r/. The President's remarks offered a stark contrast between American policies towards religion and religious practices with those of the former Taliban regime in Afghanistan. *Id.*

identifies the importance religion has in the lives of Americans and the world, as well as its importance to a free society.[123] In turn, he used his presidency, in particular his foreign policy, to promote the allowance of all religious practices,[124] especially in places where this freedom has been restricted or non-existent.[125]

B. Bush's 2005 visit to Chinese Churches and Statements on Chinese Religious Policies

Throughout his presidency, Bush emphasized his push for religious freedom in speeches and visits to China. Other parts of his administration privately pressured China to promote religious freedom;[126] however, this Note examines instances where Bush himself promoted religious freedom and their effectiveness. The instances analyzed in this Note are Bush's visit to Chinese churches in 2005, Bush's relationship with Chinese President Hu Jintao, and Bush's actions during the 2008 Beijing Summer Olympics.

To date, Bush engaged with the Chinese more than any other American President, having visited China four times, and each occasion was an opportunity to advocate policy issues with Chinese leaders in areas such as terrorism, North Korea, and religious freedom.[127] Notably, "critics of the

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122. *See id.* Lakely references criticism faced by Bush against his openness to speak about religion. *Id.* Additionally, some religious leaders and American liberals have criticized Bush for his use of religion, and in particular Christianity, in the realms of patriotism and the War on Terrorism. *See* Amanda Harmon Cooley, *God and Country: The Dangerous Intersection of Religion and Patriotism in the First Term of the George W. Bush Administration*, 16 KAN. J. L. & PUB. POL'Y 157 (2006-2007); BILL SAMMON, THE EVANGELICAL PRESIDENT : GEORGE BUSH'S STRUGGLE TO SPREAD A MORAL DEMOCRACY THROUGHOUT THE WORLD 20-21, 27 (Regnery Publishing, Inc. 2007). Even amongst his critics, Bush remained adamant that he did not use his religion to attack one's patriotism but instead respected one's right to practice or not to practice religion and wants all people to have the same opportunity people of free nations have to practice religion. *See* Lakely, *supra* note 121.

123. *See* Lakely, *supra* note 121.

124. *See* SAMMON, *supra* note 122 at 24 (quoting Bush's former Chief of Staff Joshua Bolten, a Jewish believer, who stated, "[t]he misperception is that [Bush] is essentially intolerant . . . And he . . . couldn't be more tolerant").

125. *See* 10th Anniversary, *supra* note 3; Lakely, *supra* note 121. As noted, Bush made the promotion of religious freedom an integral part of his foreign policy. *See supra* Part I. D. Additionally, Bush continued a tradition of prior American Presidents by annually celebrating a "Religious Freedom Day." On one such occasion, Bush used it as an opportunity to promote international religious freedom by stating, "Religious freedom belongs not to any one nation, but to the world, and my Administration continues to support freedom of worship at home and abroad." George W. Bush, President, Religious Freedom Day 2008, A Proclamation by the President of the United States of America (last visited Dec. 23, 2009) (transcript *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2008/01/20080114-5.html). Religious freedom is not limited to America but is vital for all nations of the world. *Id.*

126. For a list of government actions towards China in the area of religion, *see generally* 2008 Annual Report, *supra* note 81.

127. Michael Abramowitz, *Bush Says It's 'Important to Engage' China, A Mixed Appraisal on Eve of Visit*, WASH. POST, Aug. 4, 2008, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/08/04/AR2008080402460

president say he . . . emerged as an unexpected diplomat with China, conducting a personal campaign to woo the senior Chinese leadership."[128] As unexpected as it may be, Bush's ascendance as a "diplomat" to the Chinese during his presidency served as an opportunity to achieve political victories[129] and take his message of religious freedom straight to the Chinese government and people.[130] Bush even said that during his presidency his "main objective in . . . discussions on religious freedom [was] to remind this new generation of [Chinese] leadership that religion is not to be feared but to be welcomed in society."[131]

In the fall of 2005, Bush visited China for the third time and used this visit to promote religious freedom.[132] Notably, prior to meetings with Hu, Bush attended a worship service at the Protestant Gangwashi church.[133] There, Bush praised the Chinese government for allowing its citizens to practice religion[134] and said, "[M]y hope is that the Government of China will not fear Christians who gather to worship openly. A healthy society is a society that welcomes all faiths."[135] Additionally, as shall be discussed further, he encouraged the Chinese government to meet with the Dalai Lama and to invite members of the Vatican for formal discussions.[136] By attending a worship service with the Chinese people, Bush provided at least symbolic support for religious leaders seeking to make China a more tolerant society for religious practices. After the worship services had concluded, Bush began discussing the freedom of religion with Hu.[137]

During these discussions, Bush emphasized that religious freedom is essential to political freedom.[138] Speaking directly both to Hu and the Chinese government, Bush publicly declared, "[A] society which recognizes religious freedom is a society which will recognize political freedom as well."[139] Harking on that theme, Bush tried to convince Hu to reach an agreement with

_pf.html. Abramowitz noted that previous American Presidents did not visit China more than once. *Id.*

128. *Id.*

129. For example, "U.S. officials contend that Bush's ability to engage China has been a major reason for the recent breakthrough with North Korea, in which the communist state provided an inventory of its nuclear program in return for being taken off the U.S. list of state sponsors of terrorism." *Id.*

130. *See id.*

131. *Id.*

132. *Bush's Coming Visit Bends on Cooperation*, PEOPLE'S DAILY (Beijing), Nov. 21, 2005, *available at* http://english.peopledaily.com.cn/200511/17/eng20051117_222053.html.

133. Jane Macartney, *Bush Preaches Religious Freedom: The President uses a Pulpit in Beijing to Speak up for the Persecuted Christian Minority in China*, TIMES (London), Nov. 21, 2005, *available at* http://www.timesonline.co.uk/tol/news/world/article592458.ece.

134. Bush stated, "It wasn't all that long ago that people were not allowed to worship openly in this society." *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *See id.*

139. *Id.*

the Dalai Lama, and to seek opportunities to discuss how to bridge the differences between the Chinese and the Roman Catholic Church.[140] In addition to promoting freedom of religion and politics in China, Bush believed that enhancing China's relationship with the Dalai Lama and the Roman Catholic Church would also help China ease tensions with Tibet and Taiwan.[141] However, Hu and other government officials were not interested in Bush's proposal.

The Dalai Lama has not been a welcomed guest of the Chinese government because the Chinese government believes that the Dalai Lama is seeking for an independent Tibet.[142] In response to this concern, Bush said, "I thought it would be wise for the Chinese Government to invite the Dalai Lama, so he can tell them exactly what he told me in the White House the other day, that he has no desire for an independent Tibet."[143] Bush again highlighted this course of action two years later as vital for religious and political freedom, but was met with much greater resistance by the Chinese.[144] In addition, Bush's suggestions for the Chinese to meet with the leaders of the Roman Catholic Church did not fare any better.

The Chinese government is opposed to meeting with Roman Catholic Church leaders because of the Church's alliance with Taiwan.[145] More importantly, in 2005 "[t]he Vatican, which recognizes Taiwan, ha[d] been seeking for some months through goodwill gestures to obtain normalization in relations with Beijing. [However,] China has said that the Vatican must sever its diplomatic ties with Taiwan."[146]

In sum, Bush used his 2005 visit to promote not only religious freedom but also political freedom. To a casual observer, it is easy to believe that Bush merely used this visit to promote freedom only for Christians to worship and practice. However, by encouraging the Chinese to have discussions with the Dalai Lama, as well as using language such as "all faiths,"[147] Bush remained consistent with his promise that he would encourage the right of all individuals to worship in a manner of their choosing or to abstain from practicing religion.[148] More importantly, he articulated the interconnection of religious and political freedom, with each as a vital tool to advance not only American interests, but in Bush's view, the betterment of the free world.[149]

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140. *See id.*

141. *See id.*

142. *See id.*

143. *Id.*

144. *See infra* Part II.C.

145. Macartney, *supra* note 133.

146. *Id.*

147. *Id.*

148. *See* Lakely, *supra* note 121. Bush remarked, "I fully understand that the job of the president is and must always be protecting the great right of people to worship or not worship as they see fit." *Id.*

149. *See* Macartney, *supra* note 133. This point is reasonably implied by Bush's remark that "[a] healthy society is a society that welcomes all faiths." *Id.*

C. Bush's Relationship with Hu Jintao and Hu's Influence on Chinese Religious Freedom

Bush's 2005 visit to China also illustrated another important aspect of his attempt to ensure religious freedom in China, namely, his relationship with Hu Jintao. Since 1964, Hu has been a member of the Chinese Communist Party, having served various positions in the Chinese government prior to his ascension to the presidency in 2003.[150] While publicly viewed as a Party reformer in the area of religion,[151] questions remain as to whether Hu's government has internally heeded Bush's calls for religious freedom.

For example, during Bush's 2005 visit to China, Bush promoted religious freedom and encouraged the Chinese government (specifically Hu) to meet with the Dalai Lama and the Vatican for formal discussions on religious freedom.[152] This visit also marked Bush's first visit to China when Hu was President.[153] During this visit, Bush and Hu appeared to have a positive relationship. Speaking of Hu, Bush said, "[He] is a thoughtful fellow, and he listened to what I had to say."[154] In turn, Hu used the opportunity to say his people enjoy democracy.[155]

While Hu and Bush have different ideas of democracy,[156] their relationship opened the door for discussions and reform in the area of religious freedom. Since his 2005 visit, Bush used his meetings and discussions with Hu to "speak candidly... about human rights, particularly religious freedom, and [to] . . . share his religious beliefs with Hu . . . [by urging him] to lift restrictions on underground churches."[157]

In many ways, Hu's conversations with Bush appear to have had a positive effect on religious freedom in China, at least publicly. While the Communist Party officially subscribes to atheism,[158] during his presidency Hu has outwardly "indicate[d] a desire to incorporate [religious] believers into the party's quest for continued economic progress and more social harmony."[159]

150. Hu served as Vice President of the PRC from 1998 until his election as President in 2003. Hu Jintao, *supra* note 8.

151. *See* Cody, *supra* note 16. Under Hu, the Communist Party has viewed religion as "useful in encouraging social harmony because it urges its followers to hew to a moral code." *Id.*

152. *See* Macartney, *supra* note 133.

153. Bush's first two visits to China occurred while Hu was Vice-President. *See Bush Preaches Democracy to China*, BBC NEWS (London) (Feb. 22, 2002), *available at* http://news.bbc.co.uk/2/hi/asia-pacific/1835129.stm.

154. Macartney, *supra* note 133.

155. *See id.*

156. This is due to the restrictions and abuses implemented on the Chinese people by the Chinese government. *See supra* Part I.A-B, E.; Zissis & Bhattacharji, *supra* note 24.

157. Abramowitz, *supra* note 127. Abramowitz also notes that Bush discussed religious freedom with Hu's predecessor Jiang Zemin. *Id.*

158. Cody, *supra* note 16.

159. *Id.*

For example, Hu invited religious leaders to Communist Party events,[160] attempted to eliminate corruption,[161] and commissioned governmental studies to detail "the expanding role of religion in China."[162] Importantly, Hu also included religion in discussions at the National People's Congress.[163] As seen through changes in Party leaders' religious attitudes away from hostility to relative openness, these efforts to bridge the gap between religion and the government appear to have altered some government misconceptions of religion's value in a Chinese society.[164]

Some Chinese religious leaders have noticed these positive contributions under Hu's government. One religious leader noted, "Religion has become such an important concept in China that the party can no longer try to understand it in the traditional Marxist framework."[165] Even Hu himself acknowledged such sentiments by stating, "We must strive to closely unite religious figures and believers among the masses around the party and government . . . and struggle together with them to build an all-around moderately prosperous society while quickening the pace toward the modernization of socialism."[166] Thus, at least outwardly the Chinese President agreed with Bush's call for more inclusion of religion in the Chinese society.

However, skeptics maintain that for all of Hu's public affection for religion and its increasing acceptance within the government, privately, Hu and the government use religion for purposes other than expanding individual freedom. For example, "Ren Yanli, a religion specialist at the government-sponsored Chinese Academy of Social Sciences, noted that the party's recent overtures were aimed at enlisting religious beliefs as a force for economic and social progress."[167] Additionally, Yanli believes that "nowhere did the party acknowledge faith and religion as ideals to be pursued in their own right."[168]

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160. For example, Hu invited Bishop Liu Bainain of the Chinese Patriotic Catholic Association to an official Communist party New Year's tea party. *Id.* However, Bishop Liu was a government-appointed official and not approved by the Vatican. *Id.*

161. *See id.* For example, "[G]overnment controls over religious activity have loosened markedly in recent years. Political connotations, such as those attached to Buddhism in Tibet or Islam in the autonomous Xinjiang region of northwestern China, have become the major targets of police surveillance in most areas." *Id.*

162. *Id.*

163. *See id.* (noting that Hu was the first leader to include religion during a session of the National People's Congress). Additionally, Cody notes that Hu believes that "[r]eligion should no longer be considered sabotage of the party's economic and social plans . . . but rather a positive force that can be enlisted to help put the plans into effect." *Id.*

164. *See id.* In addition, many Chinese leaders "grew up with the Marxist idea that religion is a hostile force." *Id.* However, some leaders now are publicly embracing religion. For example, Jia Qinglin of the Politburo Standing Committee stated, "We must take full advantage of the positive role that religious figures and believers among the masses can play in promoting economic and social development." *Id.*

165. *Id.* (quoting Chan Kim-kwong of the Hong Kong Christian Council).

166. *Id.*

167. *Id.*

168. *Id.* Additionally, Anthony Lam of the Hong Kong Holy Spirit Study Center believes

This concern for whether Hu and the government acknowledge religion as a right as opposed to a political device is evidenced in the government's interaction with the Vatican and the Dalai Lama.[169] There has been only minimal progress towards connecting the Vatican with the Chinese Catholic Church.[170] For example, conflict remains between the two entities about the issue of the appointment of Bishops over the Catholic Churches in China.[171] The Chinese government believes it should have the power to appoint Bishops to lead Catholic Churches in China, but the Vatican believes it should have final approval of Bishops.[172] This issue is important not just for the Chinese national government but for local governments as well, because should the Vatican have final approval of Bishops, it will affect issues such as land deals.[173]

The Chinese government and especially Hu have made some progress in alleviating that dispute. For instance, in 2005, Hu organized a committee to help end this disagreement.[174] However, while Hu has publicly made an effort to help end this dispute, as of 2008, there has been no formal resolution, and the government generally continues to appoint Bishops without Vatican approval.[175]

Yet, prior to the Beijing Olympics, relations did improve on this matter. As author Edward Cody stated, "Two [Catholic] bishops were ordained with papal approval last month, following on the appointment of a Vatican-approved bishop for Beijing in September."[176] Additionally, as of 2008, the Vatican and the Chinese government have resumed low-level diplomatic discussions.[177] As such, while publically Hu has made efforts to show the Vatican that the government is willing to compromise on this issue, behind the scenes there has been minimal progress.[178]

Finally, it appears that until there is replacement of the older generation of local party leaders, the fear is that a compromise on this issue will have little or no practical effect. While Hu publicly seems to be interested in reaching a deal with the Vatican, "conservatives in the Chinese party leadership, backed by local bureaus, have prevented a final deal because they are hesitant to abandon the doctrine that the Vatican is a foreign power that should have no

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the Communist party's "overall attitude is that religion, particularly Christianity and Islam, is a portal through which foreign ideas and loyalties can make their way into Chinese society." *Id.*

169. *See id.*

170. *See id.*

171. *See id.*

172. *See id.*

173. *Id.* Currently at the local level, being a Catholic Bishop means the national government determines salaries, societal status, and housing. *Id.* As such, an increase in the influence of the Vatican also affects not only who would lead the church, but potentially the leadership of the local community. *See id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

authority in China."[179] As such, while Hu publicly seems to have acted on Bush's call to have discussions with the Vatican,[180] religion continues to be a political device.[181] This issue of appointment of Catholic Bishops will test the resolve of Hu; whether he will continue to push for reform against the opposition of his party is yet to be determined.

The Chinese government's relationship with the Dalai Lama is another example of Hu's public actions not corresponding to the internal policy of the government. While Bush encouraged Hu's government to discuss religious freedom with the Dalai Lama,[182] a strong resistance by the Chinese government continues to permeate, perhaps even affecting China's relationship with the United States in other political areas.[183]

For example, in 2007 Bush met with the Dalai Lama[184] at the White House and awarded him a Congressional gold medal.[185] However, the Chinese government strongly condemned their meeting and the awarding of the Congressional gold medal.[186] Furthermore, the Chinese government condemned the efforts of the Dalai Lama to gain autonomy for Tibet, saying he is attempting to grant independence for Tibet apart from the PRC.[187]

Furthermore, the meeting between Bush and the Dalai Lama also had an effect on American-Chinese relations not just in the issues of religious freedom but also with other international issues. For example, the Chinese government condemned the United States' actions by calling on it "[to] cancel the extremely wrong arrangements . . . [because] it seriously violates the norm of international relations and seriously wounded the feelings of the Chinese people and interfered with China's internal affairs."[188] The White House responded by reaffirming Bush's emphasis on religious freedom, stating, "The president believes that people all over the world should be able to express their religion and practice their religion in freedom. And that's why the president wants to meet with him . . . He believes he should be honored as a great spiritual leader."[189]

Moreover, on the same day the Dalai Lama was to receive this award, there was also a meeting scheduled with world leaders (including Chinese leaders) regarding Iran's nuclear program.[190] However, the Chinese

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179. *Id.*

180. *See id.*; *see also* Macartney, *supra* note 133.

181. *See* Cody, *supra* note 16.

182. *See* Macartney, *supra* note 133.

183. *See* Magnier, *supra* note 22.

184. The Dalai Lama received the 1989 Nobel Peace Prize, is the leader of Tibetan Buddhism, and has worked to "expand autonomy [for Tibet and] not establish a separate state." *Id.*

185. *Id.* The gold medal is "Congress' highest civilian honor." *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

government pulled out of the meetings.[191] While the Chinese government denied that it pulled out of the meetings because of Bush's meeting with the Dalai Lama, it is evident that Bush's meeting was at the very least an underlying cause and illustrates where the push for religious freedom may have consequences for American-Chinese relations.[192]

While the White House did attempt to please the Chinese government by not releasing photographs of Bush's meeting with the Dalai Lama,[193] it seems the Chinese government still used religion as an excuse in order to avoid having to deal with tough political issues.[194] More importantly, this is an example where Hu's critics probably would claim Hu and his government merely used religion as a mechanism for political gain.[195] Thus far, it appears that China under Hu's leadership has made minor improvements towards promoting religious freedom, in that publicly it provides an opposing viewpoint to the traditional party rhetoric on religion.[196] It appears that Bush's relationship with Hu also had the appearance of some positive effect, especially in light of Hu's public statements toward religion and the resumption of diplomatic talks with the Vatican.[197]

Yet as illustrated by the Chinese government's issues with the Vatican and the Dalai Lama, these actions by Hu appear to be only small steps towards greater acknowledgment of religious freedom in China.[198] Until Hu's statements concerning religion implement real change at the national and local levels of government, Hu's government would only be serving to use religion as a vehicle for political gain.[199] In that case, Hu's government would be undermining Bush's purpose for promoting religious freedom, namely, that it is a natural right of all people.[200]

D. Bush's Push for Religious Freedom during the 2008 Beijing Summer Olympic Games

A final example of where Bush called for Chinese religious freedom was during the 2008 Summer Olympic Games in Beijing. This is important because

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191. *Id.*

192. *Id.* While the Chinese state that they did not attend the meeting due to "technical reasons," the State Department said China "balked at attending the Berlin meeting . . . since it would be on the same day as the congressional award ceremony." *Id.* Thus, there appears to be a strong correlation between the Chinese not attending the meeting and the Dalai Lama's visit to the White House. *See id.*

193. *Id.*

194. *See id.*

195. *See* Cody, *supra* note 16.

196. *See id.*

197. See *id.*

198. See *supra* notes 169-92 and accompanying text.

199. *See* Cody, *supra* note 16.

200. *See supra* Part II. A.; *see also* International Religious Freedom Act of 1998, 22 U.S.C. § 6401(a)(2) (1998).

prior to the Olympics, there was much debate whether he should boycott the opening ceremonies. On the one hand, there was domestic[201] and foreign[202] political pressure on Bush to either consider boycotting or actually boycott the opening ceremonies because of China's human rights violations.[203] Conversely, the European Union stated that such a "boycott could signify actually loosing an opportunity to promote human rights and could, at the same time, cause considerable harm to the populations of China as a whole."[204] Additionally, Canada[205] and the Dalai Lama also urged free nations to attend the ceremonies.[206]

Ultimately, Bush decided to attend the opening ceremonies. In support of his decision, Bush rebuked the free world's calls for boycotts and isolation of China. Specifically, Bush stated that he saw the Olympics as an opportunity for the world "to come and see China the way it is, and let the Chinese see the world and interface and have . . . the opportunity to converse with people from

201. For example, current Secretary of State and former 2008 Democratic Presidential Candidate Hillary Clinton called on Bush to boycott the Olympic opening ceremonies if China did not "improve[] human rights." Steve Holland & Toby Zakaria, *Clinton Urges Bush to Boycott Beijing Olympics*, REUTERS, Apr. 7, 2008, *available at* http://www.reuters.com/article/newsOne/idUSN0642976020080407. Speaker of the House Nancy Pelosi (D-CA) also urged Bush to consider such a boycott. *See id.* Additionally, current President Obama also urged Bush to boycott the opening ceremonies if the Chinese did not curb its human rights abuses. *See* Caren Bohan, *Obama says Bush Should Weigh Boycott of Olympic Ceremony*, REUTERS, Apr. 9, 2008, *available at* http://www.reuters.com/article/politicsNews/idUSN0945363820080409. Finally, 2008 Republican Presidential nominee Sen. John McCain (R-AZ) urged Bush to consider a boycott of the opening ceremonies and stated that if he were President, he would boycott the ceremonies. *See* Posting of Dan Balz to The Trail, http://voices.washingtonpost.com/44/2008/04/10/mccain_urges_olympic_ceremony.html (last visited Oct. 9, 2009).

202. For example, while not specifically calling for Bush to boycott the opening ceremony, notably, German Chancellor Angela Merkel did not attend the Olympic opening ceremonies. Ian Traynor & Jonathan Watts, *Merkel says She will not attend Opening of Beijing Olympics*, THE GUARDIAN (London), Mar. 29, 2008, *available at* http://www.guardian.co.uk/world/2008/mar/29/germany.olympicgames2008.

203. An example of human rights violations that these political leaders cited was the Chinese reluctance to aid in ending the violence in Darfur and "improve human rights in Tibet." Bohan, *supra* note 201. *See also* Holland & Zakaria, *supra* note 201.

204. Jennifer L. Zegel, New Development, *A Funny Thing Happened on the way to the Boycott: Why We Should Respond to China's Religious Persecution and Human Rights Violations by means other than a Boycott of the 2008 Beijing Olympic Games*, 9 RUTGERS J OF L & RELIGION 17 (2008) (quoting AP, *Amid Tibet Protests, EU Parliament President Says Don't Rule Out Boycott*, ESPN.COM (Mar. 22, 2008), http://sports.espn.go.com/espn/print?id=3306522&type=story (last visited Mar. 28, 2008)).

205. Canada was concerned that a boycott might cause harm to the Olympic athletes stating, "[T]hings may not be happening in China as quickly as we would like but to use the athletes as pawns is entirely inappropriate, past boycotts have shown that." Zegel, *supra* note 204 (quoting *Olympics Winter Games Host Canada Won't Boycott Beijing Olympics*, YAHOO NEWS (Mar. 18, 2008), http://news.yahoo.com/s/afp/20080318/wl_anada_afp/oly2008chncanboycott_080318205 (last visited Mar. 31, 2008)).

206. Zegel, *supra* note 204 (quoting reference omitted).

around the world."[207] Essentially, by attending the Olympic ceremonies, Bush reiterated his rejection of isolating China from the rest of the world and adhered to his policy of actively engaging the Chinese.[208]

In terms of using the Olympics as a vehicle to encourage religious freedom, as with other visits to China, Bush promoted religious freedom for all citizens and religious groups, and attended worship services at the Kuanjie Protestant Church,[209] a Government sponsored Chinese Church.[210] As writer Tim Johnson stated, "During Bush's visit to Beijing... he mentioned religious freedom four times in public, pressing Chinese authorities to provide greater religious freedom to the nation's 1.3 billion people."[211] Incidentally, Bush again used the media to his advantage by remarking about the importance and universality of God alongside the Pastor of the Chinese church and some of the worship attendees.[212] Bush also used this visit to Beijing to meet with Hu to discuss the topic of religious freedom.[213]

Yet for all of Bush's public appearances and statements on religious freedom, it is important to note that during this visit, the Chinese government controlled the church visit. For example, the government prohibited some members of underground, i.e. non-government sponsored churches, from attending the worship service with Bush.[214] Furthermore, other citizens outside the church had negative predispositions of Bush's agenda from the Chinese media.[215] Because of the media manipulation and intimidation by government officials, some doubted the sincerity of Bush's religious freedom message.[216]

Despite the controls and intimidation tactics, Bush's message did reach many Chinese citizens and did receive a positive reaction from many people.[217]

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207. Transcript of Interview by Bob Costas' with President George W. Bush, President, Beijing, P.R.C., (Aug. 10, 2008), *available at* http://www.prnewschannel.com/absolutenm/templates/?a=749 [hereinafter Interview of the President].

208. *See* Abramowitz, *supra* note 127.

209. Though it is an official church, it reportedly is supportive of underground/house churches. Michael Abramowitz & Edward Cody, *Bush Sharpens Public Critique of China's Idea of Freedom*, WASH. POST, Aug. 10, 2008, at A12, *available at* http://www.washingtonpost.com/ wp-dyn/content/article/2008/08/09/AR2008080901260.html.

210. Bill Schiller, *Bush urges Religious Freedom: As U.S. President, Family attend Beijing Church, Some Faithful are Left Outside on Street*, TORONTO STAR, Aug. 11, 2008, *available at* http://www.thestar.com/News/World/article/475906.

211. Johnson, *supra* note 95.

212. Schiller, *supra* note 210. Standing next to the Pastor, Bush stated publically, "You know, it just goes to show that God is universal and God is love, and no state, man or woman should fear the influence of loving religion." *Id.*

213. *See* Interview of the President, *supra* note 207.

214. For example, Hua Huiqi, a Chinese underground Christian pastor ,was told that if he went to the worship service, the police would "break [his] legs." Johnson, *supra* note 95.

215. For example, one elderly citizen stated after reading the Chinese newspapers, he believed Bush had killed many people and doubted whether God would save Bush. *See* Schiller, *supra* note 210.

216. *See id.*

217. For example, a seventy three year-old man "was thrilled Bush had come to the church [and that] he and his 13-year-old granddaughter... got to shake the president's hand. 'It was a

Overall, Bush used the visit to speak to Hu and the Chinese people and to summarize his positions on religious freedom.[218] While Bush concedes that his visit to a Chinese Christian church was to a church sponsored by the government,[219] he nevertheless contended that, "It gave me a chance to say to the Chinese people, religion won't hurt you, you ought to welcome religious people. And it gave me a chance to say to the Chinese government, why don't you register the underground churches and give them a chance to flourish?"[220] Deciding to attend the opening ceremonies enabled Bush to put religious freedom at the forefront of the world stage and have one more opportunity to show China's leaders and its people the value and importance of the freedom of religion.

IV. AN EARLY ASSESSMENT OF BUSH'S LEGACY IN PROMOTING CHINESE RELIGIOUS FREEDOM

As illustrated, Bush used his presidency[221] to promote religious freedom, especially in China.[222] He said religious freedom is a key component to the spread of democracy and freedom throughout the world, which is a policy used in the fighting of the War on Terrorism and rogue regimes.[223] As this section will explain, Bush's long-term impact on the increase in religious freedom in China is hard to gauge. But for now, it is clear that his efforts were a positive step forward for American-Chinese relations, the Chinese people, and the world.

Throughout most of his presidency, Bush forged a relationship with Hu to help modernize China on this issue and served as a strong ally for reform. In his own words, Bush appears to have viewed his relationship as a positive step in China's pursuit of religious freedom. In assessing the amount of leverage the United States has on Chinese religious policy, Bush said, "I think you should look at the relationship as one of constructive engagement, where you can find common areas . . . but also be in a position where they respect you enough to

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blessing from God' [the man said]." *Id.*

218. *See* Interview of the President, *supra* note 207.

219. According to Chinese lawyer Li Baiguang, Bush "expressed willingness to visit a house church." Abramowitz & Cody, *supra* note 209. However, White House officials decided against such a visit to "avoid provoking the Chinese." *Id.* It is important to note that Bush had previously cited his meeting with Baiguang when he marked the Tenth Anniversary of the International Religious Freedom Act. *See* 10th Anniversary, *supra* note 3.

220. Interview of the President, *supra* note 207.

221. While this Note discussed Bush promoting international religious freedom in China, it is important to note that Bush used his presidency to create the Office of Faith Based and Community Initiatives to aid faith based organizations in "providing social services." White House Faith-Based & Community Initiative, http://georgewbush-whitehouse.archives.gov/government/fbci/president-initiative.html (last visited Oct. 9, 2009). Additionally, after the Sept. 11, 2001 terrorist attacks, Bush created the Office of USA Freedom Corps to work with non-profit religious and secular organizations to promote volunteerism and service. USA FREEDOM CORPS, ANSWERING THE CALL TO SERVICE 2008 at 5-6 (on file with the author).

222. *See supra* Part II.

223. *See generally* Second Inaugural Address, *supra* note 2.

listen to your views on religious freedom and political liberty."[224]

For its part, the Chinese government has certainly listened and, more importantly, taken some small but positive steps towards greater religious freedom. For example, the Chinese government enacted further domestic laws protecting the freedom to practice and not practice religion,[225] implemented lower level diplomatic talks with the Vatican,[226] allowed the increase in published religious materials,[227] and continues to work with international religious organizations.[228] In addition, China at least statistically boasts a higher number of those practicing religion.[229] Finally, Hu and his government have publically emphasized the importance of religion for a peaceful society.[230]

However, the overall negative impact on China because of its religious policies continues to outweigh its positives affects. Despite some progress in recent years, the 2008 Annual Report on Religious Freedom shows that China continues to see numerous reports of religious abuses.[231] While Chinese laws allow the freedom of religion, only five religions are officially recognized, and the government controls those.[232] Additionally, the Chinese government continues to resist the efforts of the Dalai Lama[233] and the efforts of domestic non-government sponsored places of worship.[234] Finally, while Hu has publically acknowledged religious freedom, evidence suggests that Hu and his government are merely using religion and the concept of "social harmony" for political and economic gain,[235] as well as a tool to continue using restrictive government controls over the content of religion.[236]

Bush acknowledged that while it is early and difficult to assess his impact on China's religious policies,[237] his presidency at least enabled him to bring religious freedom to the forefront of foreign policy negotiations with the

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224. Interview of the President, *supra* note 207.
225. *See generally* Regulations on Religious Affairs, *supra* note 45, art. 1.
226. *See* Cody, *supra* note 16.
227. *See* 2008 ANNUAL REPORT, *supra* note 81, § 2.
228. *See supra* Part I.C.
229. *See* 2008 ANNUAL REPORT, *supra* note 81, § 1.
230. *See China urges Promoting Equality over Different Cultures*, CHINA DAILY (Nov. 11, 2008), *available at* http://www.chinadaily.com.cn/china/2008-11/14/content_7204841.htm (noting that the Chinese Ambassador to the United Nations Zhang Yesui stated, "Religious and cultural diversity is an asset of the human society and an important driving force for social development, cultural exchange and world peace"); *see also supra* Part II.C.
231. *See* 2008 ANNUAL REPORT, *supra* note 81, § 2; *see also supra* Part I.E.
232. *See* 2008 ANNUAL REPORT, *supra* note 81, § 1.
233. *See* Magnier, supra note 22; *see also supra* Part II.C.
234. *See* 2008 ANNUAL REPORT, *supra* note 81, § 2.
235. *See* Cody, *supra* note 16.
236. *See* Clifford Coonan, *Bush Steps up Pressure on China with Call for Religious Freedom*, THE INDEPENDENT (London) (Aug. 11, 2008), *available at* http://www.independent.co.uk/ sport/olympics/bush-steps-up-pressure-on-china-with-call-for-religious-freedom-890295.html (stating that as of 2008, China continues to control Christian churches and Chinese citizens may still only worship in government approved churches).
237. *See generally* Interview of the President, *supra* note 207.

Chinese.[238] While much work remains in respect to China improving its record on religious freedom, Bush believes that once "religion takes hold in [China] it can't be stopped. . . . This is a very positive development, in my view, for peace."[239] In addition, as religion continues to take hold in China, Bush believes that it will provide the incentive for the Chinese to make more reforms.[240]

Unlike any previous American president, Bush championed religious freedom and strongly pressured the Chinese government to allow true religious freedom in China.[241] Additionally, according to Chinese lawyer Li Baiguang, Bush's visits to Chinese churches aided the push for religious freedom in China and "sen[t] a message to the Chinese government and the rest of the world that the United States regards religion as important."[242] The Bush administration's willingness to engage the Chinese, demonstrated by his decision to attend the Olympic ceremonies, provided the Obama administration with a solid foundation to work with the Chinese on international issues, including international religious freedom.[243]

Beyond religious freedom, Bush's interactions and discussions with the Chinese and Hu have "witnessed the solidification of a healthy working rapport between the United States and China."[244] From the perspective of Chinese leaders, it appears they too viewed China's overall relationship with Bush as positive, especially in the dialogues between Bush and Hu.[245] Hence, Bush's efforts have produced significant growth of the American-Chinese relationship.

Going forward, Bush hopes America will continue to engage the Chinese on religious freedom.[246] In doing so, it will create a freer China and a more peaceful world.[247] While much work remains for China to become a truly open society in terms of religious practices, there are small signs of improvement.[248]

Most importantly, by placing religious freedom at the forefront of foreign policy, it gives hope to those in China working for religious freedom and provides them with a powerful ally to aid their cause. Bush's discussions and

238. For example, Bush stated that during meetings with Hu, he "pressed the point" of religious freedom. *Id.*

239. *Id.*

240. *Id.*

241. *See* Abramowitz, *supra* note 127.

242. Abramowitz & Cody, *supra* note 209.

243. *See generally* Yoichi Funabashi, *Keeping up with Asia: America and the New Balance of Power*, FOREIGN AFF. (Sept./Oct. 2008), *available at* http://www.foreignaffairs.org/20080901 faessay87508/yoichi-funabashi/keeping-up-with-asia.html.

244. *Id.*

245. *See* Tao Wenzhao, *Bush Leaves Positive Legacy for Sino-U.S. Ties*, CHINA DAILY, Jan. 14, 2009, *available at* http://www.chinadaily.com.cn/opinion/2009-01/14/content_ 7395581.htm. Wenzhao "is a researcher with the Institute of American Studies under the Chinese Academy of Social Sciences." *Id.*

246. Interview of the President, *supra* note 207.

247. *See generally* Second Inaugural Address, *supra* note 2.

248. *See* 2008 ANNUAL REPORT, *supra* note 81, § 2.

positive relationship with Hu give the Obama administration the ability to take stronger actions in the pursuit of Chinese religious freedom. Through his strong and aggressive diplomatic relationship with Hu, his public emphasis of the importance of religious freedom, and the small improvements in Chinese religious freedom, Bush leaves a positive legacy in terms of American-Chinese relations on religious freedom.

V. RECOMMENDATIONS FOR THE OBAMA ADMINISTRATION TO ENHANCE CHINESE RELIGIOUS FREEDOM

The Obama administration must continue to promote religious freedom as a key component to freedom and democracy prospering throughout the world.[249] As part of that, Obama must continue to pressure the Chinese government to enact and enforce true reforms and permit true religious freedom. The final part of this Note outlines a few policy suggestions the Obama administration should consider to aid China's development of religious freedom.

A. Build a Relationship with Hu Jintao and Develop Benchmarks on Religious Freedom

First, Obama should forge a close relationship with Hu similar to the relationship Hu had with Bush.[250] In these discussions, Obama must encourage Hu to lift government restrictions on religion, recognize all religious groups, and permit them to practice religion freely.[251] In doing so, Obama can illustrate that the only way China's religious laws will be viewed credibly by the Chinese people is by enforcing its laws, recognizing the right of all religious groups to practice religion, and permitting domestic non-government approved places of worship. Moreover, Obama must continue to forge diplomatic talks with the Chinese government and the Vatican,[252] as well as encourage the Chinese to engage the Dalai Lama, while peacefully resolving the issues of Tibet and Taiwan.[253]

In addition, just as Obama pledged to make the American government more transparent and open to the American people,[254] Obama should urge the

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249. As such, just like Bush and as outlined under the International Religious Freedom Act, Obama must make religious freedom a central part of his foreign policy. *See* International Religious Freedom Act of 1998, 22 U.S.C. § 6401(a)(2) (1998); *see also* 10th Anniversary, *supra* note 3.

250. *See supra* Part II.C.

251. *See generally* 2008 ANNUAL REPORT, *supra* note 81.

252. *See supra* Part II.C.

253. *See* Magnier, *supra* note 22.

254. Obama pledged, "My Administration is committed to creating an unprecedented level of openness in Government. We will work together to ensure the public trust and establish a system of transparency, public participation, and collaboration. Openness will strengthen our democracy and promote efficiency and effectiveness in Government." Memorandum from

Chinese government to do likewise. This means working with the Chinese government and encouraging them to report statistics on issues such as religious membership, positive developments, and reports of abuses. This report would serve as a complement to the Annual Report on Religious Freedom and would help form a more accurate picture of China's religious policies.[255]

Coinciding with his pledge for transparency, Obama and Hu should work together to develop a series of benchmarks[256] to measure China's progress in adhering to principles of religious freedom. While the United States should lead on this issue, American allies should also aid in these efforts to oversee China's progress. These benchmarks must include, but are not limited to, the recognition of all religions, including those operated by underground churches, and allow free worship and religious publications without abusive government restrictions on domestic and international religious groups.[257] Moreover, China must end government sponsored religious abuses[258] and end the enforcement of harsh measures on religion under the guise of "social harmony."[259] Finally, China must find a peaceful resolution to the conflicts with the Dalai Lama and the Vatican.[260]

Most importantly, Obama must advocate that China should implement laws and policies at all levels of government that support the belief that freedom of religion is a natural right of all people.[261] By having these discussions and benchmarks, it would aid the international community in marking true progress for China.[262] Conversely, by publicly taking and adhering to this pledge, the Chinese government would show its people a true commitment to religious freedom by going beyond mere rhetoric[263] and actually implementing real change. By taking these steps, it will embolden the Chinese people and signal to the world that China is serious about being a real partner with the rest of the free world.

President Barack Obama for the Heads of Executive Departments and Agencies, Subject: Transparency and Open Government, Feb. 19, 2009, *available at* http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment/.

255. *See* 2008 Annual Report, *supra* note 81.

256. These benchmarks could be similar to the series of military, economic, and political benchmarks established by President George W. Bush, the United States, and Iraq to measure Iraqi political progress in the development of its democracy. *See* Lionel Beehner, *What are Iraq's Benchmarks*, COUNCIL FOREIGN REL., Mar. 11, 2008, *available at* http://www.cfr.org/publication/13333/.

257. This would be in contrast to the restrictions currently imposed under Chinese law. *See supra* Part I.B, E.

258. *See* 2008 ANNUAL REPORT, *supra* note 81 at § 2.

259. *See id.*; *see also* XIAN FA art. 36, (1982) (P.R.C.); Cody, *supra* note 16.

260. *See* Magnier, *supra* note 22.

261. *See* International Religious Freedom Act of 1998, 22 U.S.C. § 6401(a)(2) (1998).

262. By having a cooperative partnership with the Chinese, the international community could mark true progress as opposed to relying on official government media. *See generally* Zissis & Bhattacharji, *supra* note 24.

263. *See generally* Cody, *supra* note 16.

B. Work with Allies and Religious Organizations in China

Obama must also continue to reach out to allies of religious freedom, such as the Vatican, the Dalai Lama, and international religious organizations based in China, to pressure the government to allow more freedom of religion. Obama should use his Office of Faith-based and Neighborhood Partnerships[264] to reach out to American and international religious organizations in China to assist in their efforts to promote the freedom to practice religion. This support could include meeting with these leaders to determine the type of assistance that the United States could provide and even attending one of these organizations' worship services while in China to demonstrate American unity with them.

For the Dalai Lama and the Vatican, Obama should encourage each to continue to work with the Chinese government in the hopes of a peaceful resolution to their disputes. Specifically, regarding the Dalai Lama, Obama must not give in to pressure[265] from the Chinese government but continue to recognize the Dalai Lama's efforts and communicate his intentions to the Chinese government. As for the Vatican, Obama must continue to aid diplomatic discussions between it and the Chinese government.[266]

C. Continue to Visit China and Speak Directly to the Chinese People

Finally, Obama should continue to visit China as often or more than Bush did during his presidency.[267] For example, Obama should visit areas outside major cities[268] to examine how much religious freedom exists in smaller towns and villages. In doing so, Obama would draw attention to the importance of religious freedom at all levels of society and government.[269] During his visits, Obama should also attend worship services and discuss religious freedom with Hu. During each visit, Obama should visit Chinese churches and speak directly to the Chinese people about the importance of religious freedom.[270]

Aside from visiting government approved Christian churches, Obama

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264. Obama renamed Bush's Office of Faith-based and Community Initiatives and has directed this White House office to serve as "a resource for nonprofits and community organizations, both secular and faith based, looking for ways to make a bigger impact in their communities." Office of the Press Secretary, Obama Announces White House Office of Faith-based and Neighborhood Partnerships (Feb. 5, 2009), *available at* http://www.whitehouse.gov/the_press_ office/ObamaAnnouncesWhiteHouseOfficeofFaith-basedandNeighborhoodPartnerships/ [Hereinafter Faith-based and Neighborhood Partnerships].

265. Such as the Chinese government's disagreement with Bush for awarding the Dalai Lama the Congressional Gold Medal. *See* Magnier, *supra* note 22.

266. *See* Cody, *supra* note 16.

267. *See* Abramowitz, *supra* note 127.

268. The visits examined in this Note by Bush were to Beijing. *See supra* Part II.B, D.

269. This action would put pressure on Hu and the national government to ensure its laws are not ignored by local Communist Party leaders. *See* Cody, *supra* note 16.

270. Much like Bush did during his visits to Chinese churches. *See supra* Part II.B-D.

should meet with religious leaders, visit underground/house churches,[271] and visit places of worship of other faiths to emphasize the importance of freedom for all religions.[272] As noted, Obama could also meet with international organizations in China that are only permitted to eng with foreigners[273] to illustrate to the Chinese government that these organizations are not to be feared but encouraged in the society. Furthermore, Obama should meet with religious leaders and organizations that perform community service, to show the Chinese people and the government the positive influence religious freedom has on communities. Conversely, when Chinese leaders visit the United States, Obama should encourage the Chinese delegation to include religious leaders. These religious leaders could in turn meet with members of Obama's Office of Faith-based and Neighborhood Partnerships council,[274] thereby forging cooperation and partnership between American and Chinese religious leaders.

CONCLUSION

America must remain vigilant in its pursuit of worldwide democracy and freedom, with religious freedom as an essential part. A freer and more democratic China will ensure a more prosperous and safer world. An important step in China's road to true freedom is allowing real religious freedom in its society. However, while America must remain adamant in its pursuit of Chinese religious freedom, in the end, the Chinese government and its people must encourage and embrace religious freedom.

271. *See* Abramowitz & Cody, *supra* note 209 (quoting Chinese lawyer Li Baiguang who stated that if Bush would have gone to a house church, "the power of house churches in China would grow").

272. *See supra* Parts I.D., II.A.

273. For example, the Beijing International Christian Fellowship. *See supra* Part I. C.

274. The council contains both religious and secular leaders. Office of Faith-based and Neighborhood Partnerships, *supra* note 264.

A SHIP WITHOUT A CAPTAIN AT THE HELM:

THE NEED FOR THE DEVELOPMENT AND IMPLEMENTATION OF A SUPRA-NATIONAL PRUDENTIAL SUPERVISOR TO OVERSEE THE EUROPEAN UNION FINANCIAL SECTOR

Bryan S. Strawbridge*

"The current financial crisis has highlighted the weaknesses in the EU's supervisory framework, which remains fragmented along national lines despite the substantial progress achieved in financial market integration and the increased importance of cross border entities. If financial integration is to be efficient in terms of safeguarding systemic stability as well as in delivering lower costs and increased competition, it is essential to accelerate the ongoing reform of supervision."[1]

I. INTRODUCTION

With the rapid growth of financial institutions in the European Union[2] (sometimes the "EU" or the "Union"), the subsequent development of cross-border transactions, and the establishment of financial subsidiaries spread

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1. Press Release, EUROPA, High Level Expert Group on EU Financial Supervision to Hold First Meeting on 12 November (Nov. 11, 2008), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1679&format=HTML&aged=0&language=EN&guiLanguage=en [hereinafter EUROPA Press Release]. EUROPA is the name of the website for the European Union that "provides up-to-date coverage of European Union affairs and essential information on European integration." EUROPA, About EUROPA, http://europa.eu/abouteuropa /index_en.htm (last visited Oct. 29, 2009).

2. The European Union is an "economic and political partnership between [twenty-seven] democratic European countries" with over 495 million citizens that has succeeded in creating a zone of free trade and travel, developed a uniform currency, the Euro, and advocates for a "fairer, safer world." EUROPA, The EU at a Glance, Panorama of the EU, http://europa.eu/abc/panorama/index_en.htm (last visited Oct. 29, 2009). Countries that are members of the EU are referred to as "Member States" in this Note.

throughout various countries within the EU over the past three decades,[3] the need has arisen for the development of an intra-EU supervisory body to oversee an integrated financial market.[4] Similar to the United States' Securities and Exchange Commission, which, *inter alia*, regulates and supervises domestic securities transactions,[5] each European Union Member State currently domestically self-polices their individual financial sector to verify "that their work will be performed in an objective fashion and that the rules in force will be applied fairly to all agents operating in the market for financial instruments, in banking and in insurance."[6] This system of Member State national self-supervision is the final line of review for financial institutions within the EU, as there does not exist an EU-wide supervisory body.[7]

With the increasing presence of financial institutions and subsidiaries located outside the Member States' territorial jurisdictions, individual Member States are no longer capable of adequately protecting the financial interests of their citizenry as their supervisory gaze is blinded by jurisdictional limitations.[8] Due to the "growing amount of cross-border activity and cross-border mergers of financial institutions," financial supervision at an exclusively national level is gradually, but increasingly, becoming an untenable condition.[9] Therefore, the need has surfaced for the development of an intra-EU regulatory body to supervise the financial institutions within the EU as a whole as a means to

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3. PIERPAOLO FRATANGELO, BANCA D'ITALIA, INTERNATIONAL AND EUROPEAN CO-OPERATION FOR PRUDENTIAL SUPERVISION 2 (2003), http://mpra.ub.uni-muenchen.de/5539/1/MPRA_ paper_5539.pdf ("The issue is not a new one since the first forms of cross-border co-operation are almost thirty years old.").

4. ECOFIN, Focus Paper, *Informal Meeting Of The Ministers In Charge of Economy And Finance* (2008), *available at* http://www.eu2008.fr/webdav/site/PFUE/shared/import/0912_ informelle_ecofin/Focus_paper_EN.pdf. As an arm of the Council of the European Union, the Economic and Financial Affairs Council, commonly referred to as ECOFIN, is composed of the Economics and Finance Ministers of the EU Member States, and "covers EU policy in a number of areas including: economic policy coordination, economic surveillance, monitoring of Member States' budgetary policy and public finances, the Euro (legal, practical and international aspects), financial markets and capital movements and economic relations with third countries." Council of the European Union, ECOFIN Council, http://consilium.europa.eu/cms3_fo/ showPage.asp?id=250&lang=en (last visited Oct. 29, 2009).

5. The United States Securities and Exchange Commission (the "SEC") acts as the "investor's advocate" and seeks "to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation." U.S. Securities and Exchange Commission, What We Do, http://www.sec.gov/about/whatwedo.shtml (last visited Oct. 29, 2009) [hereinafter SEC].

6. ECOFIN, *supra* note 4.

7. EUROPA Press Release, *supra* note 1.

8. Eurofi, *For Effective Supervision of Cross-Border Financial Groups* (2008), http://www.eurofi.net/pdf/2008/sept2008/Supervision_Crisis.pdf. "Eurofi, a European think tank dedicated to the integration and efficiency of EU Financial, Insurance and Banking Services markets, was created in 2000." Eurofi, Who are we?, http://www.eurofi.net/who.php (last visited Oct. 29, 2009).

9. Posting of Roel Beetsma & Sylvester Eijffinger to Europe EconoMonitor, *Credit Crisis is a Missed Opportunity to Restructure European Financial Supervision*, http://www.rgemonitor .com/euro-monitor/252721/credit_crisis_is_a_missed_opportunity_to_restructure_european _financial_supervision (June 2, 2008).

supplement the "solo" supervision currently conducted by each Member State.[10] This proposed entity would act not to wholly supplant national supervision, but to instead act as an overarching supervisor with the plenary authority to verify the veracity of financial institutions providing services across the European Union thereby vitiating the jurisdictional limitations currently inhibiting national-level supervisors.[11] The national supervisors will continue to supervise financial entities within their territorial boundaries; however, the supra-national EU supervisory body will verify the integrity of the financial sector throughout the EU.[12]

The Finance Ministers of the EU Member States have begun to recognize the weaknesses of solo supervision and are at the onset of taking necessary steps to make corrections.[13] Part I of this Note will discuss the meeting in Nice, France, where representatives of the EU Member States met in 2008 to discuss the current system of prudential omissions and possible avenues for change.[14] Part II will highlight the glaring gaps in the current system of national prudential supervision, describe past steps taken to shore up such supervisory holes, as well as discuss some emerging trends on the issue.[15] Part III advocates the creation of an intra-EU regulatory body with broad powers and no jurisdictional limitations within the EU with the mandate to supervise the European financial industry.[16] Additionally, Part III will affirm the interaction and effective cross-border cooperation necessary between national supervisors and the proposed supra-national entity for successful supervision of the EU financial sector.[17] Finally, Part IV will discuss some critiques of the creation of an intra-EU prudential supervisor and other theories that have been proposed to address the issue.[18]

II. THE NICE MEETING

In September 2008, all twenty-seven finance ministers of the EU Member States, the central bank governors, the European Commission, the European Central Bank, and the European Investment Bank met in Nice, France (hereinafter, the "Nice meeting"), to confer on the issue of, *inter alia*, supervision in an attempt to "fireproof Europe's financial system from the troubles that have brought U.S. lenders close to collapse" over the past two

10. ECOFIN, *supra* note 4. *See also*, Eurofi, *supra* note 8 ("[T]he financial crisis highlights the limits of 'solo' supervision."). As discussed in Part II A *infra*, "solo" supervision refers to Member States supervising their individual financial sectors domestically without review by any other entity or other national supervisor.

11. *See infra* Part III.

12. *See infra* Part III.

13. *See infra* Part I.

14. *See infra* Part I.

15. *See infra* Part II.

16. *See infra* Part III.

17. *See infra* Part III.

18. *See infra* Part IV.

years.[19] The concern of the respective EU Member States was the "potential collapse of a larger bank or insurer that does business in several EU countries" and the subsequent "prospect of clashing views between financial supervisors . . ." as to how to handle the entity's demise.[20] The ECOFIN Chair and French Economy Minister, Christine Lagarde, who organized the Nice meeting, noted that the discussions would be "devoted to analysing the current economic situation in Europe and how the Member States should collectively respond to this situation."[21]

At the conclusion of the Nice meeting the finance ministers "offered few details about how they will revamp EU's current system of fragmented, national-based supervision."[22] However, the ministers crafted some general guidelines to revamp the struggling system and initiated a dialogue regarding the possible creation of a multinational supervisory body.[23] In the financial sector, the ministers sought to "restore confidence through transparency and accountability of banks and other sectors."[24] Additionally, the "EU ministers and central bankers said they could agree on 'broad guidelines' on carving up responsibility for how national financial supervisors should work together to tackle problems at European financial institutions."[25]

This broad based plan "would see countries shar[ing] more key information on the risk profile of a company and figure out a crisis plan that would call on a parent company to ensure that its own funds 'are allocated equitably among each entity in the group if ever there should be a failure.'"[26] This supervisory body would essentially be "a pilot in [a] plane" to streamline supervision of multinational banks and insurers.[27]

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19. Aoife White, *EU Discusses Financial Supervision*, THE INDUSTRY STANDARD (Sept. 12, 2008), *available at* http://www.thestandard.com/news/2008/09/12/eu-discusses-financial-supervision.

20. *Id.*

21. Press Release, Presidency of the Council of the European Union, Informal Meeting of the Economy and Finance Ministers in Nice (Sept. 12, 2008), *available at* http://www.eu2008.fr/PFUE/lang/en/accueil/PFUE-09_2008/PFUE-12.09.2008/informelle_ministres_finances.

22. *See generally* Adam Cohen, *EU Ministers Want Better Regulation*, WALL ST. J (Sept. 14, 2008), *available at* http://online.wsj.com/article/SB122130818990832183.html?mod=hpp_us_whats_news.

23. See *generally EU Finance Ministers Conclude Meeting with Measures to Tackle Slowdown*, CHINA VIEW (Sept. 14, 2008), *available at* http://news.xinhuanet.com/english/2008-09/14/ content_9981605.htm; Huw Jones, *EU Ministers Outline Bank Supervision Shake-Up*, THOMSON REUTERS (Sept. 13, 2008) *available at* http://www.reuters.com/article/rbssFinancialServicesAndRealEstateNews/idUSLD34647820080913 [hereinafter Jones, Supervision Shake-Up].

24. *EU Finance Ministers Conclude Meeting with Measures to Tackle Slowdown*, CHINA VIEW (Sept. 14, 2008), *available at* http://news.xinhuanet.com/english/2008-09/14/content_9981605.htm.

25. White, *supra* note 19.

26. *Id.*

27. Jones, *Supervision Shake-Up*, *supra* note 23.

Although the ministers were unable to develop a final detailed means for creating a unified supervisory entity at the Nice meeting, the stage was set for future fashioning of such a system.[28] Lagarde stated that the ministers "found the basis for unified supervision."[29] She continued by noting that a singular financial supervisory body "implies a sounder system, a more effective solution" and that following the Nice meeting, Europe had "moved towards a more integrated Europe."[30] Additionally, the meeting brought about greater transparency among the Finance Ministers and it was agreed that concerted solutions were necessary to address the growing problem.[31] Lagarde similarly stated that a lead supervisor was necessary for supervision of the EU to be effective.[32]

The financial downturn, arguably initiated by the American sub-prime mortgage debacle, exemplifies the current inability of Member States to regulate the cross-border financial institutions and their myriad of intra-Member State securities' transactions.[33] Eurofi, a European think tank that monitors financial integration, comments,

> Since cross-border financial players are characterized by highly integrated and centralized operations from a strategic and commercial perspective, as well as for their risk and cash management, it is at the group's head office that growth strategies are mapped out, future sources of profit are planned, choices are decided on in terms of innovations, and the various corresponding risks are identified.[34]

It is because of these cross-border interactions that Member States' self-policing, or "solo supervision," is untenable.[35] Member States' supervisory bodies can no longer guarantee quality supervision or effectively protect their depositors because subsidiaries can be located outside their territorial boundaries and, thus, outside their reviewable jurisdiction.[36] In order to provide for the future security and stability of the European Union, Member States should continue the dialogue begun at Nice so as to create a unified intra-EU supervisory body, which will oversee the integrity of the continent's

28. *HIGHLIGHTS—EU Finance Ministers' Meeting in Nice*, THOMSON REUTERS (Sept. 13, 2008), *available at* http://www.reuters.com/article/companyNews/idUKLC 66164120080913?symbol= LEH.N.

29. *Id.*

30. Jones, *Supervision Shake-Up*, *supra* note 23.

31. Christine Lagarde, ECOFIN Chair and French Economy Minister, Remarks following the Nice Meeting (Sept. 13, 2008) (transcript available at http://uk.reuters.com/article/UK_ SMALLCAPSRPT/idUKLC66164120080913).

32. *Id.*

33. Eurofi, *supra* note 8.

34. *Id.*

35. *Id.*

36. *Id.*

financial system.

III. CURRENT SYSTEM OF EUROPEAN FINANCIAL SUPERVISION

Debates regarding the cooperation of European nations in the financial sector typically focus on crisis management.[37] This is a natural reaction as it is these crises that bring the spotlight on inadequacies in a financial system. However, in order to properly address the way in which a system manages a crisis, it is necessary to analyze the manner in which it operates under ordinary conditions so as to ascertain the existing deficiencies.[38] This Note focuses not on the present financial crises, but instead on the deficiencies in supervision that have not yet been rectified. The financial damage could have been mitigated had these failures been previously addressed. Accordingly, attention should shift from the immediate emergency to future prevention and adaptation by focusing on cooperation of all EU Member States toward the end of creating an intra-EU supervisor.[39]

At present, prudential supervision in the EU exists exclusively at a national level,[40] meaning that there is no EU financial supervisor with the authority to verify that financial institutions are in accord with the standards[41] set forth by EU regulations or domestic laws.[42] EUROPA has noted that "[t]he current national-based organisation of EU supervisions lacks a framework for delivering supervisory convergence and limits the scope for effective macro-prudential oversight based on a comprehensive view of developments in financial markets and institutions."[43] If protecting against systematic instability and further negative developments in the EU financial sector is going to occur, integration of an EU supervisor must be accelerated.[44]

A. Supervision Versus Regulation

The difference between the creation of regulation—a legislative function—and supervision, traditionally under the purview of an executive, has been blurred.[45] Although the terms regulation and supervision are often

37. Tommaso Padoa-Schioppa, *Better Supervision is Key to Stability*, THE BANKER (Apr. 7, 2008), *available at* http://www.thebanker.com/news/fullstory.php/aid/5666/Better_supervision_is_key_to_stability.html. Mr. Padoa-Schioppa was the Minister of Economy and Finance of Italy from 2006-2008 and is a former board member of the European Central Bank (the "ECB"). *Id.*

38. *Id.*

39. *Id.*

40. EUROPA Press Release, *supra* note 1.

41. See *infra* Part II D for a discussion of supervisory standards that have been proposed to further effective cross-border communication and information sharing by national supervisors.

42. *See* EUROPA Press Release, *supra* note 1.

43. *Id.*

44. *Id.*

45. Padoa-Schioppa, *supra* note 37.

mistakenly used interchangeably, "[s]upervision refers to the oversight of financial firms' behaviour (in particular, risk monitoring)."[46] In contrast, "[r]egulation refers to rule-making."[47] The goal of economic regulation is to "correct market imperfections and unfair distribution of resources, while simultaneously pursuing three general objectives: stability, equitable resource distribution, and efficiency."[48]

A supervisor is a regulatory body that seeks to competently and objectively guarantee that rules pertaining to the market for financial institutions in banking and insurance are applied fairly to all agents in such fields.[49] "Solo" supervision refers to the overseeing of a financial market by a singular Member States' supervisor without external review.[50] For example, in France the supervisory bodies are the Autorité des Marchés Financiers, which is in charge of the financial instrument market, the Banking Commission, which oversees credit institutions and investment banks, and the Autorité de Contrôle des Assurances et des Mutuelles, which covers the insurance industry.[51] These agencies review their respective markets *sans* outside interference.[52]

As discussed below, national supervisors have voluntarily adopted quasi-uniform standards whereby each national supervisor attempts to coordinate with other national supervisors.[53] However, there currently is no EU body acting on a supra-national level to coordinate supervision. Prudential supervision is "[a] term sometimes used to describe the supervision/regulation of institutions such as banks . . . where the supervising authority seeks to ensure that the depositors are protected by the institution in question being financially sound."[54] By leaving supervision of international banks under the purview of national supervisors exclusively, supervisory review is inadequate, and exposes the financial sector to systemic failure.

B. Overview of National Supervision and Its Inherent Flaws

The traditional notion, or "institutional" model, of national supervision is predicated on specialization of each single segment of the financial industry by separate supervisors.[55] Under this model, all supervisory responsibilities of

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46. Rosa M. Lastra, *The Governance Structure for Financial Regulation and Supervision in Europe*, 10 COLUM. J. EUR. L. 49, 49 (2003).

47. *Id.*

48. Giorgio Di Giorgio & Carmine Di Noia, *Financial Market Regulation and Supervision: How Many Peaks for the Euro Area?*, 28 BROOK. J. INT'L L. 463, 469 (2003).

49. ECOFIN, *supra* note 4.

50. *Id.*

51. *See id.*

52. *Id.*

53. See *infra* Part II D for a discussion of the Basel Committee's series of standards proposed to nations around the world in an attempt to encourage cross-border communication and uniformity in applying supervisory norms.

54. prudential%20supervision/1188/ (last visited Oct. 29, 2009).

55. Di Giorgio, *supra* note 48, at 466.

each segment are assigned to a distinct agency.[56] The three traditional supervisory authorities are guardians over banks, financial mutual funds, and insurance companies.[57] These supervisory agencies control "entry selection processes (*e.g.*, authorizations and enrolling procedures in special registers), constant monitoring of business activities (controls, inspections, sanctions) and decisions about exit from the market (suspensions or removal)."[58]

The institutional model has been effective in the past as financial entities were able to efficiently interact with a single specialized supervisor (*i.e.*, a distinct national agency tasked with a particularized and individual financial sector) thereby reducing supervision costs.[59] However, with the development and growth of massive financial institutions servicing multiple arms of the financial industry, duplication and redundancy have become the norms of the traditional model of national supervision.[60] For example, financial entities performing multiple sector activities are being burdened by conflicting rules imposed by various distinct supervisory agencies due to differing classifications and overlap in their legal statuses.[61] Additionally, global banks "which operate in [ten] or more countries find it impossible to organize compliance with rules from their group headquarters in a structured way because rules and requirements are completely different across countries."[62] In a global financial economy "where the boundaries separating the various institutions are progressively being erased, it is no longer possible to definitively determine whether particular entities are banks, non-banking intermediaries, or insurance companies."[63]

The growth of conglomerates with international offices and subsidiaries makes national level regulation and supervision unable to adequately protect the public.[64] The current "financial architecture" of the supervision of Europe is defined by three principles: (1) decentralization, (2) cooperation, and (3) segmentation "by specialist financial institutions conducting distinct financial activities: banking, securities and insurance."[65] However, the current institutional design is being altered by the "trend towards unification of supervisory authorities at the level of the Member States and the possible centralization of supervisory functions at the EU level."[66] The blurring of services provided by international financial entities has created the trend toward

56. *Id.* See *supra* Part II A for an analogous discussion of the French model of supervisory segmentation by particularized financial sectors.
57. Di Giorgio, *supra* note 48, at 466.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.* at 466-67.
62. Padoa-Schioppa, *supra* note 37.
63. Di Giorgio, *supra* note 48, at 467.
64. *See id.* at 463.
65. Lastra, *supra* note 46, at 50.
66. *Id.*

the consolidation of national supervision into a single domestic supervisory entity (*i.e.*, moving away from the institutional model of supervision for each specialized financial sector).[67]

C. The Trend for Consolidation of Member State Supervision into a Singular National Supervisor

Member States with a multitude of specialized agencies are trending towards consolidation into a singular national supervisor to streamline supervision.[68] The drive for consolidation of national supervisory authorities within Member States via legislative reform "is a regulatory response to the rise in financial conglomerates and complex financial groups."[69] The impetus for these legislative reforms within certain Member States (*e.g.*, the United Kingdom[70] and Germany[71]) is that "the structure of the regulatory system needs to reflect the structure of the markets that are regulated."[72] Other Member States, such as Ireland, Sweden and Britain "have [also] moved to a single supervisor who oversees not just banks but other segments of the financial services industry, like insurance and securities."[73] This trend for individual Member States to consolidate supervisory responsibilities has significant broader implications, "as it could pave the way for the creation of a single [European Union supervisor], in particular if all or most Member States were to adopt such a model in their respective jurisdictions."[74]

Although analogous to the United States' system of supervision, the European trend to consolidate to a single national supervisor is not wholly equivalent. As noted in the introduction of this Note, the SEC is a regulator and supervisor of the United States' financial sector.[75] But, it is not the sole supervisor.[76] The United States "model of financial regulation and supervision

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67. Di Giorgio, *supra* note 48, at 466-67.

68. Lastra, *supra* note 46, at 50.

69. *Id.*

70. *Id.* at 51. The Bank of England Act of 1998, which came into effect on June 1, 1998, transferred responsibility for banking supervision from the Bank of England to the Financial Services Authority (commonly referred to as the "FSA"). *Id.*

71. *Id.* at 50. The Federal Financial Supervisory Authority of Germany, the Bundesanstalt für Finanzdienstleistungsaufsicht or "BaFin," was established on May 1, 2002, and "consists of three supervisory directorates for banking supervision, insurance supervision and securities supervision/asset management, and three cross-sectoral departments dealing with cross-sectoral issues." *Id.*

72. *Id.* (quoting Richard K. Abrams & Michael W. Taylor, *Issues in the Unification of Financial Sector Supervision* 3 (International Monetary Fund, Working Paper No. 00/213, 2000)).

73. Matthew Saltmarsh, *Jumble of Rules Would Hobble Any EU Bailout Warnings, Anger and Doubts*, INTERNATIONAL HERALD TRIBUNE, Sept. 24, 2008, at 1, *available at* 2008 WLNR 18121608.

74. Lastra, *supra* note 46, at 52.

75. *See generally* SEC, *supra* note 5.

76. Lastra, *supra* note 46, at 53.

is characterized by its complexity, the multiplicity of regulators, and the demands of federalism."[77] Additionally,

> Banking in the U.S. is subject both to federal law and to state law. There are several supervisory authorities at the federal level: the Federal Reserve System, the Office of the Comptroller of the Currency, and the Federal Deposit Insurance Corporation (in addition to the federal regulators for thrifts, such as the OTS, Office of Thrift Supervision). There are also supervisory authorities at the state level.[78]

Although a comparison of the United States' system of supervision seems rational, due to the breadth of complexity in the United States' tiered supervision, comparing the United States' system to the progression of European development towards singular Member State supervision is not wholly analogous. Accordingly, the subsequent analysis and recommendation in this Note will omit further comparison to the United States' system of prudential supervision. The emerging trend in EU Member States to consolidate their individual supervisory system within the domestic financial sector displays an openness for change as well as greater regulatory uniformity, which would make the potential for the creation of an intra-EU supervisory body more plausible as it simplifies coordination from a multitude of national agencies to a singular entity for each nation.[79]

D. EU Framework of Minimum Standards

While supervision has been effectuated on an exclusively national level in the EU, this is not to say that there does not exist communication and cooperation among Member States' domestic supervisors. Steps have been taken to encourage cross-border operations so as to maintain, as best as feasible, supervision of international banks and institutions by national supervisors.[80] As discussed below, the intrinsic failure of attempting to coordinate national supervisors is that abiding by agreements and supervisory standards are optional, and lack any legally binding force.[81]

Contrary to other industries, such as steel production or automotive manufacturing, "finance is called a system – a set of connected things."[82] That is to say, the financial sector is a global assortment of giant international financial institutions, such as "JPMorgan [Chase], Deutsche Bank, UniCredit, and perhaps two dozen other global financial institutions [that] form a system

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77. *Id.*
78. *Id.*
79. *Id.* at 51.
80. *See generally* Padoa-Schioppa, *supra* note 37.
81. *Id.*
82. *Id.*

among themselves, with the plethora of minor institutions operating in their respective home countries."[83] Although advancements have been taken in the past to make regulation of these institutions international, whether it be in the creation of capital requirements, bank licensing criteria, or deposit insurance, there has been very limited steps taken to mandate financial supervision on an international scale or at even a European level.[84]

In the European Union, the responsibility for Euro monetary policy has been centralized in the European Central Bank (the "ECB").[85] However, banking and financial supervision has remained at the national level with the respective domestic agencies.[86] This divergence is unique to the European Union.[87] National supervisors within the EU are tasked with the obligation to create both regulations, including harmonization with EU directives, and effectuate such regulation through financial supervision of domestic institutions.[88]

At the EU level, common standards have been proposed to financial intermediaries, banks, securities regulations, and accounting rules to ensure universal banking and to maintain an open market throughout the Union.[89] An example of internationally proposed supervisory standards is the Minimum Standards for the Supervision of International Banking Groups and Their Standards (the "Minimum Standards"), which were enacted in 1992.[90] Under internationally proposed standards such as these, each Member State may voluntarily adopt the Minimum Standards, but they are not mandatory.[91]

The Minimum Standards were a product of the Basel Committee, which was created in 1975 as a response to various bank failures in Europe.[92] The Basel Committee, which is still in existence, is composed of banking regulators from France, Germany, the Netherlands, Belgium, Luxembourg, Sweden, Switzerland, Italy, Spain, Japan, the United Kingdom, Canada, and the United

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83. *Id.*

84. *Id.*

85. Di Giorgio, *supra* note 4848, at 463.

86. *Id.*

87. *Id.* at 463-64.

88. *Id.* at 463.

89. Rolf H. Weber & Douglas W. Arner, *Toward a New Design for International Financial Regulation*, 29 U. PA. J. INT'L L. 391, 440 (2007).

90. Duncan E. Alford, *Core Principles for Effective Banking Supervision: An Enforceable International Financial Standard?*, 28 B.C. INT'L & COMP. L. REV. 237, 243 (2005).

91. *Id.*

92. *Id.* at 242. "The Basel Committee was established as the Committee on Banking Regulations and Supervisory Practices by the central-bank Governors of the Group of Ten countries at the end of 1974 in the aftermath of serious disturbances in international currency and banking markets (notably the failure of Bankhaus Herstatt in West Germany). The first meeting took place in February 1975 and meetings have been held regularly three or four times a year since." BASEL COMMITTEE ON BANKING SUPERVISION, HISTORY OF THE BASEL COMMITTEE AND ITS MEMBERSHIP 1 (2004), *available at* http://www.aon.com/nl/nl/risicomanagement/arc/credit_risk_management/History_of_Basel_committee_Oktober_2004.pdf.

States.[93]

The purpose of the Basel Committee is to "provide[ ] a forum for regular cooperation on banking supervisory matters . . . to enhance understanding of key supervisory issues and improve the quality of banking supervision worldwide."[94] It is worth noting, however, that the Basel Committee "has no legal enforcement power itself, but encourages member nations to abide by these regulatory guidelines and to use whatever authority they possess to enact and enforce them."[95] In order to promulgate its determinations as effectively as possible, the Basel Committee typically presents its determinations at a biennial meeting of the International Conference of Banking Supervisors.[96] These principles are subsequently endorsed by the Conference.[97] In addition to the Minimum Standards from 1992, the Basel Committee has issued other guidelines on international banking supervision: the Concordat of 1975; the Revised Concordat; the Capital Adequacy Standards, commonly referred to as "Basel I"; the Core Principles; and in 2004, the International Convergence of Capital Measurement and Capital Standards: A Revised Framework, commonly referred to as "Basel II." Some of these guidelines will be discussed below.[98]

Improved cross-border communication, a principle espoused by the Basel Committee, assists national supervisors in effectively conducting their jobs by increasing information, and evidences the point that a supra-national EU supervisor can work among multiple nationalities. Such cooperation was seen as desperately needed following bank failures in the mid-1970s "and the subsequent confusion over the settlement of the bank's liabilities."[99] The Basel Committee sought to address these deficiencies by delineating the proper roles of home country supervisory agencies over their domestically located international financial institutions.[100] To these ends, the Basel Committee issued the Concordat of 1975.[101] The proclamation was entitled a Concordat because it was not a binding legal treaty, but an enumeration of supervision guidelines that EU Member States were encouraged to adopt.[102] Duncan Alford

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93. Alford, *supra* note 90, at 242. *See generally* Bank for International Settlements, About the Basel Committee, http://www.bis.org/bcbs/ (last visited Oct. 29, 2009); Peter Cooke, *The Basel "Concordat" on Supervision of Banks' Foreign Establishments*, 39 AUSSENWIRTSCHAFT 151 (1984).

94. Bank for International Settlements, About the Basel Committee, http://www.bis.org/bcbs/ (last visited Oct. 29, 2009).

95. Alford, *supra* note 90, at 243.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 244.

100. *Id.*

101. *Id.* See Committee on Banking Regulations and Supervisory Practices, Report to the Governors on the Supervision of Banks' Foreign Establishment (1975), http://www.bis.org/publ/bcbs00a.pdf?noframes=1 (last visited Oct. 29, 2009), for the original text of the Concordat of 1975. The original name of the Basel Committee was Committee on Banking Regulations and Supervisory Practices. *Id.*

102. Alford, *supra* note 90, at 244.

comments on the Concordat:

> The objectives of the Concordat were to ensure the adequate regulation of foreign banks and the prevention of foreign banks from escaping supervision. A central tenet of the Concordat was joint responsibility between home and host countries in regulating international banks.
>
> The Concordat dealt primarily with the liquidity, solvency, and foreign exchange operations of foreign banks. The host supervisory authority was responsible for regulating liquidity, regardless of the type of banking entity established in the host nation.[103]

The Concordat sought to clarify confusion between supervisors as to which supervisor, domestic or host country, was responsible for overseeing international corporations based on what type of foreign banking entity was involved.[104] It was proclaimed by the Concordat that "subsidiaries and joint ventures were the responsibility of the host regulator, while branches were the responsibility of the home regulator."[105]

Although the Concordat was effective in shoring up some of the confusion regarding which supervisor was tasked with overseeing a particular entity, it did have some weaknesses.[106] For example, the Concordat left open the question of which supervisor should act to oversee a major bank failure.[107] Additionally,

> designation of the host supervisor as the primary regulator of foreign bank subsidiaries ran contrary to the system of consolidated supervision used in most industrialized nations. The allocations of responsibility in the Concordat presented a risk that host regulators, following consolidated supervision, would look to parent supervisors to regulate a bank subsidiary's solvency, while parent regulator, relying upon language in the Concordat, would look to the host supervisor to perform this task.[108]

There was also a mistaken belief that lender of last resort responsibilities came along with supervisory obligations; this was never intended, nor stated in

103. *Id.* at 244-45 (internal citations omitted).
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.* at 245-46 (internal citations omitted).

the Concordat.[109] Member State supervisors were interpreting the Concordat inconsistently, leading to incongruous determinations.[110] In the end, it was the lack of specificity that relegated the Concordat to failure and necessitated amendment.[111]

The 1982 implosion of the Luxembourg subsidiary of Banco Ambrosiano, which at one point was the largest Italian bank, evidenced the insufficiencies of the original Concordat.[112] The Luxembourg subsidiary had made $1.4 billion worth of loans to Latin American countries, which proved to be ill-considered.[113] The subsidiary also owed $450 million to a myriad of creditors, which the bank was unable to pay leading to a total financial collapse.[114] Both the Italian and the Luxembourg supervisors claimed not to have supervisory or lender of last resort obligations.[115] Italian regulators opined that since local regulators had rebuffed their attempts to examine Banco Ambrosiano's South American offices, they accordingly had no legal authority to regulate the bank's foreign subsidiaries.[116] The Italian government's argument was that Italian regulators could not take responsibility for a bank failure that they were not permitted to supervise.[117] Contrastingly, Luxembourg regulators believed that the responsibility rested solely with Italian regulators because the subsidiary was operating under the same name as the parent.[118] Banco Ambrosiano's collapse in Luxembourg and the subsequent tangle over responsibility accentuated the failures in the Concordat and led to the creation and implementation of the Revised Concordat of 1983.[119]

The Revised Concordat of 1983 was not a new agreement, but rather an amendment to the original Concordat.[120] Similar to the original, the Revised Concordat is a non-binding agreement that was promulgated by the Basel Committee as a proclamation of "recommended guidelines of best practices."[121] The revisions sought to close the gaps in European financial supervision that had been present under the original Concordat and directly addressed foreign bank regulation and supervision.[122] As with the original, the Revised Concordat instituted the principle of consolidated supervision whereby, "firstly, no foreign banking establishment should escape supervision; and secondly, that

109. *Id.* at 246.
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* at 247.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*

the supervision should be adequate."[123] Although these principles may seem clear in modern finance, "[T]hey express an 'essential truth' that constitutes the basis of international co-operation: without them current structures wouldn't exist."[124]

A pivotal amendment included in the Revised Concordat was the principle of "Dual Key" supervision.[125] Under such a system, both home and host supervisory entities assess the quality of the other's supervision for international banks.[126] This gives both supervisors—home and host—the authority to make sure that the manner in which the other is supervising meets their minimum degree of quality.[127] Duncan Alford comments that under the Revised Concordat:

> The host jurisdiction had to be satisfied with the supervision over the parent bank within its home jurisdiction; likewise, the parent bank's home jurisdiction had to be satisfied that the foreign operations of its domestic banks were supervised adequately by the host regulators.
>
> If the host regulator considered the parent regulator's supervision insufficient, the host regulator had the right to discourage or prohibit the foreign bank from operating within its jurisdiction or to set stringent conditions for the bank's continued operation therein. Likewise, the parent regulator could attempt to extend its jurisdictional reach if it did not believe that the host regulator was providing adequate supervision.[128]

The goal of the revisions was to prevent a "race to the bottom" mentality where jurisdictions would relax their regulations and supervision with the hopes of attracting foreign investment.[129]

In the context of the Banco Ambrosiano failure, if the Revised Concordat had been in effect at that time instead of the Concordat, Luxembourg would have had the responsibility for supervising the Italian bank's subsidiary in Luxembourg.[130] However, if Italian supervisory authorities had not been satisfied with the quality of supervision by Luxembourg, Italian supervisors

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123. Fratangelo, *supra* note 3, at 3. *See also* Weber & Arner, *supra* note 89, at 391.
124. Fratangelo, *supra* note 3, at 3.
125. Alford, *supra* note 90, at 248.
126. *Id.*
127. *Id.*
128. *Id.* at 248-49.
129. *Id.* at 249.
130. *Id.*

would have been able to step in and provide supervision.[131] This is a prime example of the benefits of Dual Key supervision. As it stood, no regulator interceded and took responsibility for supervisory duties.[132]

In addition to Dual Key supervision, the Revised Concordat also implemented the theory of Consolidated Supervision whereby "the parent supervisor monitored a parent bank's risk exposure and capital adequacy based on all operations of the bank, wherever conducted."[133] It was noted by the Basel Committee that this principle might extend the commonly understood jurisdictional bounds of supervisory responsibilities.[134] Although the Revised Concordat took great steps in filling the gaps in supervision, there still remained flaws.[135] Most glaringly, the Revised Concordat still lacked provisions pertaining to lender of last resort responsibilities.[136] Additionally, "[t]he Revised Concordat purposely blurred host and parent regulatory responsibilities in order to avoid the type of finger-pointing that occurred among regulators after the Banco Ambrosiano failure."[137] By doing this, the Basel Committee created new issues of overlapping supervisory authority between home and host agencies where one regulator might have responsibility as the primary supervisor, but another regulator has an interest in maintaining supervision over a foreign institution.[138]

Addressing critiques of the Revised Concordat, the Basel Committee put forth the Minimum Standards in 1992.[139] The Minimum Standards were intended by the Basel Committee to tighten international bank supervision and strengthen the principles espoused in the Concordat and the Revised Concordat.[140] The Minimum Standards required that:

> (1) all international banks and banking groups should be supervised by home country regulators; (2) international banks should obtain permission from both the host and home country regulators before opening branches or other banking establishments in foreign nations; (3) banking regulators should have the right to gather information form international banks; (4) host regulators can impose restrictive measures against the international banks if the Minimum Standards are not met; and (5) encouragement of information exchanges

131. *Id.*
132. *Id.*
133. *Id.* at 250.
134. *Id.*
135. *Id.* at 251.
136. *Id.*
137. *Id.* at 252.
138. *Id.*
139. *Id.* at 255.
140. *Id.*

between regulators in different nations should continue.[141]

The Minimum Standards affirmed to the world that no internationally operating European bank can function outside the eye of a supervisor and that "consolidated supervision is a fundamental regulatory principle adopted by the international bank supervisory community."[142]

The Minimum Standards, like the Revised Concordat, accentuated the notion of consolidated supervision whereby all international banks would be, at a minimum, supervised by their home country supervisors and obligated to conduct business in accordance with their domestic regulations.[143] Under this theory of supervision, home country supervisors would have verifiable information on the international operations of banks within their home jurisdiction that are operating on a supra-national scale.[144] Home country supervisors would then assess the financial practices based on the information gathered for "safety and soundness of international banks."[145] Additionally, home country supervisors could block the creation of corporate subsidiaries that they deemed to be in discord with the theory of consolidated supervision or prevented adequate supervision.[146]

The responsibility for ensuring that home country supervisors were able to meet the Minimum Standards rested solely with the home country supervisors themselves.[147] The Minimum Standards also required banks desiring to operate on an international scale to obtain permission from both the home country and host country supervisors before commencing such operations.[148] This was not always readily obtained as such approval was conditioned on a multilateral accord between supervisors with often-divergent opinions.[149] In the absence of such agreement, the "Minimum Standards allocated supervisory responsibilities between home and host country regulators in a similar manner as the Revised Concordat."[150] The Minimum Standards, like other Basel Committee plans, are not without flaws necessitating redress.[151]

Unlike the Minimum Standards and other Basel Committee standards that are adopted solely on an optional basis, principles relating to financial institutions that each Member State was obligated to interpose into its national laws were delineated with the 1986 Single European Act.[152] This act

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141. *Id.* at 255-56.
142. *Id.* at 257.
143. *Id.* at 256.
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *See* Europa, The Single European Act, http://europa.eu/scadplus/treaties/singleact_en.htm (last visited Oct. 29, 2009), for the text of the statute, which "revises the

"implemented the common internal market on the basis of mutual recognition that is based on common minimum standards applicable in all Member States through European Directives and implemented through domestic legislation."[153] Weber and Arner note that under the Single European Act

> all Member States agree to recognize the validity of one another's laws, regulations, and standards, thereby facilitating free trade in goods and services without the need for prior harmonization, while limiting the scope for competition among rules by mandating Member State conformity with a "floor" of essential, minimum European requirements. As such, financial services regulation in the European Union seeks to avoid the problem of competitive deregulation and regulatory arbitrage that may undermine the legitimacy and efficiency of financial markets.[154]

Through the combination of promoting the Minimum Standards for financial regulation and respecting the free flow of capital throughout the EU via the Single European Act, businesses have been encouraged to conduct commerce outside their "home state" and enter the "host states" throughout the EU.[155] The notion of a "single" passport permits an EU firm to conduct business throughout the Union as if there were no territorial boundary restrictions.[156]

Free movement of capital and commerce within the EU is possible, in part, due to the Minimum Standards directed to all national regulators and supervisors. By creating a system of common Minimum Standards, financial institutions are on notice as to at least the "floor" of essential requirements.[157] A drawback of this legal framework is that despite making institutions aware of the minimum burdens prescribed, the EU is still lacking a supra-national supervisor with the authority to oversee compliance by financial entities. Instead, national supervisors are the sole watchdogs to ensure the veracity of the financial entities. Relying exclusively on national supervisory entities exposes consumers both inside and outside the EU to fiscal harm.

Like the Revised Concordat, the Minimum Standards had gaps that banks attempted to utilize to gain advantages and avoid regulations.[158] Host country

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Treaties of Rome in order to add new momentum to European integration and to complete the internal market. It amends the rules governing the operation of the European institutions and expands Community powers, notably in the field of research and development, the environment and common foreign policy." *Id.* *See generally* Single European Act, Feb. 17, 1986, 1987 O.J. (L 169) 1.

153. Weber & Arner, *supra* note 89, at 440-41.
154. *Id.* at 441.
155. *Id.*
156. *Id.*
157. *Id.*
158. Alford, *supra* note 90, at 258.

supervisors were able to choose to allow foreign banks to operate within their jurisdiction even if the banks' domestic supervisors did not act in accordance with the Minimum Standards.[159] To do this, host country supervisors needed only to issue restrictions upon the foreign bank that it held to be "necessary and appropriate."[160] Furthermore, questions of retroactivity were left untouched by the Minimum Standards.[161] Although new branches were covered by the conditions of the Minimum Standards, pre-existing branches were not explicitly addressed, leaving lingering questions of whether the new provisions were to be retroactively applied to the older financial establishments.[162]

The premise behind the Minimum Standards was to "promote cooperation between home and host countries and encourage the flow of information among bank regulators."[163] To achieve this end, the drafters of the Minimum Standards intentionally left the provisions therein vague.[164] By doing this, it was believed that ambiguity would facilitate flexibility to analyze each issue for what it was on a case-by-case basis.[165] Similar to the Concordat and the Revised Concordat, the Minimum Standards are not legally binding.[166] Therefore, enforcement of the mandates in the Minimum Standards rested solely on the shoulders of national supervisors.[167] Furthering confusion, domestic supervisors interpreted the Minimum Standards as they saw fit, creating murky standards at best and illogical discrepancies at worst.[168] Conceived in 1992, the Minimum Standards were supplemented, due to many of these failing, by the Core Principles for Banking Supervision, commonly referred to as the "Core Principles," in 1997.[169]

In order to move past mere coordination of national supervisors, the Basel Committee proffered the Core Principles to develop a more substantive notion of banking regulation and supervision.[170] This move was seen to be a reaction to many prominent bank failures after 1992 and the insufficiencies of the

159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.* at 258-59.
164. *Id.* at 259.
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.* at 260. The Core Principles were created by the Basel Committee "slightly over one year after the G-7's request." *Id.* at 261. The G-7 had asked for "more comprehensive and detailed financial standards." *Id.* In their communiqué, the G-7 "encourag[ed] the adoption of strong prudential standards in emerging economies and increase[ed] cooperation with their supervisory authorities; international financial institutions and bodies should increase their efforts to promote effective supervisory structures in these economies." *Id.* (quoting *Strengthening Economic and Monetary Cooperation*, Making a Success of Globalization for the Benefit of All: Economic Communiqué, G-7 Lyon Summit (June 28, 1996), *available at* http://www.g8.utoronto.ca/ summit/1996lyon/communique.html).
170. *Id.* at 260.

Minimum Standards to meet those challenges.[171] These bank failures occurred not only in the EU, but also in the United States.[172] The Core Principles are expansive and addressed the best practices for supervision in the banking industry.[173] Spread across twenty-five guidelines, the Core Principles cover "supervising entire national banking systems from the licensing of banks to their closure due to insolvency."[174] Merely three of the principles discuss "cross-border banking, which previously had been the focus of the Basel Committee's standard- setting work."[175] Supervision of banks conducting operations across borders as well as exclusively domestic services is enumerated in the remainder of the Core Principles.[176] The Core Principles were seen by the financial industry as "a major expansion of the Basel Committee's work on bank supervision."[177]

The Core Principles are far more detailed than previous Basel Committee standards and are enumerated in seven categories: (1) preconditions for effective banking supervision; (2) licensing and structure; (3) prudential regulations and requirements; (4) methods of ongoing banking supervision; (5) information requirements; (6) formal powers of supervision; and (7) cross-border banking.[178] Although a detailed explanation of these guidelines is not essential to this analysis, the preconditions set forth in Principle 1 are worth noting. The Core Principles' preconditions mandate

> that there are certain economic conditions necessary for an effective bank supervisory system. A nation must have sound macroeconomic policies, effective market discipline, a well-developed legal system, sound accounting principles, an orderly method for closing insolvent banks, and policies that promote financial system stability such as lender of last resort responsibility and depositor protection. Although bank supervisors generally do not create or implement these policies, sound macroeconomic conditions are vital to their

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171. *Id.* The Bearings Bank of London "failed after a trader in the Singapore operation . . . had lost over 927 million British pounds . . . in the futures market." *Id.* The Bank of England refused to rescue the bank, and it was sold to ING. *Id.* Many attributed the failure of the bank to botched supervision because the individual trader in question hid the losses for some years. *Id.*

172. *Id.* In 1995, "the Federal Reserve Board revoked the charter of the New York branch of the Daiwa Bank . . . because of its concealment of over US $ 1 billion in unrecorded trading losses incurred in the bond market." *Id.* This failure to disclose did not rest solely with the Daiwa Bank because the Japanese Ministry of Finance was knowledgeable of the loss, but had failed to notify the Federal Reserve in a timely manner. *Id.*

173. *Id.* at 261.

174. *Id.* at 261-62.

175. *Id.* at 262.

176. *Id.*

177. *Id.*

178. *Id.*

ability to regulate banks effectively.[179]

The theme most espoused by the Core Principles is the need for supervisory independence.[180] To maintain such independence, supervisors must be provided adequate resources with respect to funding as well as staffing.[181] Effective supervisors will have delineated parameters and objectives for their respective agency.[182] Additionally, the Core Principles posit best practices in fairly broad terms.[183] For example, the Core Principles recommend that supervisors should attempt to "limit[] or restrict bank exposures to single borrowers" or "groups of related borrowers."[184] Such broad language was most likely the effect of compromise among the drafters of the Core Principles who varied in their desired language for the guidelines.[185] Although the Basel Committee was the original drafter of the Core Principles, supervisory entities from non-G-10[186] nations endorsed the Core Principles as well.[187] For example, "[r]epresentatives from Chile, the People's Republic of China, the Czech Republic, Hong Kong, Mexico, Russia, and Thailand participated in the drafting process, while officials from Argentina, Brazil, Hungary, India, Indonesia, the Republic of Korea, Malaysia, Poland, and Singapore participated closely in the Core Principles' development."[188] Additionally, at the International Monetary Fund's annual meeting in 1997 and the World Bank's annual meeting, representatives of the attending nations endorsed the Core Principles.[189]

Despite the drastic steps taken by the Basel Committee to express as much guidance as possible, the Core Principles nonetheless lacked in some areas.[190] The Core Principles failed to satisfactorily address "whether a country should have a deposit insurance scheme."[191] Although they mention a "systemic safety net as a precondition to effective supervision," the Core Principles do not delineate specific requirements such as amounts or percentages as to deposit insurance.[192] Additionally, the Basel Committee did

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179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.* at 263.
184. *Id.*
185. *Id.*
186. At the time of the Core Principles' promulgation, the "informal forum that promotes open and constructive discussion between industrial and emerging-market countries on key issues related to global economic stability" was known as the "G-10." Currently there are twenty members of the group now known as the "G-20." G-20, About G-20, http://www.g20.org/about_what_ is_g20.aspx (last visited Oct. 4, 2009).
187. Alford, *supra* note 90, at 263.
188. *Id.* at 263-64.
189. *Id.* at 264.
190. *Id.* at 265.
191. *Id.*
192. *Id.*

not specify the most appropriate structure for supervisory agencies. However, this flaw is *de minimis* as many commentators have provided guidance on this topic *ad nauseam*.[193] Furthermore, the Core Principles failed to agree on a common bank accounting system.[194] Principle 21 asserted that accounting systems should be fair and consistent; however, more is needed than a vague suggestion such as this.[195] It is essential and should have been recommended by the Basel Committee that a common system of accounting standards be developed across the continent for commonality to effectuate consolidated supervision.[196] Duncan Alford notes that "[i]t appears that more substantive harmonization of bank accounting standards will be left for a future revision of the Core Principles."[197] Although the enumeration of the Core Principles is the most profound step taken by the Basel Committee to clarify the best practices to supervise financial institutions,[198] proposals by a non-government entity without the force of law can only go so far in advancing effective supervision of the European Union financial sector.

The ambiguities of Basel Committee proposals are often criticized, as they are in this Note; however, there are some advantages to non-treaty agreements.[199] "Soft law" is beneficial in that it is fairly easy to gain wide acceptance of the agreement without having to deal with the haggling and compromise of "hard law."[200] Additionally, "[t]his type of law is flexible and allows the parties to consider specific national conditions or attributes in implementing the standards. For instance, the Core Principles are sensitive to the fact that bank regulatory structures differ greatly among nations."[201] By not being bound to the explicit provisions of non-binding agreements, nations tend to be easily persuaded to accept the substantive principles expressed in the document without fear of facing repercussions in failing to abide by the entirety.[202] This is particularly true in industries where standards are rapidly evolving, such as finance.[203] In the scope of this Note, "soft law" has been an effective means for the Basel Committee to gain acceptance of uniform supervisory standards with which individual nations are familiar. By building comprehension among national supervisors of these standards, the creation of an intra-EU supervisor will be eased, as there will be little substantive change in the supervisory standards.

The advancements taken over the past forty years to shore up deficiencies

193. *Id.*
194. *Id.* at 266.
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.* at 269.
199. *Id.* at 284-85.
200. *Id.* at 285. "Soft law" is defined as being a non-enforceable agreement. *Id.* at 284.
201. *Id.* at 285.
202. *Id.*
203. *Id.*

in European financial supervision and prudential cooperation have been profound; however, the goal of effective supervision has not been satisfied. Further developments are needed to address the supervisory flaws currently still in existence. The financial emissaries that met in Nice in 2008 sought to solve such problems, but by the beginning of 2009, their objectives still remained unattained. Angel Gurría, the Secretary General for the Organisation for Economic Cooperation and Development, proclaimed in January 2009 that a single centralized EU-wide supervisor is absolutely necessary to work in conjunction with national supervisors.[204] With no end in sight to the current economic turmoil, European Union leaders now see that a drastic shift in the supervision of financial entities is no longer a debate, but instead a necessity.[205] National supervision coordination alone is an insufficient means to quell fears of instability and authenticate the veracity of the financial sector. The creation of an intra-EU supervisory entity alone is adequate to effectively supervise the Union's financial industry.

IV. CREATION OF AN INTRA-EU PRUDENTIAL SUPERVISOR

A. Overview

Whether phrased as the "lead supervisor,"[206] the proposed European Financial Services Authority, commonly referred to as the "EFSA",[207] a pan-European supervisor,[208] or, as it is in this Note, an intra-EU supervisor or supra-national supervisor, the notion remains the same: the creation of a prudential supervisory entity tasked with the mandate to oversee the financial industry within the entire EU. This entity would directly supervise all "internationally operating companies or companies that operate only at the national level but that are so big that they pose a potential systemic risk."[209] The supra-national

204. Press Release, Organisation for Economic Co-operation and Development, Euro Area Needs More Integrated Financial Market Supervision, says OECD's Gurría (Oct. 29, 2009), *available at* http://www.oecd.org/document/49/0,3343,en_2649_34569_41985521_1_1_1_1,00.html.

205. Huw Jones, *EU Executive, Watchdogs Spar in Supervision Debate*, THOMSON FINANCIAL NEWS, Oct. 29, 2009, http://www.forbes.com/feeds/afx/2009/01/27/afx5969284.html [hereinafter Jones, *Watchdogs Spar*]. EU Economic and Monetary Affairs Commissioner, Joaquin Almunia, posited that "[t]here is now a real necessity to have a single supervisory agency at EU level." *Id.*

206. *See generally* European Financial Services Round Table, On the Lead Supervisor Model and the Future of Financial Supervision in the EU (2005), *available at* http://www.efr.be/members/upload/news/22676EFRlsvfinal-June2005.pdf [hereinafter European Financial Services Round Table].

207. Beetsma & Eijffinger, *supra* note 9.

208. *See generally* Duncan Alford, *The Lamfalussy Process and EU Bank Regulation: Another Step on the Road to Pan-European Regulation?*, 25 Ann. Rev. Banking & Fin. L. 389 (2006) [hereinafter Alford, *The Lamfalussy Process*].

209. Beetsma & Eijffinger, *supra* note 9.

prudential supervisor would be a lead contact for all issues of prudential supervision, create a system of reporting, and to the extent necessary, harmonize conflicting national regulations.[210]

This European supervisory body will have the ability to dictate standardized rules on supervision at the national level. Moreover, the national supervisors will exist under the umbrella of the European supervisor.[211] A system of uniform rules will create equality across borders and prevent national supervisors from initiating advantages for local companies through loose supervision.[212] However, "[s]upervision of smaller, national financial enterprises can be delegated to national supervisory agencies."[213] Thus, "these agencies will not disappear, because they are in close contact with national financial firms and as such they have the necessary information for adequate supervision."[214]

B. Factors Encouraging Integration of a Supra-National Supervisor

The European Union has the ability to move ahead on the path to an intra-EU financial market and a single prudential supervisor.[215] In addition to individual Member States moving to consolidate their domestic supervisors into a sole entity,[216] "[f]inancial operators enjoy complete freedom of movement across Member States while the introduction of the single currency offered new opportunity of business all over the Continent."[217] However, there still remains a great many barriers to the integration of an intra-EU prudential supervisor.[218]

The legal, cultural, and tax code differences amongst twenty-seven different Member States has a very real impact on the ability for cross-border collaboration and coordination.[219] Additionally, "with the accession of new Member States from Eastern Europe, these differences will be even more evident considering the specific history of these countries."[220] Accordingly, further development of cross-national relations will continue to be a prerequisite for the viability of an intra-EU prudential supervisor.[221]

The manner in which individual Member States self-regulate their respective financial industries is affected by their historical development of regulation as well as the character of their financial institutions.[222] The public

210. European Financial Services Round Table, *supra* note 206, at 23.
211. *See generally id.*
212. *See generally id.*
213. Beetsma & Eijffinger, *supra* note 9.
214. *Id.*
215. Fratangelo, *supra* note 3, at 2.
216. *See supra* Part II C.
217. Fratangelo, *supra* note 3, at 2.
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.*
222. Iain Begg & David Green, *Should the European Tier Play a Role in Prudential*

predominantly owns some Member States' financial institutions; whereas, other "countries have centralised financial systems in which major financial groups play a leading role, while in others, the system is fragmented either regionally or by type of service."[223] The differences in each country's "legal, political and institutional arrangements are compounded by contrasting market structures in financial services."[224] These varying prudential supervision lineages are as much of the result of historical context as they are rationalized choices premised in sound economic principles.[225]

Laws regarding insolvent financial institutions differ markedly from one Member State to another within the EU with some leaning towards creditor's favor and others to debtors.[226] European finance ministers noted in April 2008 that speed is of the essence following a financial implosion of a mega-institution.[227] The ministers signed a "memorandum of understanding binding national authorities to favor private-sector rescues where possible, and urging them to decide in advance who would foot the bill for banks that operate in more than one country if state bailouts are required."[228] Unlike a unified federal nation where the citizenry shares a common understanding, Europeans will likely not have an affinity for sending their tax dollars out of the country to foot the bill on a failed bank in a neighboring country.[229] Although Member States recognize the importance of cross-border interaction in sidestepping complete collapse of financial institutions, in the absence of an intra-EU authority with broad powers to coordinate a potential bailout, the likelihood of success for such a bailout is minimal.

C. The ECB Willing to Assume Supervisory Responsibilities

One of the initial questions pertaining to any conversation regarding the creation of an EU-wide supervisor is: who will assume supervisory responsibilities yet maintain independence? The most capable entity to perform supervisory duties is the ECB. The President of the ECB, Jean-Claude Triche, has made clear that the Bank is willing to take control of the new intra-EU supervisor.[230] The ECB's willingness to accept such responsibility is significant as the ECB is widely recognized as being an independent agency.[231] This is due, in part, to the fact that the ECB's independence is enshrined in the

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Supervision of Banks? (2001) (unpublished manuscript, on file with the Archive of European Integration, available at http://aei.pitt.edu/6899/01/begg_iain.pdf).

223. *Id.*

224. *Id.*

225. *Id.*

226. Saltmarsh, *supra* note 73, at 2.

227. *Id.*

228. *Id.*

229. *Id.* at 3.

230. *Calls for Single EU Financial Supervisor Resurface*, EURACTIV, Oct. 29, 2009, http://www.euractiv.com/en/financial-services/calls-single-eu-financial-supervisor-resurface/article-178514 [hereinafter EURACTIV].

231. Jones, *Watchdogs Spar*, *supra* note 205.

European Union's founding treaty.[232] Some members of the ECB have commented that the Bank "could play a central role in [E]uro zone banking supervision without needing to change the treaty, which would be a difficult task."[233]

However, an assumption of supervisory duties by the ECB would not be without some hindrances. A major

> obstacle lies in wait regarding a possible extension of the ECB's powers. The bank only has a mandate to act on behalf of the [sixteen E]urozone countries, thus excluding the [United Kingdom], Sweden, Denmark, Poland and the majority of the Eastern EU member states, which have not adopted the single currency.[234]

Thus, creating an entire new agency seems more likely than expanding the ECB scope to non-Eurozone countries.[235]

The European Financial Services Round Table[236] has articulated the creation of a "lead supervisor" since June 2004.[237] It notes "the lead supervisor should be responsible for the prudential supervision not only of branches in other EU [M]ember [S]tates, but also of fully owned (fully controlled) subsidiaries in other EU [M]ember [S]tates."[238] Additionally, "[i]n order to be considered optimal and conducive towards reaching its goals, any supervisory structure must meet—and must be assessed against—objective criteria."[239] Such criteria include: (1) the creation of financial stability while implementing a framework for a competitive financial industry; (2) a cost efficient supervisory system; (3) transparency; (4) an effective crisis management system; (5) adaptable to market evolvement; and (6) political accountability.[240]

Proponents of creating a supra-national supervisory body in Europe point to the increased cooperation amongst Member States as evidence that the proposed entity is becoming more feasible.[241] With EU regulators meeting regularly, such as the Nice meeting, the European Union leaders, specifically the European Commission, are duly advised as to how to amend or draft new rules to most effectively combat issues hindering the financial markets.[242] To

232. *Id.*

233. *Id.*

234. EURACTIV, *supra* note 230.

235. *Id.*

236. "The purpose of the [European Financial Services Round Table] is to provide a strong industry voice on European policy issues relating to financial services." European Financial Services Round Table, www.efr.be (last visited Nov. 27, 2009).

237. EUROPEAN FINANCIAL SERVICES ROUND TABLE, *supra* note 206, at 7.

238. *Id.*

239. *Id.* at 10.

240. *Id.*

241. Saltmarsh, *supra* note 73.

242. *Id.*

accentuate their point, critics point to the $700 billion plus financial "bailout"[243] in the United States in 2008[244] as the type of assistance which would be difficult to formulate under a system without an intra-EU prudential supervisor.[245] The blurred rules in Europe "concerning the insolvency of a financial institution that operates in different countries in particular is causing unease."[246] These differences amongst Member States would make any multi-State coordinated assistance package difficult unless there was a captain at the helm, such as a supra-national supervisor. In order to address these and other noted concerns, EU leaders must act to implement a single intra-EU supervisor with relative haste.

V. CRITICS OF INTRA-EU SUPERVISION & OTHER OPTIONS

With the escalation of financial institutions' struggles throughout 2008, 2009, and foreseeably into 2010, some nations and groups have called for greater (or lesser) steps than what this Note has recommended.[247] Below are some alternative proposals that have been advocated for during the financial struggle.

A. A Pseudo Supra-National Supervisor: An Early Warning System

In early 2009, a combination of a multitude of plans emerged as the leading blueprint for creating a pseudo supra-national supervisor.[248] This proposed entity is a watered-downed version of the supervisor advocated for in this Note.[249] At an emergency summit in Brussels on the financial crises, EU leaders backed a proposal that "recommended setting up two new broad supervisory bodies in the EU—one chaired by the ECB to monitor system-wide risks, the other to combine the efforts of national supervisors."[250] This plan

243. The Author acknowledges that the purported "bailout" is not technically a bailout, but is merely referring to its colloquially used designation.

244. *See* Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (2008).

245. Saltmarsh, *supra* note 73.

246. *Id.*

247. *See generally* David Rothnie, *EU Called for Worldwide Banking Watchdog*, EVENING STANDARD, Oct. 16, 2008, at 26. *See also* Charlie McCreevy, European Comm'r for Internal Markets and Services, Address at the Lead Conference—Euro Finance Week: Prudential Supervision in an Integrated Market (Nov. 17, 2008) (transcript *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/08/623&format=DOC&aged=0&language=EN&guiLanguage=en).

248. Huw Jones, *UPDATE 1-EU Leaders Back Financial Supervision Blueprint*, THOMSON REUTERS, Mar. 1, 2009, http://uk.reuters.com/article/idUKL165744420090301 [hereinafter Jones, *Blueprint*].

249. *EU Considers New, Stronger Financial Supervision*, ASSOCIATED PRESS (Feb. 25, 2009), *available at* http://www.iht.com/articles/ap/2009/02/25/business/EU-EU-Banking-Oversight. php.

250. Jones, *Blueprint, supra* note 248.

calls for the creation of "a new EU-wide supervisor to oversee risks and give early warnings, but that individual banks should continue to be looked after by strengthened national regulators."[251] With this, national supervisors would maintain their status as the effective supervisor of their domestic institutions while the two EU-wide supervisors would serve as gatherers of information to facilitate cross-nation supervisor communications and to serve as an early warning system for pending failures of financial entities.[252]

Previously viewed as a potential hindrance to any step towards a supra-national supervisory entity, German Chancellor Angela Merkel noted that she "encourage[d] the European Commission to rapidly implement the [proposal]."[253] Additionally, French President Nicolas Sarkozy and Britain's Prime Minister, Gordon Brown, advocated on behalf of the adoption of this blueprint.[254] The inclusion of these leaders amongst those supporting any measure advocating the creation of a supra-national supervisor is not insignificant.

Although this proposal is leading down the road towards an intra-EU supervisor, it falls "short of advocating a single European superregulator, opting instead for a more pragmatic and incremental approach toward strengthening supervision."[255] As this Note recommends, the creation of a supra-national supervisor would "run the risk of a veto from Britain, which is worried about transferring responsibility for the management of the City of London, the British financial center, to a European level."[256] Stephen Castle notes that this proposal's "authors said they thought the scale of the financial crisis might persuade national governments to cede some supervisory authority, and, under their plans, the City of London would, to some extent, be supervised by a pan-European watchdog."[257] However, this plan is but an intermediate step that falls short of the recommendation made in this Note.

The proposal's author, Jacques de Larosiere, explained the rationale as to why the drafters did not push for the creation of an EU-wide supervisor with broad powers.[258] He noted "it would have been 'unrealistic' for one EU-wide supervisor to police banks, saying it 'would not necessarily prove effective' and would not be accountable to taxpayers."[259] Additionally, Larosiere mentioned that recommending the creation of the supra-national supervisor had "little

251. *EU Considers New, Stronger Financial Supervision*, *supra* note 249.
252. *Id.*
253. Jones, *Blueprint*, *supra* note 248.
254. *Id.*
255. Stephen Castle, *European Panel Seeks Closer Supervision of Banks*, THE NEW YORK TIMES, Feb. 25, 2009, http://www.nytimes.com/2009/02/26/business/worldbusiness/26euro.html?_r=1&ref=europe.
256. *Id.*
257. *Id.*
258. *EU Considers New, Stronger Financial Supervision*, *supra* note 249.
259. *Id.*

prospect of being accepted" due to Britain's purported veto on the issue.[260]

Notwithstanding many EU Member States' leaders' support, this proposed plan is not without its dissenters.[261] Peter Praet, who chairs the Banking Supervision Committee of EU Central Banks, noted that although the proposal is "a very good step in the right direction and some of the problems we have seen could have been mitigated under such a system," it is "certainly not sufficient in the absence of a strong crisis management and resolution framework for the European Union as a whole."[262] Praet noted the conceptual and practical insufficiencies of the plan in relation to the exchanges of "monetary policy, financial stability, and micro supervision."[263] Although this proposal takes an affirmative step towards the creation of a supra-national supervisor, it is too little, too late. Greater steps are necessary at this pivotal juncture. The creation of a supra-national entity is mandated by this economic climate. Any step short of that action is insufficient.

B. *Proposed International Supervisor*

Some leaders from around the globe have now recognized that there is indeed an international market warranting increased steps to streamline regulations across the globe, instead of merely the EU.[264] The meeting of the leaders from twenty heads of state, commonly known as the "G20," in November 2008 culminated in a shared understanding "towards a more appropriate financial architecture at the global level."[265] Additionally, the leaders put forth their notion of the cause of the financial turmoil:

> Not least among these was the fact that regulators and supervisors did not fully understand the risks building up in the financial markets. They did not keep pace with financial innovation or give due attention to cross-sectoral propagation of risk. There was a lack of transparency and inadequate oversight of market players, particularly with respect to complex financial instruments. The G20 leaders also noted that the segmented nature of regulation contributed to inconsistencies, both domestically and internationally. These regulatory deficiencies contributed to the excesses in the market and ultimately resulted in severe market disruption.[266]

260. *Id.*

261. *Top EU Supervisor Says Reform Plan Good but Insufficient*, THOMSON FINANCIAL NEWS, Feb. 25, 2009, http://www.forbes.com/feeds/afx/2009/02/25/afx6094879.html.

262. *Id.*

263. *Id.*

264. McCreevy, *supra* note 247.

265. *Id.*

266. *Id.*

The G20 meeting came on the heels of an announcement by EU leaders in October 2008 calling for the creation of an international board to oversee, at a minimum, the world's thirty largest financial institutions.[267] This proclamation was at the behest of United Kingdom Prime Minister Gordon Brown.[268] In order for such a plan to come to fruition, the significant hurdles of gaining Chinese and American approval remain.[269] Furthermore, there appears to be disagreement amongst some Member States regarding the exact details of the supervisory body.[270] Specifically, the United Kingdom is unlikely to sign off on French requests to extend financial supervision to hedge funds or to remove financial offshore offices in the Channel Islands or the Isle of Man.[271] Whether the relevant parties will be able to reach a compromise as to the exact specifics of an international supervisory body is yet to be seen and is, in fact, unlikely. In the interim, the EU should proceed on the road to create its own intra-EU supervisory body to fully and efficiently protect the citizenry of the EU Member States.

C. Common Regulation Without a Common Supervisor

Other financial theorists have opined that although a common system of rules would be advantageous to the EU, the creation of a single supervisor is unnecessary and could be in fact counterproductive to the stated goals.[272] Rosa Lastra notes that a system of common regulation could be adopted through a treaty or a directive that would require harmonization of national regulations similar to that of other EU directives without the need of a supra-national supervisor.[273] The advantage of such a proposal is that supervision would be left in the hands of national supervisors and that international financial institutions would not be burdened with conflicting and confusing regulations differing from nation to nation. Such a system of common regulations would be an increase over the current framework of minimum standards previously discussed as this system would be mandatory throughout the EU.[274] Lastra additionally points out that some Member States have begun to consolidate their individual supervisory agencies into a single national supervisor.[275] This

267. Rothnie, *supra* note 247.
268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.*
272. Lastra, *supra* note 46, at 59.
273. *Id. See, e.g.*, Council Directive 85/374, On the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, 1985 O.J. (L 210) 20 (commonly referred to as "The EU Products Liability Directive," mandating harmonization of national statutes with the directive).
274. See *supra* Part II D for a discussion on the minimum obligations encouraged for all financial institutions within the EU.
275. See *supra* Part II C for a discussion of the trend towards having a singular national supervisor exclusively.

trend would make communication, coordination, and harmonization more streamlined should the EU decide to adopt a model system of regulations instead of following the recommendation of this Note and create a single supra-national supervisor.[276]

Member States who are hesitant to relinquish autonomy of their national supervisory agencies could potentially be the greatest inhibitor of creating a uniform and mandatory system of EU-wide standards (even without an intra-EU supervisor). This debate is not unknown to scholars of the creation of the United States' system of government. The proposed system of common regulations throughout the EU mandating increased and uniform supervision by national supervisory entities is analogous to the United States' notion of Federalism in that nations are apprehensive of subjecting themselves to the regulations of a higher authority.[277] With the advent of the American theory of government evolved the duopoly of the power of the federal system compared to that of the independence of states.[278] Advocates for the rights of individual states were threatened by the supremacy[279] of federal laws and sought to ensure that the recent Revolution would not be for naught with the creation of a new monarchy in federal form imposing potentially restrictive laws upon the states. This debate is analogous to the present Note in that individual EU Member States and their respective supervisory agencies, whether singular or specialized by sector, wish to ensure the veracity of financial institutions throughout the EU without subjecting the businesses within their territories to overly burdensome regulations or restrictive provisions imposed by an EU-wide directive mandating common supervisory standards.

By creating a common system of regulations for national supervisors to follow uniformly throughout the EU, transaction costs for financial entities to act in compliance with a multitude of, at times, conflicting rules would be minimized. Although the creation of a system of uniform standards, whether implemented through a directive or otherwise, would be advantageous for uniformity throughout the EU, without an intra-EU supervisor to mandate compliance, national supervisors alone would be ineffective in verifying conformity therewith.

D. EU Member Opposition to the Creation of an Intra-EU Supervisor

As previously noted, some Member States vehemently oppose the

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276. Lastra, *supra* note 46, at 66. See *supra* Part II C for a discussion of the trend towards the merging of specialized national supervisory agencies into a single national supervisor.

277. See STATES' RIGHTS AND AMERICAN FEDERALISM: A DOCUMENTARY HISTORY (Frederick D. Drake & Lynn R. Nelson eds., 1999), for a general commentary on the debate between Federalism and states' rights advocates during the inception and ratification of the United States of America and its Constitution from 1787-1789.

278. *Id.*

279. *See* U.S. CONST. art. VI cl. 2.

creation of a singular intra-EU supervisor for a multitude of reasons.[280] EU heavyweights Germany and the United Kingdom have previously opposed any sort of new supervisory body or extending the reach of the ECB because both nations prefer domestic control of the financial institutions.[281] Additionally, "both countries prefer the concept of collegial supervision, which would effectively allow them to control branches located in other EU countries."[282] Even some smaller Member States, especially in Eastern Europe, oppose enlarging supervision "as they want to retain control of their own banking sectors."[283] Finally, as discussed above, "France and Italy, which are keen to promote more centralised European supervision . . . would prefer to address the issue at global level. Italy was among the first to push for the idea, while French President Nicolas Sarkozy backed the concept at a hearing in the European Parliament " in September 2008.[284]

The opposition of even a single Member State could derail the entire process.[285] At the 1998 European Council meeting in Vienna, the integration of the financial services sector was advocated.[286] Following that conference,

> the European Commission proposed a Financial Services Action that outlined the steps (including forty-two legislative measures) to complete the creation of an internal market for financial services. As of June 2004, nearly all the required legislation at the EU level had been enacted. Nevertheless, [Member States] have yet to enact legislation at the national level to implement the various EU directives.[287]

Furthermore, advocates for the transfer of supervisory responsibilities to the ECB should note that pursuant to the Treaty on European Union, "the ECB can only aid in the smooth operation of prudential supervision of banks" because the ECB does not "have direct responsibility for the supervision of banks within the EU."[288] The Treaty on European Union does have a provision whereby supervisory duties can be transferred to the ECB; however, the passage of such responsibilities requires a unanimous approval from Member States that would be exceptionally difficult to achieve.[289] Nonetheless, the current economic climate has shifted notions of traditional expectations making an unanimous approval, something normally outside the realm of possibility,

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280. EURACTIV, *supra* note 230.
281. *See generally id.*
282. *Id.*
283. *Id.*
284. *Id.*
285. Alford, *supra* note 90, at 269-71.
286. *Id.* at 269.
287. *Id.* at 269-70.
288. *Id.* at 270.
289. *Id.*

into a real prospect.

The aforementioned alternative proposals certainly have merit and are well thought out approaches to previous financial supervision deficiencies; however, incremental steps are insufficient at present. The implementation of an intra-EU supervisor with broad supervisory reach alone is satisfactory to provide adequate supervision of cross-border entities within the European Union.

VI. CONCLUSION

Dissenters to the creation of a supra-national EU-wide supervisor with plenary supervisory authority point to the numerous difficulties in such creation as the grounds for implementing some watered-down supervisory scheme.[290] Concededly, there are indeed substantial hindrances to achieving this end. However, merely because the implementation of the entity is fraught with political challenges does not warrant the implementation of a lesser plan that is incremental in nature. The past half-century of European financial supervision development has seen the increasing growth of cross-border communication and a merging of the standards of best supervisory practices.[291] Whether promulgated by the Basel Committee or other advisory bodies,[292] the theories encompassing effective supervision have evolved to the degree where the next logical and proper step is the creation of an intra-EU supervisor without jurisdictional limitations.

The leaders of the EU Member States have delineated a blueprint for supervision that would leave supervision to their own national supervisors and have EU supervisors serve as conduits of information and as an early warning system.[293] This proposal is insignificant when viewed under the eye of the current economic climate. Such a blueprint is insufficient. The citizenry and investors of the EU financial system deserve greater protection that what this plan offers. Accordingly, leaders of the EU should move with relative haste to develop and implement the supra-national EU supervisor with broad power to adequately protect the European financial sector.

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290. See *supra* Part IV A for a discussion of the proposal to create two new supervisory bodies at the EU-level while leaving effective supervision to national supervisors. The EU-wide supervisors would "oversee risks and give early warnings, but that individual banks should to be looked after by strengthened regulators." *EU Considers New, Stronger Financial Supervision*, *supra* note 249.

291. See *supra* Part II D for a discussion of the developments of cross-border communication of national supervisors and the Basel Committee's non-binding "soft laws" to encourage greater supervision standards.

292. *See supra* Part II D.

293. *See supra* Part IV A.

EDUCATION ON THE HOME FRONT:

HOME EDUCATION IN THE EUROPEAN UNION AND THE NEED FOR UNIFIED EUROPEAN POLICY

Colin Koons*

I. INTRODUCTION

> *"[T]he direction in which education starts a man . . .will determine his future life."*[1] – Plato

The future of a nation is inherently related to the quality of its educational system because education directs not only the lives of individuals but also the future life of the state itself. As a result, education is a crucial area of public policy, and a state has a particular interest and responsibility in guaranteeing that its children are provided with an education and that the education achieves a consistent standard of excellence.

Within the European Union, each Member State retains some level of sovereignty over its own public policies. However, "the [M]ember [S]tates delegate some of their decision-making powers to shared institutions they have created, so that decisions on specific matters of joint interest can be made democratically at European level."[2] For example, the Members have delegated the power to facilitate commerce, establish defense policies, and encourage travel across national borders in the European Union. These delegated powers given to the European Union primarily deal with international issues and the promotion and protection of the European Union.[3]

Although the Member States technically reserve the power over their individual education policies, the European Union remains interested about the quality education in each Member State because education serves as an important function in economic growth.[4] Thus, the European Union plays a

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1. PLATO, THE REPUBLIC, Book IV, (Benjamin Jowett trans., Random House 1958), *available at* http://classics.mit.edu/Plato/republic.5.iv.html.
2. European Union Website, *EU institutions and other bodies*, http://europa.eu/institutions/index_en.htm. (last visited Nov. 30, 2009).
3. *See id.*
4. European Union, School Education: Equipping a New Generation, http://ec.europa.eu/

significant role in developing policies and initiatives to assist its Member States in developing of their educational systems.[5]

The European Union has noted that although the Members are responsible for the organization and content of their school structures, the challenges facing its Member States are strikingly similar. For example, only seventy-eight percent of twenty-two year-old Europeans complete their secondary education.[6] Because of these similar obstacles, the European Union encourages a unified European education policy to respond to the challenges Europe faces in "globalization, integration, enlargement, and the economic polarization that is evident among the European regions."[7]

In an attempt to influence its members' decisions and develop a unified education policy, the European Union sought the public's "views on some important aspects of school education and on future challenges and possible solutions."[8] The survey included responses from the general public, public policy organizations, and academia from across Europe.[9] The results, published in June 2008, distinguished different methods and concerns that these groups believed were most important in developing a successful education system. The results revealed a strong consensus from respondents "that school curricula and teaching methodologies need to enable students to develop their own learning competences in a more flexible learning environment."[10]

In fact, a call for a unified educational policy has been made in think tanks across the European Union.[11] The Socires Organization, a civil society

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education/lifelong-learning-policy/doc64_en.htm (last visited Sept. 17, 2009) [hereinafter School Education: Equipping a New Generation]. The European Union assists its member states by supporting their national efforts to develop educational systems which "set people on the path to a lifetime of learning, if they are to prepare them adequately for the modern world." *Id.* The European Union's role is primarily twofold. First, the EU injects "millions of Euros each year in projects that promote school exchanges, school development, the education of school staff, school assistantships and more." Second, the EU "works closely with policy-makers from Member States to help them develop their school education policies and systems. It does this by gathering and sharing information and analysis and by encouraging the exchange of good policy practice." *Id.*

5. European Union Website, Public Consultation "Schools for the 21st century," http://ec.europa.eu/education/school21/index_en.html (last visited Sept. 17, 2009) [hereinafter Public Consultation].

6. School Education: Equipping a New Generation, *supra* note 4.

7. Richard Edwards and Nicholas Boreham, *'The Centre Cannot Hold': Complexity and Difference in European Union Policy Towards a Learning Society*, 18 J. OF EDUC. POL'Y 407, 407 (2003).

8. Commission of the European Communities, *Commission Staff Working Document accompanying the Communication from the Commission to the Europeans Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, 2, COM (2008) 43, *available at* http://ec.europa.eu/education/school21/sec2177_en.pdf.

9. Public Consultation, *supra* note 5; *See also* European Union, Centre for Strategy and Evaluation Service, *School's for the 21st Century – Analysis of Public Consultation* (June 2008), http://ec.europa.eu/education/school21/results/report_en.pdf [hereinafter ANALYSIS OF PUBLIC CONSULTATION].

10. ANALYSIS OF PUBLIC CONSULTATION, *supra* note 9 at pg. ii.

11. Homeschooling vs. the European Union (Nov. 28, 2007, 20:20 EST),

think tank located in the Netherlands, argues that "a common and coherent position and strategy" is absolutely necessary to produce European freedom of education.[12] For example, a unified policy promotes inter-European worker mobility because educational quality would remain unchanged with a move across Europe, and parents would have the same educational choices and schooling methods in each Member State.[13] Other educational policy organizations, such as the European Council of National Associations of Independent Schools, note that the development of any European Union educational policy should encourage flexibility in the educational structures.[14] In a survey conducted across the European Union, the Council stated that "many schools and national level [organizations] stressed the need for teachers to be able to work autonomously in order to develop the pedagogic strategies that work best for them."[15] These statements from education policy organizations are nearly identical to the public response assembled by the European Union, and they demand flexibility and unique strategic solutions to solve European educational problems.[16]

Home education is an example of a unique pedagogical strategy that provides the flexibility of student autonomy while maintaining high educational levels. In home education, the parent is the primary educator of the child and the majority of the work is done outside of a formal or traditional school setting.[17] The education that is "provided at home does not necessarily mirror the education provided in government funded schools," because it can include online classes, activities with cooperative homeschool organizations, or individualized reading and discussions.[18]

Home education has received a great deal of attention in the United States, and although specific regulations may vary, home education is generally legal throughout the United States.[19] As a result, the number of children educated at home in the United States has dramatically increased in the last twenty years.[20] According to a report by the U.S. Department of Education's National Center for Education Statistics in 2007, the number of children

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http://informaledcommunity.atom5.com/homeschooling-vs-eur-1161.html.

12. Socires Organization, *Striving for Freedom of Education: A Mapping of European Policy*, Jan. 2007, pg. 15, http://www.socires.nl/21/2005A Education Policy Europe.pdf.

13. Home School Legal Defense Association, *European Commission to Open Dialogue with Germany on Homeschooling Law*, July 29, 2008, http://www.hslda.org/hs/international/Germany/200807291.asp.

14. EUROPEAN COUNCIL OF NATIONAL ASSOCIATIONS OF INDEPENDENT SCHOOLS WEBSITE, SCHOOLS FOR THE 21ST CENTURY – ANALYSIS OF PUBLIC CONSULTATION, http://www.ecnais.org/documents/ SummaryofreportSchoolsforthe21stCentury.040908.doc (last visited Oct. 8, 2009).

15. *Id.*

16. *Id.*

17. Amanda Petrie, *Home Education in Europe and the Implementation of Changes to the Law*, 47 INT'L REV. EDUC. 477, 479 (2001).

18. *Id.*

19. *Id.* at 480.

20. Eric J. Isenberg, *What Have We Learned About Homeschooling?*, 82 PEABODY J. OF EDUC. 387, 389 (2007).

educated at home in the United States has grown to over 1.5 million students, nearly three percent of all U.S. school-aged children.[21] The report also noted an extraordinary surge in the number of children who are educated at home in the last ten years; in 1999, only 850,000 children were educated at home, which was approximately 1.7 percent of all U.S. school-aged children.[22]

Parents who choose to educate their children at home do so for a variety of reasons. Some scholars note that formal schools "have lost some of their legitimacy as they have lost a clear functional role in preparing youth for their role in the larger economic system,"[23] and by educating their children at home, parents attempt to regain power over their children's education and remove them from traditional schools. In the United States, the National Center for Education Statistics noted in its 2007 report that "parents homeschooled their children for a variety of reasons, but three reasons—to provide religious or moral instruction, concern about the school environment, and dissatisfaction with the academic instruction at other schools" remain the prominent motivations.[24]

In contrast to the United States, the laws concerning home education widely vary across the European Union. At one extreme, several Member States completely restrict any type of home education; at the other extreme, some Member States recognize home education as a valid educational choice and leave the decision to the parents.[25] Likewise, public interest in home education is also varied, but the strongest interest is mostly centered in the United Kingdom and France, both of which allow parents to choose between various educational methods.[26]

As the European Union's power has developed amid sovereign European community members, there have been occasional situations in which the powers delegated to the European Union have directly conflicted with the reserved powers of the Member States. For example, several instances were documented in which migrant workers have been forced to leave one Member

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21. Nat'l Center for Educ. Statistics, U.S. Dept. of Educ., 1.5 MILLION HOMESCHOOLED STUDENTS IN THE UNITED STATES IN 2007 (Dec. 2008), http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/42/b1/4b.pdf.

22. *Id.*; *see also* D.V., *Home Schooling*, EDUC. WEEK, Feb. 21, 2009.

23. Kurt J. Bauman, *Home Schooling in the United States: Trends and Characteristics*, 10 EDUC. POL'Y ANALYSIS 26 (2002), *available at* http://epaa.asu.edu/epaa/v10n26.html.

24. National Center for Education Statistics, U.S. Dept. of Education, *supra* note 21.

25. *See generally* HSLDA: Home Schooling - International page, http://www.hslda.org/hs/international/default.asp (last visited Oct. 11, 2009). The Home School Legal Defense Association (HSLDA) is a non-profit organization located in the United States which was "established to defend and advance the constitutional right of parents to direct the education of their children and to protect family freedoms." HSLDA: About HSLDA, http://www.hslda.org/about/default.asp (last visited Oct. 11, 2009). HSLDA provides legal services, research, and lobbying efforts for home education in the United States and around the world. *Id.*

26. *See generally* Lesley A. Taylor & Amanda J. Petrie, *Home Education Regulations in Europe and Recent U.K. Research*, 75 PEABODY J. OF EDUC. 49 (2000); *see also* HSLDA: Home Schooling - International, http://www.hslda.org/hs/international/default.asp (last visited Oct. 11, 2009).

State and migrate to another in order to avoid compulsory state education.[27] In this situation, a unified European education policy would assist the European Union's goal of a unified economic policy.

This Note will focus on the legality of home education in the European Union's Member States and its future within the European Union's political and economic policies. In Part II, the differences of the home education laws in Europe will be examined, using Germany and the United Kingdom to compare and contrast the extreme positions in Europe. Part III will analyze the differences between the Member States by examining them in light of the major European agreements which form the European Union and the European Court of Human Rights. Specifically, this is developed by examining the European agreements that promote the state's protection of a child's right to education while preserving the right of parents to direct the type and quality of their children's education. These agreements have direct consequence on any possible unified stance in the European Union concerning education specifically and on the future of human rights in the European Community generally. Finally, Part IV will focus on how home education fits within the stated policy positions and goals of the European Union and whether home education should play a role in the future policy decisions of a unified Europe.

II. THE LEGALITY OF HOME EDUCATION IN EUROPE

The laws concerning home education vary greatly among the Europe Union Member States. Some Members allow or encourage home education, while other countries completely ban its use. Amanda Petrie, a research fellow of education at the University of Liverpool, has grouped the Member States into three categories.[28] Although it is only a rough summarization, Petrie's categorization provides a framework in which to analyze the legality of home education in Europe.

Petrie's first category consists of "those countries which accommodate home educators and have always done so."[29] Although the countries in this group may have some light regulations concerning its use, home education is generally legal. For example, England, Ireland, and France have legalized homeschooling, and although there may be some minor restrictions, these three countries give a great deal of flexibility in allowing parents to shape their children's education.[30]

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27. Home School Legal Defense Association, *European Commission to Open Dialogue with Germany on Homeschooling Law*, July 29, 2008, http://www.hslda.org/hs/international/Germany/200807291.asp.

28. Petrie, *supra* note 17, at 483.

29. *Id.*

30. *See generally* HSLDA: Home Schooling - International, *supra* note 25. The HSLDA International webpage provides a general outline of the legality of home education around the world, and the webpage provides information for most of the European Union member countries.

Petrie's second category includes those countries which, although historically preventing or outlawing home education, have changed or updated their systems to permit home education.[31] However, the countries in this category often highly regulate and restrict home education's use.[32] For example, Hungarian home educators must follow a mandatory state curriculum and be tested twice a year.[33]

Finally, Petrie's third category identifies those countries which "no longer permit home education in the word of the law, but would appear to permit individual instances."[34] Essentially, although not technically illegal, the national regulations in these countries are so strict that home education is effectively banned.[35] For example, although Germany does not actually prohibit home education, it requires compulsory state education at a state school until age 16, which effectively makes home education illegal.[36] However, local German authorities are given some discretion to allow home-education with professional tutors, but this usually only occurs in extraordinary circumstances, such as celebrity children or children with such severe disabilities that they are completely unable to attend school.[37]

Because Petrie's categories represent such a wide range of laws, it is helpful to closely examine the ends of the spectrum to provide clarification. Lying at the most restrictive end of the spectrum, Germany represents the notable example of a country in Petrie's third group because it has been the harshest on home education and has consistently limited its use.[38] At the other end, the United Kingdom has officially recognized home education as an alternative to state or private schools, and it is considered to have some of the most liberal education laws among the European Union's Member States.[39]

A. Home Education and Germany

German national law does not technically prohibit home education

31. Petrie, *supra* note 17, at 483.

32. *Id.*

33. Home Education in Germany: Homeschooling - International, http://www.hausunterricht.org/html/hs_international.html (last visited Oct. 11, 2009). The original webpage is in German, but an informal translation has been performed through http://translate.google.com.

34. Petrie, *supra* note 17, at 483.

35. *Id.* at 484.

36. Home Education in Germany, The Legal Situation in Germany, http://www.hausunterricht.org/html/rechtliches.html (last visited Oct. 11, 2009). The original webpage is in German, but an informal translation has been performed through http://translate.google.com.

37. Scatty, Why home education is verboten in Germany, http://gfoh.blogspot.com/2007/05/why-home-education-is-verboten-in.html, (May 17, 2007, 8:49 EST).

38. Thomas Spiegler, *Home Education in Germany: An Overview of the Contemporary Situation*, 17 EVALUATION & RES. EDUC. 167, 179-80 (2003).

39. *See* HSLDA: Home Schooling - United Kingdom, http://www.hslda.org/hs/international/UnitedKingdom/default.asp (last visited Oct. 11, 2009).

because the local officials have the ability to enforce national school requirements as they see fit.[40] However, the local authorities have used this authority to actively prevent home education except in rare circumstances such as children involved in musical careers.[41] Some researchers estimate that only 500 children in Germany are educated at home, whether "in secret, with tacit toleration by the local authorities[,] or with legal consequences [which] rang[e] from a fine to partial loss of child custody, or even the possibility of a prison sentence."[42]

Although the reasons for refusing to legalize home education vary, a major reason for this hostility stems from the German government's view that home education harms both the children and society.[43] For example, one German court stated that children should be removed from their parents for home educating "in order to protect the children from further harm."[44] Indeed, a local education official brought a case against two families who were educating their children at home because he claimed it was "a right of the child not to be kept away from the outside world," and that "[t]he parents' right to personally educate their children would prevent the children from growing up to be responsible individuals within society."[45] The German court agreed with the local education official and appointed a public guardian over the children, stating that the parent's actions were "a stubborn contempt both for the state's educational duty as well as the right of their children to develop their personalities by attending school."[46]

This type of governmental treatment of German home educators is not unusual. For examine, a young girl was forcibly taken from her family and placed into a psychiatric ward because her parents had educated her at home.[47] She originally attended a state school, but when local school officials claimed that she had been falling behind in her grades, her parents began giving her tutoring at home after her school classes. The local officials, who strongly disagreed with any kind of home education, expelled her from the state school for receiving any home tutoring.[48] Because she had been expelled, her family

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40. Spiegler, *supra* note 38, at 181.

41. *Id.*

42. Mary Ann Zehr, *U.S. Home Schoolers Push Movement Around the World*, EDUC. WEEK, Jan. 4, 2006, at 8.

43. Spiegler, *supra* note 38, at 188.

44. Alexandra Cohen, *Hitler's Ghost Haunts German Parents*, BRUSSELS JOURNAL, Aug. 8, 2005, http://www.brusselsjournal.com/node/139.

45. *Id.*; *See also* Home School Legal Defense Association, *"Homeschooling Illegal" Declares German School Official*, Jan. 7, 2005, http://www.hslda.org/hs/international/Germany/200501100.asp.

46. Cohen, *supra* note 44.

47. Charlie Francis-Pape & Allan Hall, *Home-school Germans flee to UK*, THE OBSERVER, Feb. 24, 2008, *available at* http://www.guardian.co.uk/education/2008/feb/24/schools.uk.

48. Bob Unruh, *Girl sent to Psych Ward for Homeschooling, Parents Billed*, WORLDNETDAILY, Mar. 30, 2008, http://worldnetdaily.com/index.php?fa=PAGE.view&pageId=59947.

was forced to home educate her full time; however, the officials continued to object, and they quickly removed her from her home and placed her into state custody.[49]

In another case, an American family living in Germany was fined approximately $2,300 per child for home educating their children.[50] In July 2008, another family was fined approximately $1,200 for home educating in Germany, and the parents were given a ninety day prison sentence.[51]

However, such harsh resistance to home education has not been limited to the local level but has included opposition at the national level. Officials at the German embassy in Washington, D.C., have defended Germany's position on home education, stating that "[t]he public has a legitimate interest in countering the rise of parallel societies that are based on religion or motivated by different worldviews."[52] Indeed, some German national officials have commented that home education in Germany is essentially impossible and that any discussion of nationwide legality for home education would be rejected from any governmental agenda.[53]

German families who continue to educate their children at home, despite the ban on home education, state a variety of reasons for their choice. For example, one family claimed that after a two-year posting away from Germany, they were discouraged by the lack of variety that they found in German schools, especially in languages and science, and they turned to home education when their children were unable to adapt to the German school system.[54]

Although a few local officials turn a blind eye to an occasional instance of home education, many parents are forced to flee Germany in order to find a country with more friendly education laws, and they often look to the United Kingdom or the United States.[55] For example, one German family is seeking refuge in Tennessee after local German officials forcibly took the children to a state school, and the family felt "they had no choice but to move abroad after authorities came to their home to enforce the [compulsory state education] law."[56] The family is currently attempting to obtain permanent residence status

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49. *Id.*

50. Taylor & Petrie, *supra* note 26, at 52.

51. Home School Legal Defense Association, *Appeals Court Orders New Trial for Homeschoolers Sentenced to Prison*, Jan. 9, 2009, http://www.hslda.org/hs/international/Germany/200901090.asp. The parent's prison sentence was later overturned on other grounds. *Id.*

52. Zehr, *supra* note 42.

53. Home School Legal Defense Association, *Highs and Lows of Two Families Illustrate Challenges for Homeschoolers*, Sept. 15, 2008, http://www.hslda.org/hs/international/Germany/200809150.asp.

54. Cynthia Guttman, *European Disunity*, UNESCO COURIER, June 2000, at 15, *available at* http://www.unesco.org/courier/2000_06/uk/apprend2.htm.

55. Francis-Pape and Hall, *supra* note 47.

56. Christina Bergmann, *German Family Fled to US for Educational Freedom*, DEUTSCHE WELLE, Feb. 1, 2009, http://www.dw-world.de/dw/article/0,,3979558,00.html. A federal immigration judge was scheduled to announce a ruling on January 26, 2010, concerning whether

in the United States and "hopes that their application for political asylum will be successful and that they will be granted permanent residence and work permits in the United States."[57] Such attempts to seek political asylum abroad are not uncommon for those who have attempted to home educate in Germany, and approximately seventy-eight home educated children and their families fled Germany in 2007 to avoid persecution from local officials.[58]

B. Home Education and the United Kingdom

While Germany sits at the furthest end of Petrie's spectrum, essentially restricting home education altogether, the United Kingdom is at the opposite end. The United Kingdom has some of the most liberal education laws in the European Union and directly permits home education by national law.[59] It is estimated that between 45,250 to 160,000 children are home educated in the United Kingdom, and those numbers are rapidly increasing.[60] However, it is extremely difficult to calculate the number of home educators because "there is currently no obligation in law for families to register that their children are receiving their education in this manner."[61]

Under British law, parents have the responsibility to give their school age children "efficient full-time education . . . either by regular attendance at school or otherwise."[62] Parents must only assure the local school board that their children are receiving an appropriate education.[63] Further, the law states that local authorities must follow the general principle that students are to be educated "in accordance with the wishes of their parents," as long as the parental choice would give the child efficient instruction while avoiding "unreasonable public expenditure."[64]

Although the procedures for home education vary in different parts of the United Kingdom, "education" is considered to be compulsory rather than "schooling."[65] Although this word choice might seem inconsequential, it has

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the family would be granted political asylum in the United States. *See* Home School Legal Defense Association, *Decision in Romeike Political Asylum Case Delayed*, January 20, 2010, http://www.hslda.org/hs/international/Germany/201001200.asp. As of this Note's writing, the decision had not yet been released.

57. *Id.*

58. Francis-Pape & Hall, *supra* note 47.

59. Home Education in Germany: Homeschooling - International, *supra* note 33.

60. VICKY HOPWOOD ET AL., THE PREVALENCE OF HOME EDUCATION IN ENGLAND: A FEASIBILITY STUDY, *available at* http://www.parliament.uk/deposits/depositedpapers/2008/DEP2008-1324.pdf.

61. Karen McIntyre-Bhatty, *Interventions and Interrogations: An Analysis of Recent Policy Imperatives and Their Rationales in the Case of Home Education*, 1 EDUC., KNOWLEDGE, & ECON. 241, 242 (2007).

62. Education Act, 1996, c. 1, § 7 (Eng.), *available at* http://www.opsi.gov.uk/Acts/acts1996/ukpga_19960056_en_2#pt1-ch1-pb3-l1g7.

63. Home Education in Germany: Homeschooling - International, *supra* note 33.

64. Education Act, 1996, c. 1, § 9 (Eng.), *available at* http://www.opsi.gov.uk/Acts/acts1996/ukpga_19960056_en_2#pt1-ch1-pb3-l1g7.

65. Education Otherwise: The Law, http://www.education-otherwise.org/legal.htm (last

significant effect in the debate for home education, and this significance is discussed *infra* at Parts III and IV. In the United Kingdom, parents are allowed to choose home education for a variety of reasons, but the guidelines require that the "local authority's primary interest should lie in the suitability of parents' education provision and not their reason for doing so."[66]

Although the national law specifically permits its use, home education has recently come under attack in the United Kingdom. The Baroness Morgan of Drefelinhas, the United Kingdom's Children Minister, has challenged home education as a harbor for parental "abuse, neglect, forced marriage, sexual exploitation or domestic servitude" and has called for a review of the local rules covering home education.[67] This review will examine whether the local authorities should have more power to enter a home and inspect the quality of education given to the children.[68]

The announcement of the review has been received with mixed reaction. The home education community in the United Kingdom has decried the review as offensive and believes that "[no] other community would be expected to suffer the prejudice and discrimination which our community has to endure."[69] British home education advocates are concerned about new regulations because they claim that if the local governments are given swingeing powers to restrict home education, their children's education will suffer because nearly sixty percent of British home educated school children have been withdrawn from a formal school because of bullying, assault, or special needs.[70] British parents also claim that they have chosen to educate their children at home because of the reduction in educational quality at British schools.[71]

Some home education groups have compared the review to any full-scale review that would be made of the location, numbers, and activities of the

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visited Oct. 11, 2009). Education Otherwise is a British organization "that provides support and information for families whose children are being educated outside school, and for those who wish to uphold the freedom of families to take proper responsibility for the education of their children." Education Otherwise: About us, http://education-otherwise.org/abouteo.htm (last visited Oct. 11, 2009). This organization provides services similar to those offered by HSLDA, mentioned *supra* note 25, and supplies access to contacts, resources, and informational exchanges in the United Kingdom. *Id.*

66. DEPARTMENT FOR CHILDREN, SCHOOLS, AND FAMILIES, ELECTIVE HOME EDUCATION: GUIDELINES FOR LOCAL AUTHORITIES, at 3 (2007), *available at* http://www.dcsf.gov.uk/everychildmatters/_download/?id=1905.

67. Alexandra Frean, *Home education 'Can be Cover for Abuse and Forced Marriage,'* THE TIMES ONLINE, Jan. 20, 2009, http://www.timesonline.co.uk/tol/life_and_style/education/article5549380.ece.

68. *Id.*

69. Graeme Paton, *Children's Minister: Home Education 'May be Cover for Abuse,'* THE TELEGRAPH, Jan. 19, 2009, http://www.telegraph.co.uk/education/4291728/Childrens-Minister-Home-education-may-be-cover-for-abuse.html.

70. Adi Bloom, *Home Education a Cover for Abuse? Supporters Denounces 'Slur,'* THE TIMES EDUCATIONAL SUPPLEMENT, Jan. 30, 2009, Section News, at 25, *available at* http://www.tes.co.uk/article.aspx?storycode=6007914.

71. Graeme Paton, *Parents teaching children at home rather than send them to failing schools*, THE TELEGRAPH, Jan. 31, 2009, http://www.telegraph.co.uk/education/4398402/Parents-teaching-children-at-home-rather-than-send-them-to-failing-schools.html.

Muslim community simply because "some" Muslims have participated in terrorism.[72] However, other organizations strongly approve a review of home education rules and legislation and assert that "the existing legislation and guidance on elective home education is outdated."[73]

Because of the United Kingdom's liberal education laws, most research on home education in the European Union has been done in the United Kingdom.[74] Paula Rothermel, a British educational psychologist and specialist in home education, notes that religion is not a strong motivation for home education. Relying heavily upon her personal research and experience with home educated families,[75] Rothermel reports that "only about 4 percent of the 412 British home-schooling families she surveyed said religion was a motive for home schooling. Nearly thirty-one percent cited disappointment with regular schools."[76]

This examination of the situations in Germany and United Kingdom reveals the greater issues at stake in the home education debate. These issues include the parents' right to raise their children in a manner they see fit; the state's responsibility to assure an educated public, a responsibility particularly important in a democratic era to ensure that public officials are thoughtfully elected; and the child's independent right to choose their own education.

Beyond the scope of this Note, there is a debate whether the parent or the state is a better guardian or representative of the child's choice. Although this Note discusses the rights of parents, the state, and the child, it does not specifically address whether the state or the parent is the best representative of the child's rights. However, the right of the parent has been a right that has been a respected part of the West's history.[77] Thus, it is assumed that the parental right should be respected along with the state's responsibility to promote the children's interests.

III. HOME EDUCATION, EUROPEAN COURTS, AND HUMAN RIGHTS

Because of the potential conflict between a parent's rights and the state's rights, the national courts across Europe have vainly attempted to find a judicial standard. Essentially, the conflict of rights comes down to constitutional interpretation of human rights, and the European Convention on Human Rights

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72. Ann Newstead, *The Government is Victimising Parents Who Home Educate*, THE TELEGRAPH BLOGS, http://blogs.telegraph.co.uk/ann_newstead/blog/2009/01/22/the_government_is_victimising_parents_who_home_educate, (Jan. 22, 2009 10:12 GMT).

73. Mithran Samuel, *DCSF Launches Home Education Review and Safeguarding Concerns*, CommunityCare.co.uk (Jan. 20, 2009), http://www.communitycare.co.uk/Articles/2009/01/20/110495/dcsf-launches-home-education-review-amid-safeguarding-concerns.html.

74. Guttman, *supra* note 54.

75. Paula Rothermel Website, Expert Witness Specialising in Home Education, http://www.pjrothermel.com/ExpertWitness/Introduction.htm (last visited Sept. 15, 2009).

76. Zehr, *supra* note 42.

77. McIntyre-Bhatty, *supra* note 61, at 241-42 ("[T]hroughout history, children's education has always been the responsibility of their parents.").

is the controlling human rights document in the European Community.[78] The Convention, signed at Rome in 1950, is the treaty by which the forty-seven "[M]ember [S]tates of the Council of Europe undertake to respect fundamental freedoms and rights."[79]

The Convention established the European Court of Human Rights, and a human rights violation by any of the member countries may be appealed to the Court. Since 1998, any individual in a contracting state has the "right of action to assert the rights and freedoms to which they are directly entitled under the Convention."[80] The Court, however, does have discretionary power over hearings, and it may refuse an appeal if it finds an application to the Court to be manifestly ill-founded.[81]

The European Convention of Human Rights relates directly to the home education debate because it guarantees the right to education.[82] In Article 2 of the First Protocol to the Convention, the treaty affirms that:

> No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.[83]

Using the Convention's requirement that a state must respect parental rights in education, several German parents, who have attempted to refuse Germany's mandatory state schooling and home educate, have appealed to the Court of Human Rights.[84]

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78. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, Nov. 4, 1950, http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ EnglishAnglais.pdf [hereinafter European Convention on Human Rights]. The Convention was first signed at Rome in 1950, and then later ratified individually by its members, and it is also known as the European Convention on Human Rights. Council of Europe website, *Signature Lists*, http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ EnglishAnglais.pdf (last visited Sept. 15, 2009). The First Protocol to the Convention, dealing with the rights to property, education, and free elections, was signed March 20, 1952. *Id.*

79. Council of Europe, *What's what?*, http://www.coe.int/T/E/Com/About_Coe/ whatswhat.asp (last visited Sept. 15, 2009).

80. The European Court of Human Rights, *Information document on the Court*, para. 4 (2006), http://www.echr.coe.int/NR/rdonlyres/981B9082-45A4-44C6-829A-202A51B94A85/0/ ENG_Infodoc.pdf.

81. The European Court of Human Rights, *Some Facts and Figures 1998-2008*, at 3 (Nov. 2008), http://www.echr.coe.int/NR/rdonlyres/65172EB7-DE1C-4BB8-93B1-B28676C2C844/0/ FactsAndFiguresENG10ansNov.pdf. In 1998, Protocol 11 was added to the Convention, recognizing the right to Individual Applications to the Court. *See* Protocol No. 11 to the Convention, art. 34, *available at* http://conventions.coe.int/Treaty/en/Treaties/Html/155.htm.

82. European Convention on Human Rights, *supra* note 78, at art 2.

83. *Id.*

84. Francis-Pape and Hall, *supra* note 47.

In 2006, a German parent who tried to educate her child at home appealed to the European Court of Human Rights in *Konrad and Others v. Germany* after German officials refused to allow him to home educate; however, the appeal was denied because the Court held the claim was inadmissible.[85] The Court stated that the case was rejected because of the concern the Court had for parallel societies that develop through home education.[86] "The acquisition of social competence in dealing with other persons who hold different views and in holding an opinion which differed from the views of the majority could only [materialize] through regular contact with society."[87] Essentially, the Court approved of the view that only through a traditional school setting can a state ensure the education of a citizenry ready to "participate in a democratic and pluralistic society" because the "[e]veryday experience with other children based on regular school attendance was a more effective means to achieve that aim than home education."[88]

However, the Court did not ignore the interest of the parents, but it attempted to balance the interest of the parents against "the general interest of society in the integration of minorities and in avoiding the emergence of parallel societies . . . ."[89] The Court held that parents could supplement their children's education but that they could not keep their children from compulsory state education.[90]

This decision reveals a conflict in the various interpretations of the Convention's language because the Court did not determine what is required in "the right to education." In *Konrad*, the Court of Human Rights essentially recognized the right to "schooling," a term which is interpreted much broader than just "education."[91] Education is the actual education of the child, such as learning to read and write. Schooling, on the other hand, is a broader term and requires formal education as well as the social environment of the traditional school and classroom setting.[92]

In *Leuffen v. Federal Republic of Germany*, a case extraordinarily similar to *Konrad*, the difference between "schooling" and "education" was similarly distinguished by the European Commission of Human Rights. In that case, the Commission held a home education claim to be inadmissible because the parents were unable to sufficiently meet their educational needs of their

85. Summary of Konrad and Others v. Germany, Eur. Ct. H.R. No. 35504/03 (2006), http://www.echr.coe.int/Eng/InformationNotes/INFONOTENo89.htm [hereinafter Summary of Konrad].

86. European Court of Human Rights, Fifth Section Decision as to the Admissibility of Application no. 35504/03 Fritz KONRAD and Others against Germany (2006), http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=808899&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649.

87. Summary of Konrad, *supra* note 85.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. Petrie *supra* note 17, at 479.

children.[93] Although *Leuffen* was "a significant challenge to the claims of home educators," Daniel Monk, a senior lecturer at Birkbeck College School of Law, University of London, notes that "it is important to acknowledge its weaknesses."[94] He comments that the interpretation is unclear because the Commission placed emphasis "on both the inability of *Leuffen* to educate her child and the importance of the child's right to education, giv[ing] credence to the possibility that the Commission simply 'confused' schooling with education."[95]

However, Amanda Petrie, a research fellow at the University of Liverpool, argues that the parent's ability in *Leuffen* was never actually reviewed by the Commission or by the local education authorities.[96] The mother in *Leuffen* "had religious reasons for home educating her son; she also felt that she could give her son a wider education than that provided at school[, however h]er ability to home educate was never assessed, the school authorities stating that home education was not permitted."[97] When the Commission held the mother's claim inadmissible, the mother was forced to flee to London, where she continued to successfully home educate her son.[98] After she moved to England, the local British school authorities noted that the son "maintained his enthusiasm and eagerness to learn and constantly find out more about his environment. He seem[ed] to be a very happy child and relate[d] very well to other people."[99]

Like the Commission's decision in *Leuffen*, the *Konrad* Court did not explicitly state that the right to education means "schooling." In addition, because this is not an official decision, but merely reason for rejecting an appeal, the Court is not bound to the language of *Konrad*. However, if the Court follows its potential policy in *Konrad* and requires "schooling" as a part of "education," this would mean that a parent could *never* give the child an education in the home and the child must be educated in a traditional school. As Daniel Monk explicitly states, if the "right to education" in Article 2 of the First Protocol to the Convention is interpreted as only given through attendance

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93. European Commission of Human Rights, Leuffen v. F.R.G. (1992) App. No. 198441/92, Eur. H.R. Rep. Until 1998, an individual could only bring a Human Rights case before the Commission. *See* The European Court of Human Rights, *Some Facts and Figures 1998-2008*, *supra* note 81. When Protocol 11 was passed in 1998, it changed the structure of the appeals process for a violation of the European Convention on Human Rights cases, and an individual citizen could bring a human rights case in the European Court of Human Rights. *Id.* Thus , this case was brought in the European Commission of Human Rights, whereas *Konrad* was brought in the European Court of Human Rights in 2006.

94. Daniel Monk, *Problematizing home education: challenging 'parental rights' and 'socialisation,'* 24 LEGAL STUDIES 568, 582 (2004).

95. *Id.* at 586.

96. Amanda Petrie, *Home Educators and the Law within Europe*, 41 INT'L REVIEW OF EDUC. 285, 293 (1995).

97. *Id.*

98. *Id.*

99. *Id.*

at a state school institution, "then it can be argued that *no* parent is capable of ensuring the education of his or her child at home and that in effect school attendance is essential for 'education.' "[100] Monk acknowledges that this argument relies on the assumptions "that social and developmental benefits form part of the right to education" and "that only school attendance can provide this form of education."[101]

Although Monk directs his argument against home education because of the socialization concerns, he admits that "what is more surprising is that despite the prevailing common-sense perception that attending school per se is a 'good thing' and necessary for healthy child development there is remarkably little evidence and no specific research which explicitly supports this claim."[102]

Similarly, Chris Lubienski, an assistant professor in the Department of Curriculum and Instruction at Iowa State University, admits in his critique of home education that most arguments that home education "inhibits the proper socializations" are claims that are "overblown."[103] He points out that "[t]here is little reason to think that [home education] – if done correctly – cannot introduce a child to basic social norms, at least as transmitted through a given family."[104] However, Lubienski argues that home education will not provide an equally diversified social experience as state schools.[105]

If the European Court of Human Rights eventually interprets "the right to education" to be the "right to schooling," a direct conflict could result between the Convention and the reserved policies of the European Union's Member States. For example, the United Kingdom has not recognized the right to schooling, and it has specifically allowed home education to be a valid alternative that fulfills "the right to education."[106] Thus, the United Kingdom's policy of allowing home education could be directly threatened if a case is ever brought to the Court of Human Rights and the Court specifically requires a right to schooling.[107]

However, according to Monk, the threat of a conflict may not exist because the "[a]uthority for a broad definition of education can be found in a

100. Monk, *supra* note 94, at 586.

101. *Id.*

102. *Id.* at 591.

103. Chris Lubienski, *A Critical View of Home Education*, 17 EVALUATION AND RES. IN EDUC. 167, 170-71 (2003).

104. *Id.* at 170-71.

105. *Id.* at 171.

106. *See* DEPARTMENT FOR CHILDREN, SCHOOLS, AND FAMILIES, ELECTIVE HOME EDUCATION: GUIDELINES FOR LOCAL AUTHORITIES, *supra* note 66. The regulations which guide local authorities directly state that home education is a valid and optional means of education. Even the guidelines themselves refer to allowing the parents choose their children's education, whether in the state school, private schools, or by some means of education "otherwise." *See* Education Act, *supra* note 62.

107. *See* A-Level-Law.com, Judicial Precedent, http://www.a-level-law.com/els/judicial_precedent.htm (last visited Sept. 15, 2009) ("Under the Human Rights Act 1998, English courts must now have regard to decisions of the European Court of Human Rights.").

number of sources. Most importantly, the second sentence of art 2 of the First Protocol refers to both 'education' and 'teaching' . . . ."[108] Thus, Monk notes that the European Court of Human Rights gives the "two words . . . distinct meanings." He points out that the Court "argued that 'education' included the development and moulding of the character and mental powers of its pupils' and referred to, 'the whole process whereby, in any society, adults endeavour to transmit their beliefs, culture and other values to the young . . . ."[109] On the other hand, "'teaching' or 'instruction' refers in particular to the transmission of knowledge and to intellectual development."[110]

Monk also finds support for his interpretation of education in the United Nations Convention on the Rights of the Child of 1989.[111] Article 29 of that Convention declares that, "[T]he education of the child shall be directed to . . . the development of the child's personality, talents and mental and physical abilities to their fullest potential."[112] However, the Convention on Rights of the Child is balanced against the rights given in the United Nations Universal Declaration of Human Rights because the Convention on the Rights of the Child specifically recognizes that "everyone is entitled to all the rights and freedoms set forth" in the Declaration.[113]

Although the United Nations Universal Declaration of Human Rights is not binding on the European Court of Human Rights, it is of value to compare the Declaration with the European Convention on Human Rights because the Convention was based upon and closely follows the language of the United Nations Declaration.[114] In Article 26, the Universal Declaration states that:

> Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory . . . Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms . . . . Parents have a prior right to choose the kind of education that shall be given to their children.[115]

The Special Rapporteur on Education to the United Nations Human Rights Council, a position created to monitor the enforcement of the right to

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108. Monk, *supra* note 94, at 586.

109. *Id.* (citing Campbell v. U.K., 4 Eur. Ct. H.R. 293 (1982)).

110. *Id.*

111. *Id.*

112. Convention on the Rights of the Child, G.A. Res. 44/25, art. 29(1)(9), U.N. Doc. A/RES/44/2 (Sept. 2, 1990), *available at* http://www2.ohchr.org/english/law/crc.htm [hereinafter Convention on the Rights of the Child].

113. *Id.* at preamble, para. 4.

114. The Open University, *Part B: The European Convention on Human Rights*, http://openlearn.open.ac.uk/mod/resource/view.php?id=282268 (last visited Mar. 9, 2009).

115. Universal Declaration of Human Rights, G.A. Res. 215(111), (Dec. 10, 1948), *available at* http://www.un.org/en/documents/odhr.

education in the Universal Declaration, has stated that home education should be a valid educational option.[116] In his report on the right to education in Germany, the Special Rapporteur claimed that "education may not be reduced to mere school attendance and that educational processes should be strengthened to ensure that they always and primarily serve the best interests of the child."[117] In fact, he directly supported alternatives to formal school education and stated that "[d]istance learning methods and home schooling represent valid options which could be developed in certain circumstances, bearing in mind that parents have the right to choose the appropriate type of education for their children, as stipulated in article 13 of the International Covenant on Economic, Social and Cultural Rights."[118]

Larry Willmore, a research scholar at the International Institute for Applied Systems Analysis and a former economic affairs officer for the United Nations, comments that parental choice is often ignored in the debates about freedom in education.[119] Under the Universal Declaration of Human Rights, the right to education is more frequently discussed in the international arena than the right of parents to choose the type of education for their children, "even though this human right, without question, is violated more frequently than the right to free education."[120] Willmore argues that "[t]his neglect is unfortunate, since school choice is known to improve the quality of education in general and in state schools in particular by making them more accountable to parents and students . . . ."[121]

Although the European Union is a completely separate agreement from the European Convention on Human Rights, it plays a significant role in the development of European Union policy because the "[M]ember [S]tates of the EU agreed that no state would be admitted to membership of the EU unless it accepted the fundamental principles of the European Convention on Human Rights and agreed to declare itself bound by it."[122]

IV. HOME EDUCATION AND FUTURE EUROPEAN UNION POLICY

In 1993, the European Union established a single European market with the purpose to unify and strengthen Europe, economically and politically, by developing trade and eliminating economic barriers within Europe.[123] Because

116. United Nations Human Rights Council, *Report of the Special Rapporteur on the right to education, Mission to Germany*, A/HRC/4/29/Add.3 (Mar. 9, 2007) at 15, para. 62, *available at* http://www.hslda.org/hs/international/Germany/Munoz_Mission_on_Germany.pdf [hereinafter *Report of the Special Rapporteur*].

117. *Id.*

118. *Id.*

119. Larry Willmore, *Basic Education as a Human Right: 'Education for All' through Privatisation?* 24 ECON. AFF. 20-21 (2004).

120. *Id.*

121. *Id.*

122. The Open University, *supra* note 114.

123. EUROPA, The EU at a glance, Europe in 12 lessons – the Single Market, para. I(b),

education is crucial to future economic development, the European Union recognizes that knowledge, education, and training "are the EU's most valuable assets, particularly as global competition becomes more intense in all sectors."[124] In response, the European Union has developed an education policy that "supports, develops and implements lifelong learning policies with the aim of enabling countries to work together and to learn from each other, with an important emphasis on mobility."[125]

The European Union itself was established by a series of treaties that work in tandem to create a unified Europe, and these treaties are controlling upon any Member State which has agreed to the Union.[126] The first of these agreements, the Treaty Establishing the European Community, includes general provisions concerning the creation of the European Union, and this treaty, as amended in the Treaty of Amsterdam, covers general policy issues.[127] The second treaty, the Treaty on European Union, signed in Maastricht, focuses more on the economic policies of the Union.[128]

In 2001, the Treaty Establishing the European Community and Treaty on European Union were merged together by the Treaty of Nice, and these governing documents provide the general policy goals and purposes of the European Union.[129] The following section examines these stated policy goals and the role that home education may play in developing and achieving their objectives.

A. General Policy Objectives of the European Union Governing Treaties

Through the Treaty of Nice, the Treaty Establishing European Community and the Treaty on European Union were merged into a consolidated document, along with any amendment which had been previously made to these treaties. However, the two treaties are still separated within the consolidated document,[130] and thus the policy statements in each treaty will be

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http://europa.eu/abc/12lessons/lesson_6/index_en.htm (last visited Sept. 15, 2009) ("The aim was to stimulate industrial and commercial expansion within a large, unified economic area on a scale with the American market.").

124. European Commission, European strategy and co-operation in education and training, http://ec.europa.eu/education/lifelong-learning-policy/doc28_en.htm (last visited Sept. 15, 2009).

125. European Commission, Education & Training - Our Mission, http://ec.europa.eu/education/ who-we-are/doc324_en.htm (last visited Sept 15, 2009).

126. *See generally* The CIA World Factbook, *European Union*, https://www.cia.gov/library/ publications/the-world-factbook/geos/ee.html (last visited Sept. 15, 2009) ("The evolution of the European Union (EU) from a regional economic agreement among six neighboring states in 1951 to today's supranational organization of 27 countries across the European continent stands as an unprecedented phenomenon in the annals of history.").

127. *See* EUROPA website, The EU at a glance - Treaties and law, http://europa.eu/abc/ treaties/index_en.htm (last visited Sept 15, 2009).

128. *Id.*

129. *Id.*

130. *See generally* Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community, Dec. 29, 2006, 2006 O.J. (C 321), *available at*

addressed separately in the discussion below.

First, the Treaty Establishing the European Community dictates the general policy directives of the European Union, and it clearly states that the main purpose of the European Union is to promote the "economic and social cohesion and solidarity among Member States."[131] The European Union has the responsibility to achieve unification through several methods or means, including "contribution to education and training of quality and to the flowering of the cultures of the Member States."[132] According to the Treaty, the European Union should "contribute to the development of quality education by encouraging cooperation between Member States."[133]

However, this duty to contribute to the members' educational systems may only be fulfilled through certain means; specifically, the European Union may only make contributions "by supporting and supplementing [the Member States] action[s], while fully respecting the responsibility of the Member States for the content of teaching and the [organization] of education systems and their cultural and linguistic diversity."[134] However, although the European Union cannot overtly use legislation to dictate the educational systems of the Members States, the treaty states that the European Union should "adopt incentive measures" to increase systems which might lead to "[harmonization] of the laws and regulations of the Member States."[135] For example, although the European Union cannot directly change a law that falls under a Member State's reserved power, the European Union could indirectly pressure a Member State's officials to accept certain types of policies or regulations in order to promote unified system of law across Europe.[136]

Unlike the general policy purposes in the Treaty Establishing the European Community, the Treaty on European Union addresses primarily economic objectives, such as the establishment of the Euro and the development of a unified European economic policy.[137] Although this Treaty focuses on economics, the Treaty's beginning paragraphs state several economic objectives which directly relate to education policy because they emphasize the importance of eliminating national barriers to increase economic growth and development.[138] The Treaty states that in order to "promote economic and social progress and a high level of employment," the European

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http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/ce321/ce32120061229en00010331.pdf.

131. Consolidated Version of the Treaty Establishing the European Community, Dec. 29 2006, 2006 O.J. (C 321) E/37, at art. 2, *available at* http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/ce321/ce32120061229en00010331.pdf [hereinafter Treaty Establishing the European Community].

132. *Id.* at art. 3(1)(q).

133. *Id.* at art. 149(1).

134. *Id.*

135. *Id.* at art. 149(4).

136. Unruh, *supra* note 48.

137. Consolidated Version of the Treaty on European Union, Dec. 29, 2006, 2006 O.J. (C 321) E/5, art. 2, *available at* http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/ce321/ce32120061229en00010331.pdf [hereinafter Treaty on European Union].

138. *Id.*

Union should develop policies towards this goal, "in particular through the creation of an area without internal frontiers [and] through the strengthening of economic and social cohesion . . . ." [139] Although primarily economic in purpose, the Treaty clearly resonates with policy objectives that are typically found in human rights agreements. For example, the Treaty states that the goal of the European Union is to "maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured . . . ."[140]

Through these two treaties, the European Convention on Human Rights may come to play a significant role because the combination of the Treaty of the European Community and the Treaty Establishing the European Union establishes a certain level of European citizenship that guarantees rights to social and economic protection.[141] According to the Treaty on European Union, the European Union should "strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union."[142] Because the European Union is designed primarily as an economic union, the treaties say little about fundamental human rights directly. [143] However, the Treaty on European Union does state that because the European Union is "founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States,"[144] the European Union must respect the fundamental rights that are assured in the European Convention for the Protection of Human Rights.[145] Thus, the interpretation of the European Court of Human Rights is important to the Member States because the European Union must respect the Convention on Human Rights, although the European Union itself is not a member of the Convention.[146]

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139. *Id.*

140. *Id.*

141. See EUROPA website, *The Amsterdam Treaty: the Union and the citizen*, http://europa.eu/legislation_summaries/institutional_affairs/treaties/Amsterdam_treaty/a12000_en.htm (last visited Sept. 3, 2009).

> As set out in the Maastricht Treaty, any national of a Member State is a citizen of the Union. The aim of European citizenship is to strengthen and consolidate European identity by greater involvement of the citizens in the Community integration process. Thanks to the single market, citizens enjoy a series of general rights in various areas such as the free movement of goods and services, consumer protection and public health, equal opportunities and treatment, access to jobs and social protection.

Id.

142. Treaty on European Union, *supra* note 137, art. 2.

143. *See* European Union Website, Panorama of the EU, http://europa.eu/abc/panorama/index_en.htm (last visited Oct. 7, 2009).

144. Treaty on European Union, *supra* note 137, art. 6(1).

145. *Id.* at art. 6(2).

146. *See* Council of Europe, Simplified Chart of Signatures and Ratifications, http://conventions.coe.int/Treaty/Commun/ListeTableauCourt.asp?MA=3&CM=16&CL=ENG (last visited Sept. 3, 2009).

Although every one of the European Union's members has individually signed and ratified the Convention, the European Court of Justice, the supreme judicial court of the European Community, has held that the European Community could not accede to the Convention under the power given in the treaties.[147] Indeed, the Court held that "[s]uch a modification of the system of protection of human rights would be of constitutional significance."[148]

As a result of this decision, a lobbying effort was made in the European Community to include a human rights treaty in the proposed Treaty of Lisbon, a treaty which would form a European Constitution.[149] This human rights portion of the proposed European Constitution, the European Union Charter of Fundamental Rights,[150] provides the right to education and promises that the "right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected."[151] However, the Charter is not binding because the Constitution, although signed, has not been ratified and is not enforceable.[152] However, the Charter is worth noting because any current European Union decision concerning policy could become the policy incorporated by any future European Constitution.

Further, the European Court of Human Rights should be brought into a discussion concerning education policy because any deference that the European Union gives to the Court's decisions could lead to a conflict with the stated policies of the European Union. As previously stated, the European Union was developed to encourage economic growth and development of its Member States. However, if the Court prevents the Member States from promoting educational choice, there will be restrictions on worker mobility that are unrelated to economic causes. Workers should be motivated by the laws of supply and demand and should be able to migrate where they are most needed. However, home-educating families which are restricted by the European Court of Human Rights from educating their children as desired would be limited in their opportunities to move within the European Union.

Although this situation might seem unlikely, it does come up as shown

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147. Eurofound website, European Convention for the Protection of Human Rights and Fundamental Freedoms, http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/europeanconventionfortheprotectionofhumanrightsandfundamentalfreedoms.htm (last visited Sept. 3, 2009).

148. *Id.*

149. *See* EUROPA website, A Constitution for Europe, http://europa.eu/scadplus/constitution/ introduction_en.htm (last visited Sept. 3, 2009).

150. *See generally* Charter of Fundamental Rights of the European Union, Dec. 18, 2000, 2000 O.J. (364), *available at* http://www.europarl.europa.eu/charter/pdf/text_en.pdf.

151. *Id.* at art. 14.

152. *See* EUROPA website, Lisbon Treaty – Introduction, http://europa.eu/legislation_summaries/institutional_affairs/treaties/Lisbon_treaty/indexs)_en.htm (last visited Oct. 7, 2009). For a general discussion of the human rights that incorporated by the Lisbon Treaty and the Charter of Fundamental Rights, see the EUROPA website, A Europe of Rights and Values, http://europa.eu/lisbon_treaty/glance/rights_values/index_en.htm (last visited Oct. 7, 2009).

supra in Part III concerning home educating families who fled Germany for refuge in England. Some of these families attempted to seek better jobs in Germany, but they were driven away from those opportunities because of Germany's restriction on home education and the threats by the local authorities for not enrolling their children in state schools.[153] One home educating family stated that the German draconian restriction on homeschooling "feels like persecution,"[154] and another German family reported that their bank accounts were frozen and their car was seized merely because they where home educating their children.[155]

The European Union is supposed to grant "the right to travel, work, and live anywhere in the Union."[156] However, if parents involved in home education are forced to decide between their children's education and seeking the best vocational opportunity, these guaranteed rights are extremely limited.

If the European Charter of Fundamental Rights is ratified and then interpreted to follow the decisions of the European Court of Human Rights which limit the choices in education, the economic opportunity of home-educating parents in the European Union will be severely restricted. This conflict between the stated goals of the European Union and the Court's interpretation of the Charter of Fundamental Rights could create national barriers between the members, limit economic progress, and directly prevent the purposes of the European Union.

B. Home Education and the European Union Policies on Education

In order to encourage the development of its economic and political goals, the European Union produces general education policies that it suggests and promotes to the Member States.[157] Given the added support of the Lisbon Treaty, the European Union has created a united educational strategy that consists of three overall objectives: "improving the quality and effectiveness of education and training systems; facilitating access to education and training systems; and opening up EU education and training systems to the wider world."[158]

Home education should fit within the European Union's general policy and should be included in the future strategic decisions concerning European education. The following is a discussion of the policy concerns connected with home education, in addition to the concerns that were noted *supra* in Part III, and an explanation of how home education can be used as a method to fulfill

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153. Francis-Pape & Hall, *supra* note 47.

154. *Id.*

155. *Id.*

156. EUROPA Website, A Citizens' Europe, http://europa.eu/abc/12lessons/lesson_9/index_en.htm (last visited Oct. 7, 2009).

157. *See* European Commission Website, European Strategy and Co-operation in Education and Training, *supra* note 124.

158. *Id.*

the European Union's political and economic objectives.

In its strategies for European education in the twenty-first century, the European Union has set clear directives for its Members, and the European Union has said, "Schools need to set people on the path to a lifetime of learning, if they are to prepare them adequately for the modern world. A sound school education system . . . also helps ensure open and democratic societies by training people in citizenship, solidarity and participative democracy."[159] In an effort to comply with this statement, the "[e]ducation ministers from EU Member States have set themselves 13 specific areas for improvement in national systems, including the education and training of teachers, key competences, language learning, ICT, maths, science and technology, active citizenship and social cohesion."[160]

Independent public policy organizations have noted a significant decrease in the European Union of citizen engagement in "traditional democratic processes," and they have suggested that parents should be supported in developing young children "to recognize and develop their roles informing citizens. Parent, family, and women's education are particularly relevant."[161] They also call for an "encouragement of initiatives that involve young people in the governance of their own educational and other institutions, as this is likely to be particularly helpful in creating a sense of engagement."[162] Home education can serve as an effective means of academic education while promoting democratic values and active citizenship.

As noted *supra* in Part I, home education grew rapidly popular in the United States during the twentieth century. However, home education should not be a foreign concept to Europeans; prior to the introduction of government-provided and mass education in nineteenth century, home education was normal in Europe.[163] As renewed European interest in home education has grown, its effectiveness has been closely followed, and the numbers clearly demonstrate that home education is a viable alternative to traditional schools.[164] Alan Thomas and Harriet Pattison, fellow research associates at the Institute of Education, University of London, claim that home education is an "astonishingly efficient way to learn."[165] They claim that "[t]he ease, naturalness and immense intellectual potential of informal learning up to the

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159. School Education: Equipping a New Generation, *supra* note 4.

160. *Id.*

161. PJB ASSOCIATES, NEW PERSPECTIVES FOR LEARNING: ENGAGING PEOPLE IN ACTIVE CITIZENSHIP, BRIEFING PAPER 44 FOR THE EUROPEAN COMMISSION, 4 (June 2003), http://www.pjb.co.uk/npl/bp44.htm.

162. *Id.* at 5.

163. Cynthia M. Villalba, *Creating Policy from Discursive Exchanges on Compulsory Education and Schooling in Sweden*, 17 EVAL. & RES. IN EDUC. 191, 193 (2003).

164. McIntyre-Bhatty, *supra* note 61, at 247 ("International studies have consistently demonstrated the effectiveness of home education.").

165. Jessica Shepherd, *No School like home: Jessica Shepherd meets the children who don't go to school*, THE GUARDIAN, Aug. 19, 2008, at 1, *available at* http://www.guardian.co.uk/ *education/2008/aug/19/schools.education.*

age of middle secondary school means they can learn certainly as much if not more."[166]

However, some scholars and educators are concerned about the abilities of children educated at home to succeed beyond mere academics. As mentioned *supra* in Part II, the lack of daily peer interaction is a major source of unease for opponents of home education. They claim that a holistic approach to education requires social experiences as well as academics, and they fear that students educated at home will detrimentally lack the social exposure of the classroom and be deficient in peer interactions. For example, Daniel Monk expresses his concern that home educated students and their parents are stigmatized from the process, and he states that in the United Kingdom, "parents who choose to home educate are . . . perceived at best as somewhat eccentric or odd and at worst viewed with a degree of suspicion and unease."[167]

However, Karen McIntyre-Bhatty argues that there is little to no evidence that traditional schools promote social interaction any more than home education does. "Whereas school is seen to ensure the welfare of the child, home education is seen as a cause for concern with regard to welfare and development without evidence to support this assumption.[168] According to her research, children in traditional schools "are no less at risk than those educated at home."[169]

Further, some scholars argue that restrictions on home education may cause harmful, unintended consequences. For example, Amanda Petrie notes that a ban or restriction on home education has extraordinary enforcement problems. She points out that a complete prohibition of home education is nearly impossible to enforce because enforcement methods are extremely limited.[170] She argues that governments generally use three types of enforcement methods in this situation: (1) fines, (2) imprisonment of the parents, or (3) placement of the children in state custody.[171] Petrie states that none of these lead to efficient enforcement because in the first method, the parents simply pay the fine and continue to home educate, while the second and third methods tear the families apart and do not keep the best interests of the children at issue.[172] Thus, a ban on home education likely fails to promote educational policies that protect the best interests of the children.

Further, a ban on home education restricts the parents' personal liberty by limiting their right to choose their children's education. Larry Willmore argues that the interpretation of the right to education guaranteed in any international

166. *Id.*
167. Monk, *supra* note 94, at 589.
168. McIntyre-Bhatty, *supra* note 61, at 255.
169. *Id.* at 256.
170. Petrie, *supra* note 17, at 498.
171. *Id.* at 485, 498.
172. *Id.* at 498.

agreement should reflect the individuals' right to choose their own education.[173] However, Daniel Monk points out that there is a tension between the negative right of the parents to avoid government intervention and the positive right of the child to receive an education.[174] That is, a child's right to education is a positive right because it places a duty on the parents to provide an education. According to Monk, this tension leads to conflict "between the 'liberty' rights of parents to educate their children as they wish and the 'claim' rights made on behalf of children for the state to protect their right to education and to monitor how parents exercise their duty to provide education."[175] However, Monk argues that because the child's right to education is a positive right, the right to education should be construed as a welfare right. "Constructing education as a form of 'welfare,' emphasizing the extent to which it can be understood to be a 'service offered for the benefit of the recipients,' enables state involvement to be distinguished from totalitarian control."[176]

In contrast, Christian Beck, a professor of education at the Institute of Educational Research, University of Oslo, notes that allowing parents the flexibility to choose home education can promote individual liberty while encouraging social diversity. "When a centralized public school emphasizes universal national, secularized, and objective values, home educating environments may constitute post-modern, particular, local communities of shared values, which could be a threat to social integration, but could also be constructive and essential for maintaining social diversity and necessary to overall social integration."[177] Indeed, Beck also states that "[h]ome education on individual, local and national levels depend . . . upon an atmosphere of open-mindedness and open communication."[178] Thus, it is possible that home education could actually increase social diversity while preserving the parents' individual right to choose their children's education.

Further, because modern types of state education require extraordinary centralization of bureaucracy and standardization, Beck argues such standardization loses more individual freedom than is desirable. "Home education has given impulses to arguments for personalized education and populistic perspectives in education . . . home education has [the] effect on a more personalized education in school."[179] Indeed, some authors note that the repressive laws against home education in Germany have been an attempt to suppress individual expression and produce a uniform society.[180]

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173. *See* Willmore, *supra* note 119, at 17.

174. Monk, *supra* note 94, at 579.

175. *Id.*

176. *Id.*

177. Christian W. Beck, Home Education and Social Integration, 10 (unpublished article, available at http://folk.uio.no/cbeck/Home%20education%20and%20social%20integration.pdf).

178. *Id.* at 10.

179. Christian W. Beck, *Home Education: Globalization Otherwise?* 4 MANAGING GLOBAL TRANSITIONS INT'L RES. J. 249, 258 (2006).

180. Monk, *supra* note 94, at 583.

Beck also notes that because state and home educators have their own forms of education, local authorities may perceive home education as conflicting with the interests of the state. However, simply because a home educator chooses a different method of education does not mean that "their interests or values conflict with those of society-at-large."[181] Beck argues that "[i]t is neither home education's content nor methods that are perceived as threatening by public authorities, but the fact that home educators break with the public school system and conduct students' education in the home, outside of established schools."[182] Using Norway as an example, Beck notes that the most stigmatized European home educators are those who are forced underground and are unregistered. In contrast, those home educators who register and are recognized by the local government produce "well-socialized students."[183]

Similarly, Cynthia Villabla notes some local authorities misunderstand home educators because the terms that frame the home education debate are often confused. Villabla states that the "[p]ractical-pedagogical-cognitive versus political-social-moral elements are predominant in the discourse between the family and the education authorities in the municipality."[184] The practical-pedagogical-cognitive elements focus on "school environment, age of the pupil, teaching methods and monitoring methods" while the second set of elements focuses on "more value-oriented items such as 'social training,' equity and equality . . . ."[185] In discussions about home education, home educators tend to emphasize the practical-pedagogical cognitive elements while local authorities view home education with the second set of elements. However, Villabla notes that Swedish families that are home educating have formed unique, flexible solutions that allow both practical and social elements of education to be satisfied.[186]

Indeed, because it is not the same thing as "taking the school to home," home education allows significantly more flexibility than traditional education. Although there are different styles of home education, home education is "a child-centred phenomena, whether it involves laissez-faire learning or formal teaching."[187] In a study of children educated at home in the United Kingdom, Paula Rothermel notes that the daily structure of home education differs significantly from that of a traditional school: "At home, children's learning was generally not 'planned' in the way it might be in school, particularly at this early age, and parents appeared not to think in terms of 'future progress' but

181. *Id.* at 4.
182. *Id.* at 8-9.
183. Beck, *supra* note 177, at 10.
184. Villalba, *supra* note 163, at 204.
185. *Id.*
186. *Id.*
187. Paula Rothermel, *Home Education: Comparison of Home-and School-educated children on PIPS Baseline Assessments*, 2 J. OF EARLY CHILDHOOD RES. 273, 276 (2004).

rather of allowing the children to learn at whatever pace suited them."[188]

Further, some studies have shown that home education may lead to more politically active and involved youth. For home educators in the United States, the family unit is the basic "building block of a national and international political network." Bruce Cooper and John Sureau of Fordham University's Graduate School of Education argue that "[a]lthough homeschool kids are taught individually or in small groups," they tend to be very political in their actions. [189] That is, "they may also come to feel part of a vocal political, religious, and social grassroots community that knows and speaks its mind, reasserting a fundamental quality of grassroots democracy."[190]

In Paula Rothermel's study of home educated children in the United Kingdom, she discovered that they avoid much of the social-economic stratification present in most formal school situations.[191] Further, contrary to the popular belief that only affluent children are successful in home education, Rothermel notes that home educated children from lower socio-economic backgrounds scored higher in test results than home educated children with affluent parents.[192] According to Rothermel, children educated at home are "free from the stigma of being poor, simply because they are not learning in an environment where affluence and labelling are an issue."[193] Although some home educating parents found living on one income a burden, Rothermel notes that the families preferred their freedom to home-educate over greater economic wealth.[194]

In a study of Canadian home-educators, researchers found that home education gives parents "the surest parental route for a specialized curriculum to match their child's particular needs."[195] Although the research in Europe has not been as extensive as that performed in North America, the current United Kingdom research shows similar results to North America, and British home educated children have outperformed children other types of traditional schools in the United Kingdom.[196]

In an attempt to develop a unified educational policy, the European Union encourages the concept of "Lifelong Learning." Lifelong Learning is a means for the European Union to "enhance economic competitiveness, while at the same time promoting social justice and democratic citizenship."[197] This

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188. *Id.* at 290.

189. Bruce S. Cooper & John Sureau, *The Politics of Homeschooling: New Developments, New Challenges*, 21 EDUC. POL'Y 110, 128 (2007).

190. *Id.* at 128.

191. Rothermel, *supra* note 187, at 293.

192. *Id.*

193. *Id.*

194. *Id.* at 295-96.

195. Janice Aurini and Scott Davies, *Choice Without Markets: Homeschooling in the Context of Private Education*, 26 BRITISH J. OF SOC. OF EDUC. 461, 472 (2005).

196. Taylor & Petrie, *supra* note 26, at 68.

197. Veronica Crosbie, *From Policy to Pedagogy: Widening the Discourse and Practice of the Learning Society in the European Union*, 6 LANGUAGE AND INTERCULTURAL COMM. 234,

system of learning emphasizes a lifetime of learning, and it encourages citizens to "*learn how to learn*, thus freeing them to engage in learning of their choosing in both formal and informal contexts."[198] Within this policy, the "underpinning concerns of flexibility, transferability and mobility are the consistent driving concepts of the European Union."[199] Originally, Lifelong Learning was developed as a way to accomplish an "education-centered society," and it is produced through national strategies which provide "opportunities for adults to learn what, when, and how they wished" and "maximize the learning opportunities and potential of the population as a whole."[200]

In the European Union's public consultation "Schools for a 21st Century" mentioned *supra*, the European Union asked how schools might be changed to "give young people with the competences and motivation to make learning a lifelong activity."[201] In response, the public gave a "clear emphasis on the need to motivate young people to learn and to involve them in the learning process."[202] In their responses to the study, schools and national level organizations stated that teachers should have more autonomy in developing "the pedagogic strategies that work best for them."[203]

Amanda Petrie notes that home education fits directly within the goals of Lifelong Learning, and she notes that parents who educated their children at home want a lifetime of learning "for their children from the day they are born, starting in the home and expanding into the community as the child grows," a form of education that she argues is "a truer definition of life-long learning."[204]

As a result, home education should play a role in the development of a Lifelong Learning policy of the European Union. Because there is little research on home education in Europe, there is admittedly some uncertainty concerning home education's survival in the European Union. However, if home education in Europe continues to exhibit the same success that it has had in North America, home education could be a viable educational alternative that would provide pedagogical flexibility, promote individual freedom, and accomplish the stated objectives of the European Union.

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241 (2006).

198. *Id.* at 236 (emphasis in the original).

199. Jacky Brine, *Lifelong Learning and the Knowledge Economy: Those That Know and Those That Do Not – the Discourse of the European Union*, 32 BRITISH EDUC. RES. J. 649, 659 (2006).

200. Edwards & Boreham, *supra* note 7, at 415.

201. ANALYSIS OF PUBLIC CONSULTATION, *supra* note 9, at pg. ii.

202. *Id.*

203. Commission of the European Communities, *Commission Staff Working Document accompanying the Communication from the Commission to the Europeans Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, 4, Parl. Eur. Doc. SEC(2008)2177, available at http://ec.europa.eu/education/school21/sec2177_en.pdf.

204. Petrie, *supra* note 17, at 483.

V. CONCLUSION

> The continent that has adopted a single currency is a long way from unity on home education. Although data remains scarce, support groups in several countries claim that they are receiving increasing numbers of requests from parents looking for alternatives to formal school systems, a movement being matched by legislative attempts to curtail its practice.[205]

As Europe quickly moves towards economic and political unification, education will become one of the most crucial areas of public policy in the age of globalization. It is particularly important for European policy makers to promote educational systems that will prepare Europe's future generations to compete effectively in the world market. However, the lack of European unification in educational policy is creating problems not only for education but also for worker mobility and economic development. The European Union's efforts to eliminate barriers between Member States are directly hindered by the conflicts in its Member's educational policies.

Most European home education regulations, including the United Kingdom's, are not written with proper communications involving the home education community, local authorities, and the legislature.[206] Any discussions between policy makers and home education community must avoid mere speculation and must be based on research, and legislatures should develop any home education regulations with an eye on the evidence of home education's actual results.

Although home education may not be the proper method for every student, research shows that home education in North America and the United Kingdom rivals traditional schools in educational quality. Arguably, home education should not be encouraged on a grand scale because a mass-exit from state schools could prove detrimental to those left in government schools.[207] However, home education should be at least an option from which European parents may choose, especially because education at home produces results directly congruent with the European Union's goals outlined in its plan for *Improving Competences for the 21st Century: An Agenda for European Cooperation on Schools*.[208] As the Special Rapporteur on the right to education stated in his report, "[A] system of public, government-funded education should not entail the suppression of forms of education that do not

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205. Guttman, *supra* note 54.

206. *See generally* McIntyre-Bhatty, *supra* note 61, at 241.

207. Chris Lubienski, *supra* note 103, at 169.

208. European Commission, Education & Training, *What Should Our Schools be Like in the 21st Century?*, http://ec.europa.eu/education/school-education/doc838_en.htm (last visited Mar. 9, 2009).

require attendance at a school."[209]

As a result, the European Union should take a closer look at the possibility that home education could be an answer to its stated economic and political goals and to the development of a unified education policy. European policy makers should examine the conflict between the interpretation of the right to "education" or "schooling" in the European Convention on Human rights. Especially in light of the pending Charter of European Human Rights, the European Union should provide a unified position on the extent of the rights granted in the Convention. Although such a position would not be binding on the European Court of Human Rights, a unified policy in the European Union could prevent future conflicts between Member States and provide a policy guide for Member States when they prepare their own educational regulations.

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209. *Report of the Special Rapporteur*, *supra* note 116, at 16.