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SYMPOSIUM: REFLECTING ON JUSTICE ANTONIN SCALIA'S RELIGION CLAUSE JURISPRUDENCE

RECENT DEVELOPMENTS

Justice Antonin Scalia's Opinions on Religion: An Introduction

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This issue of the University of Hawai'i Law Review contains a wonderful collection of articles on the constitutional standards protecting religious freedoms, focusing on the views of Justice Antonin Scalia. Justice Scalia visited the University of Hawai'i in February 2000 and participated in a number of classes and programs through which he helped the rest of us understand the nature of his views on a wide range of issues. In order to give the visit a specific focus, our Law Review invited a group of distinguished law professors to analyze Justice Scalia's opinions in the area of religious freedoms and put these opinions in a larger context. The forum provided our academic community with an afternoon of intense intellectual stimulation, and this publication makes the event accessible to a larger audience.

The First Amendment's two clauses on religion – protecting the "free exercise" of religion and prohibiting the "establishment" of religion – are expansive and visionary, and have guided our nation for more than two centuries to protect the diversity of religious beliefs while maintaining a separation of church and state. But these two clauses can come into conflict, and the effort to protect the free exercise of one group's religious activities frequently risks the danger of endorsing a practice or even coercing others who reject such activities, and thus of "establishing" a religion. How to draw the line between the allowable accommodation of religious practices and the prohibited establishment of religion is one of the central problems facing U.S. courts today. Justice Scalia's opinion for the Court in *Employment Division, Oregon Department of Human Resources v. Smith*[1] pointed a new direction on this issue, and the implications of the opinion are still being sorted out by the U.S. Congress, courts, and commentators.

The *Smith* decision says that a generally applicable law is enforceable even if it interferes with the religious practices of a group, so long as the law was not adopted for the specific purpose of interfering with the group's religious activities.[2] Justice Scalia's opinion leaves a number of issues unresolved – such as whether the generally applicable law must be a criminal law, or whether civil laws have the same effect, and whether the rule applies in situations where other constitutionally-protected rights are also involved, such

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[1] 494 U.S. 872 (1990).

[2] An example of a law adopted specifically to burden a religious practice was found in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

as the right to privacy or the rights of parents to provide for the education of their children. Congress' attempt to reverse the *Smith* holding in the 1993 Religious Freedom Restoration Act[3] was declared unconstitutional by the Court in the *City of Boerne* case,[4] but it remains unclear whether the *Boerne* decision applies to federal programs, or only to those of the states.

Other important unresolved issues include the basic question of what is a religion and what role courts should play in determining what is a bona fide religious belief or practice,[5] what standards should govern the question of when governmental action amounts to an "establishment" of religion, what duties governments have to "accommodate" religions by allowing public property to be used by religious groups, and what governments and courts should do to identify and discourage "opportunistic fraud" or "strategic adherence," whereby persons or organizations become religious in order to take advantage of the protections of the Free Exercise Clause.

The articles that follow attempt to sort out these issues, and others, and provide a framework for future analysis of religious disputes. Professor Erwin Chemerinsky focuses on Justice Scalia's religious decisions, and his approach toward constitutional and statutory interpretation, and addresses whether he is using neutral principles or a result-oriented approach. Professor William Kelley, a former law clerk of Justice Scalia's, examines and explains the Justice's views in a broader perspective. Dean Kathleen Sullivan provides an innovative and extremely useful matrix for categorizing and understanding judicial perspectives on religious issues. And Professor Aviam Soifer places the recent decisions in historical context and discusses their practical implications.

These thoughtful articles provide a rich cornucopia of ideas and a good read for anyone seeking insight into these important and complicated issues. We are grateful for the contributions of these distinguished academics, and hope

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[3] While he was visiting us in Hawai'i, I asked Justice Scalia how he would rule if Congress removed the exemption for religious groups from the prohibition in Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1) (1994), on sex-based discrimination in employment, thus making illegal the Roman Catholic Church's prohibition on women becoming priests. He said that as a judge he would enforce the generally-applicable law against the Church, but that as a citizen he would join in political efforts to restore the exemption and thus to allow the Church to continue its practices. He contended that the political process is usually adequate to protect and accommodate minority religious practices, pointing out that shortly after the *Smith* decision Oregon changed its law so that the religious use of peyote by the Native American Church was no longer illegal.

[4] City of Boerne v. Flores, 521 U.S. 507 (1997).

[5] *Cf.* Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) (upholding the Mormon Church's exemption from Title VII of the 1964 Civil Rights Act, even for janitors working in a Church gymnasium) *with* Equal Employment Opportunity Comm'n v. Kamehameha Schools/Bishop Estate, 990 F.2d 458 (9th Cir. 1993) (refusing to recognize such an exemption for the Kamehameha Schools, which were established by a will requiring all teachers to be Protestants).

that this issue of our Law Review will be of assistance in bringing clarity to a confused body of constitutional law.

The Jurisprudence of Justice Scalia: A Critical Appraisal

Erwin Chemerinsky*

I. INTRODUCTION

I am not a fan of Justice Antonin Scalia's work on the United States Supreme Court. When the Justice Scalia fan club is formed, I'm not joining. Since I'm liberal and he's conservative, this is hardly a surprise. But my dislike for Justice Scalia's jurisprudence is much greater than an ideological disagreement. To be blunt, there is a disingenuousness to Justice Scalia's decision-making and a meanness to his judicial rhetoric that I believe are undesirable and inappropriate.

In this paper, I want to make three points. First, Justice Scalia's approach to the Religion Clauses is unduly restrictive and would leave little constitutional protection for either free exercise or the Establishment Clause. Second, Justice Scalia's jurisprudence is founded on the premise that the Supreme Court should decide cases without Justices making value choices.[1] I believe that this is impossible and that Justice Scalia, and all the Justices, constantly and inevitably make value choices in deciding constitutional cases. What disturbs me about Justice Scalia's jurisprudence is that by denying that it is making value choices, it pretends that its decisions are a result of a neutral judicial methodology. As a result his value choices are not defended, but rather hidden behind a claim that the results have been discovered not chosen.

Justice Scalia's unique contribution to constitutional theory has been his jurisprudence of "original meaning."[2] His central idea is that the meaning of the Constitution is fixed and that it is discoverable by looking at the text and the practices at the time the Constitution was written. I argue below that this is an undesirable method of constitutional interpretation and one that Justice Scalia uses selectively when it leads to the conservative results he wants, but ignores when it does not generate the outcomes he desires.[3]

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[1] *See infra* notes 22-29 and accompanying text.

[2] *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997).

[3] *See infra* notes 37-52 and accompanying text.

Third, Justice Scalia's opinions are distinctive because of his frequent sarcasm and pointed attacks on his colleagues.[4] No doubt, this makes his opinions among the most interesting to read and to teach. Justice Scalia writes superbly and uses far more colorful language, far more frequently than anyone else on the Supreme Court. But I am greatly distressed by the message that his sarcasm and that his attacks on other Justices transmit to law students and to attorneys about how it is appropriate to speak and to talk to one another in judicial settings.

No one would deny Justice Scalia's great intellect or the passion with which he holds and expresses his views. But these enormous strengths should not hide the fact that Justice Scalia's method for interpreting the Constitution and the rhetoric of his opinions are very troubling.

II. JUSTICE SCALIA ON THE RELIGION CLAUSES: LITTLE IS LEFT

As Professor Kathleen Sullivan demonstrates in her elegant paper, Justice Scalia very narrowly interprets both the Free Exercise Clause and the Establishment Clause and leaves little room for judicial protection under either.[5] Ultimately, Justice Scalia would leave to the political process both the protection of free exercise of religion and the safeguards of the Establishment Clause. Justice Scalia's views on the Free Exercise Clause have gained support from a majority of the Court, but his position on the Establishment Clause never has gained the necessary five votes.

Justice Scalia's approach to the Free Exercise Clause was adopted in *Employment Division, Department of Human Resources v. Smith*, in which the Court expressly and dramatically changed the law of the clause.[6] *Smith* involved a challenge by Native Americans to an Oregon law prohibiting use of peyote, a hallucinogenic substance. Specifically, individuals challenged the state's determination that their religious use of peyote, which resulted in their dismissal from employment, was misconduct disqualifying them from receipt of unemployment compensation benefits.

Justice Scalia, writing for the majority, rejected the claim that free exercise of religion required an exemption from an otherwise valid law. Scalia said that "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition."[7] Scalia thus declared

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[4] *See infra* notes 71-83 and accompanying text for a long list of examples.

[5] *See* Kathleen Sullivan, *Justice Scalia and the Religion Clauses*, *infra* 22 U. HAW. L. REV. 449 (2000).

[6] 494 U.S. 872 (1990).

[7] *Id.* at 878-89.

"that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability of the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[8]

Justice Scalia's opinion then reviewed the cases where Free Exercise Clause challenges had been upheld and said that none involved Free Exercise Clause claims alone. All involved "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, . . . or the right of parents to direct the education of their children."[9] The Court said that *Smith* was distinguishable because it did not involve such a "hybrid situation," but was a free exercise claim "unconnected with any communicative activity or parental right."[10]

Moreover, the Court said that the line of cases preventing the government from denying benefits to those who quit their jobs for religious reasons applied only in the context of the denial of unemployment benefits;[11] it did not create a basis for an exemption from criminal laws. Scalia wrote that "[e]ven if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law."[12]

The Court expressly rejected the use of strict scrutiny for challenges to neutral laws of general applicability that burden religion. Justice Scalia said that "[p]recisely because 'we are a cosmopolitan nation made up of people of almost every conceivable religious preference,' and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming presumptively invalid, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order."[13] The Court said that those seeking religious exemptions from laws should look to the democratic process for protection, not the courts.

Smith radically changed the test for the Free Exercise Clause. Strict scrutiny was abandoned for evaluating laws burdening religion; neutral laws of general applicability only have to meet the rational basis test, no matter how much they burden religion. For instance, prior to *Smith*, if a county had a law prohibiting all consumption of alcoholic beverages, there is no doubt that a free exercise exemption could have been obtained by a priest who wanted to use wine in communion or a Jewish family that wanted to use wine at a

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[8] *Id.* at 879 (citation omitted).

[9] *Id.* at 881 (citations omitted).

[10] *Id.* at 882.

[11] *See id.* at 872. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963) (state may not deny benefits to those who quit jobs for religious reasons).

[12] *Smith*, 494 U.S. at 884.

[13] *Id.* at 888 (citation omitted).

Sabbath or Seder dinner. Yet, after *Smith*, it is clear that the priest or the Jewish family would lose in their free exercise claim. The prohibition of the consumption of alcohol is a neutral law of general applicability; it applies to all in the county and was not motivated by a desire to interfere with religion.

Justice Scalia has also emphasized deference to majoritarianism in his interpretation of the Establishment Clause of the First Amendment. To my knowledge, in his almost fourteen years on the Court, Justice Scalia has never voted in favor of an Establishment Clause claim or against the government in an Establishment Clause case. Justice Scalia's very narrow reading of the Establishment Clause is evident in his dissenting opinion in *Lee v. Weisman*.[14] In *Lee*, the Court declared unconstitutional clergy-delivered prayers at public school graduations. Justice Kennedy, writing for the Court, said that "the controlling precedents as they relate to prayer and religious exercise in primary and secondary public schools compel the holding here . . . . The State's involvement in the school prayers challenged today violates these central principles [of the Establishment Clause.]"[15]

But Justice Scalia, joined by Chief Justice Rehnquist and Justices White and Thomas, vehemently dissented and disagreed with the view that there was anything coercive about a clergy-delivered prayer at a public school graduation.[16] Scalia said that even if a student did feel subtly coerced to stand during the prayer, this was acceptable because "maintaining respect for the religious observance of others is a fundamental civic virtue that government . . . can and should cultivate."[17] For Scalia, the prohibition of prayer constitutes impermissible hostility to religion. He wrote:

> The reader has been told much in this case about the personal interest of [the plaintiffs], and very little about the personal interests on the other side. They are not inconsequential. Church and state would not be such a difficult subject if religion were, as the Court apparently thinks it to be, some purely personal avocation that can be indulged entirely in secret, like pornography, in the privacy of one's room. For most believers it is not that, and has never been. . . . But the longstanding American tradition of prayer at official ceremonies displays with unmistakable clarity that the Establishment Clause does not forbid the government to accommodate it.[18]

Under Justice Scalia's approach, little ever will violate the Establishment Clause.[19] The Free Exercise Clause would be violated under this approach

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[14] 505 U.S. 577 (1992).

[15] *Id.* at 586-87.

[16] *See id.* at 632 (Scalia, J., dissenting).

[17] *Id.* at 638 (Scalia, J., dissenting).

[18] *Id.* at 645 (Scalia, J., dissenting).

[19] Suzanna Sherry, Lee v. Weisman*: Paradox Redux*, 1992 SUP. CT. REV. 123, 134. Professor Sherry argues that the coercion test "makes the Establishment Clause redundant. Any

only by the government creating its own church, or by force of law requiring religious practices, or by favoring some religions over others. Justice Scalia ignores the importance of the Establishment Clause in preventing the government from making those of other religions feel unwelcome and keeping the government from using its power and influence to advance religion or a particular religion.[20] Justice O'Connor expressed this view when she wrote:

> An Establishment Clause standard that prohibits only "coercive" practices or overt efforts at government proselytization, but fails to take account of the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others, would not, in my view, adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic political community. Thus, this Court has never relied on coercion alone as the touchstone of Establishment Clause analysis.[21]

Thus, Justice Scalia takes an extremely narrow view of the protections of both the Free Exercise Clause and the Establishment Clause. As to both, he emphasizes deference to majoritarian government decision-making. He gives no weight to the need for the judiciary to enforce these clauses, especially to protect those of minority religions.

III. JUSTICE SCALIA'S PHILOSOPHY OF VALUE-FREE ORIGINAL MEANING: WHEN IT SERVES HIS CONSERVATIVE AGENDA

A. The Scalia Philosophy

The core of Justice Scalia's judicial philosophy is that judges deciding constitutional cases should discover the answers in external sources; judges must not make value choices. Among his most explicit expressions of this view was in his opinion in *Michael H. v. Gerald D.*[22] In rejecting the claim of a biological father to visit his child, Justice Scalia argued that the general tradition of protecting parental rights is irrelevant. He declared:

> Because such general traditions provide such imprecise guidance, they permit judges to dictate rather than discern the society's views. The need, if arbitrary

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government action that coerces religious belief violates the Free Exercise Clause." *Id.* Subsequent to the symposium and completion of this article, the Court decided *Mitchell v. Helms*, 120 S. Ct. 2530 (2000), in which Justice Scalia joined a plurality opinion written by Justice Thomas which would allow government aid to parochial schools, including for religious instruction, so long as the government treats all religions equally.

[20] For an excellent criticism of the accommodation approach, see Mark Tushnet, *The Emerging Principle of Accommodation of Religion (Dubitante)*, 76 GEO. L.J. 1691 (1988).

[21] County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 627-28 (1989) (O'Connor, J., concurring in part and concurring in the judgment).

[22] 491 U.S. 110 (1989).

> decisionmaking is to be avoided, to adopt the most specific tradition as the point of reference. . . . Although assuredly having the virtue (if it be that) of leaving judges free to decide as they think best when the unanticipated occurs, a rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all.[23]

Similarly, in *Stanford v. Kentucky*, the Court upheld the imposition of capital punishment on an individual for a crime committed at sixteen or seventeen years of age as permissible under the Eighth Amendment.[24] Justice Scalia wrote for the Court and stated that to declare this unconstitutional would be to impose "our personal preferences" and "to replace judges of the law with a committee of philosopher-kings."[25]

Justice Scalia has expressed this view in other cases[26] and in a book, *A Matter of Interpretation: Federal Courts and the Law*.[27] In it he expressly rejects the idea of a "Living Constitution."[28] He argues that the meaning of the Constitution is "static" and writes:

> As soon as discussion goes beyond the issue of whether the Constitution is static, the evolutionists divide into as many camps as there are individual views of the good, the true, and the beautiful. I think that this is inevitably so, which means that evolutionism is simply not a practicable constitutional philosophy.[29]

Justice Scalia argues instead for a constitutional jurisprudence based on "original meaning." He carefully distinguishes this from an approach that searches for "original intent." He is clear that he is not searching for or relying upon the Framers' intent.[30] He writes: "What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended."[31]

How is this original meaning found? Justice Scalia's book does not elaborate an answer, but his many decisions indicate that Justice Scalia looks to the text of the Constitution and to practices that existed at the time the Constitution was ratified. For instance, in *Printz v. United States*,[32] the Court declared unconstitutional the Brady Handgun Prevention Act,[33] and held that

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[23] *Id.* at 127 n.6.
[24] 492 U.S. 361 (1989).
[25] *Id.* at 379 (plurality opinion).
[26] *See, e.g.*, Burnham v. Superior Court, 495 U.S. 604 (1990).
[27] ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997).
[28] *Id.* at 41-44.
[29] *Id.* at 45.
[30] *See id.* at 38.
[31] *Id.*
[32] 521 U.S. 898 (1997).
[33] 18 U.S.C. § 922 (1998).

forcing state and local law enforcement personnel to conduct background checks before issuing permits for firearms violates the Tenth Amendment.

Justice Scalia, writing for the majority, said that "[b]ecause there is no constitutional text speaking to this precise question, the answer . . . must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of the Court."[34] Justice Scalia began by reviewing the experience in early American history and found that there was no support for requiring states to participate in a federal regulatory scheme. As to history, Justice Scalia said that Congress, in the initial years of American history, did not compel state activity and since "early Congresses avoided use of this highly attractive power, we would have reason to believe that the power was thought not to exist."[35]

Similarly, in other cases, Justice Scalia expressly bases his understanding of "original meaning" on the practices that occurred at the time the relevant constitutional provision was adopted. For instance, in *McIntyre v. Ohio Elections Commission*, Justice Scalia dissented from the Court's holding unconstitutional a law that prohibited the distribution of anonymous campaign literature.[36] Justice Scalia focuses on the practices at the time the Constitution was written in urging upholding of the Ohio law.

B. A Critique

There are thus two key, albeit interrelated, aspects to Justice Scalia's judicial philosophy: an emphasis on judges discovering and not imposing values, and a search for the Constitution's original meaning. I consider each in turn.

1. The impossibility of value neutral judging

Is it possible that Justice Scalia really is, as he argues, simply "discerning" the results in constitutional cases, rather than dictating them? Is it mere coincidence that in virtually every case Justice Scalia discerns from the Constitution the conclusion is consistent with his conservative personal ideology? Justice Scalia, for example, discerns from the Constitution a strict prohibition of affirmative action,[37] no protection for abortion rights,[38]

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[34] *Printz*, 521 U.S. at 905.

[35] *Id.*

[36] 514 U.S. 334 (1995).

[37] *See* City of Richmond v. J.A. Croson, 488 U.S. 469, 520-28 (1989) (Scalia, J., concurring).

[38] *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 979-1002 (1992) (Scalia, J., dissenting).

permissibility of school prayer,[39] strong protection for states and state sovereign immunity,[40] condemnation of unwed mothers and fathers,[41] and so on. It leads one to believe that the original meaning of the Constitution and the Republican platform are remarkably similar.

Yet, as I argue below in criticizing the philosophy of original meaning, in these cases Justice Scalia is very much making a personal value choice and then invoking the history that he wants to support it. Consider affirmative action as an example. Justice Scalia's writings emphasize the importance of judicial deference to democratic decision-making.[42] Yet, in the area of affirmative action, Justice Scalia shows no deference to majoritarian decision-making; he is consistent in his willingness to strike down affirmative action even when it is approved by popularly elected legislatures.[43] But he does not justify this, and cannot justify it, based on his philosophy of original meaning. No one would doubt that the original meaning of the Equal Protection Clause was to benefit African-Americans, not white males, and there is overwhelming historical evidence that affirmative action was widespread around the time that the Fourteenth Amendment was adopted.[44] Yet here, where history does not support his conclusions, Justice Scalia ignores it. Justice Scalia has simply imposed his conservative ideology which opposes affirmative action to strike down the acts of the democratic process.

Consider as another example Justice Scalia's consistent votes in favor of protecting state sovereign immunity.[45] Justice Scalia finds in the Constitution a broad principle of sovereign immunity that protects state governments from suit in federal and state courts. He obviously cannot base this on the text of the Constitution. The Eleventh Amendment only prevents a state from being sued in federal court by citizens of other states and there is no constitutional provision that protects states from being sued by their own citizens.[46]

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[39] *See* Lee v. Wiesman, 505 U.S. 577, 632 (1992) (Scalia, J., dissenting).

[40] *See* Printz v. United States, 521 U.S. 898 (1997); College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 627 (1999).

[41] *See* Michael H. v. Gerald D., 491 U.S. 110 (1989).

[42] *See* SCALIA, *supra* note 27, at 44-46.

[43] *See, e.g.*, Metro Broadcasting v. FCC, 497 U.S. 547 (1990); City of Richmond v. J.A. Croson, 488 U.S. 469 (1989).

[44] For an excellent detailing of the extent of affirmative action at this time, see Stephen A. Siegel, *The Federal Government's Power to Enact Color Conscious Laws: An Originalist Inquiry*, 92 Nw. U. L. REV. 477 (1998).

[45] He wrote the majority opinion in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 627 (1999); he elaborated his views in *Pennsylvania v. Union Gas*, 491 U.S. 1, 42 (1989) (Scalia, J., concurring in part and dissenting in part); he was in the majority in cases such as *Alden v. Maine*, 527 U.S. 706 (1999); *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999); and *Kimel v. Florida Board of Regents*, 120 S. Ct. 631 (2000).

[46] In *Alden v. Maine*, 527 U.S. 706 (1999), the Supreme Court held that state governments

Instead, Justice Scalia must base this conclusion on the premise that states had sovereign immunity prior to the adoption of the Constitution and the original meaning was to preserve this. There are huge problems with this conclusion from the perspective of a theory of original meaning. First, it ignores the text of the Constitution, specifically the Supremacy Clause. The Constitution, in Article VI, says that the Constitution is the supreme law of the land. Yet, Justice Scalia finds a principle nowhere stated in the Constitution, sovereign immunity, to be higher than the Constitution itself. A state cannot be sued for violating the Constitution because of its sovereign immunity. Yet, Chief Justice John Marshall, long ago, declared:

> If any one proposition could command the universal assent of mankind, we might expect it would be this – that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result, necessarily, from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. . . . The nation, on those subjects on which it can act, must necessarily bind its component parts.[47]

Second, the original meaning of the Constitution is unclear as to sovereign immunity. Certainly, it is possible to point to some evidence as to the importance of sovereign immunity. But there is equal, and likely better, historical evidence that the original meaning was not to protect sovereign immunity. Justice Souter has explained:

> There is almost no evidence that the generation of the Framers thought sovereign immunity was fundamental in the sense of being unalterable. Whether one looks at the period before the framing, to the ratification controversies, or to the early republican era, the evidence is the same. Some Framers thought sovereign immunity was an obsolete royal prerogative inapplicable in a republic; some thought sovereign immunity was a common-law power defeasible, like other common-law rights, by statute; and perhaps a few thought, in keeping with a natural law view distinct from the common-law conception, that immunity was inherent in a sovereign because the body that made a law could not logically be bound by it. Natural law thinking on the part of a doubtful few will not, however, support the Court's position.[48]

In other words, Justice Scalia cannot claim to have simply discovered sovereign immunity in the original meaning of the Constitution. As a conservative he has the traditional conservative desire to protect state governments and enforce federalism. He has made a value choice to favor

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cannot be sued in state court without their consent. Justice Kennedy wrote the majority opinion, which Justice Scalia joined.

[47] McCulloch v. Maryland, 17 U.S. 316, 405 (1819).

[48] *Alden*, 527 U.S. at 764 (Souter, J., dissenting).

state government immunity over state government accountability, but he hides it in the language of original meaning.

Consider one more example of Justice Scalia unquestionably making exactly the kind of value judgments that he purports to disavow: drug testing. In 1989, in *National Treasury Employees Union v. Von Raab*, Justice Scalia wrote a passionate dissent from the Supreme Court's approval of random drug testing for customs' workers.[49] Justice Scalia emphasized how the Fourth Amendment was meant to eliminate random searches based on general warrants and required individualized suspicion.[50] But in 1995, Justice Scalia wrote the majority opinion in *Vernonia School District v. Acton*, approving random drug testing for high school athletes.[51] Justice Scalia justified this latter ruling by arguing that high school students have a minimal expectation of privacy and that the intrusion of random testing is justified by the schools' interest in combatting drug abuse. This unquestionably is a value judgment, not a conclusion based on the original meaning of the Constitution, which Scalia persuasively argued in *Von Raab* disapproves random drug testing.

My point is a basic one, and one made long ago by the Legal Realists and one that I would think is virtually universally accepted. Justices deciding constitutional cases inevitably must make value choices. The Constitution's text does not answer the vast majority of constitutional cases and, as argued below, there almost never is an original meaning waiting to be found. Moreover, inevitably in constitutional cases Justices must decide whether the government's action is justified by a sufficient purpose. This balancing, such as determining whether there is an important or a compelling interest, inescapably requires a value choice by the Justice.

The great danger is that by pretending that by denying that value choices are being made the value judgments never get defended. The majority opinions, such as in all the recent sovereign immunity decisions, turn into a battle of historical evidence. The real question, how state government immunity should be weighed against state government accountability, never gets expressly discussed even though that is the key issue in the cases.

A response to my criticism could be that Justice Scalia, at times, follows his interpretive methodology even when it leads to results inconsistent with a conservative's likely beliefs. For instance, he voted that flag burning is constitutionally protected[52] and that the right to confrontation must be

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[49] 489 U.S. 656 (1989) (Scalia, J., dissenting).

[50] *See id.* The Court declared constitutional, over Justice Scalia's vehement dissent, random drug testing for those applying for positions or promotions in the federal Customs Service. *See id.*

[51] 515 U.S. 646 (1995).

[52] *See* Texas v. Johnson, 491 U.S. 397 (1989); United States v. Eichman, 496 U.S. 310 (1990).

preserved even in child abuse cases.[53] What is striking, however, is that all of these instances that I can identify occurred in his first few years on the Court. I cannot think of a single instance since the early 1990s in which Justice Scalia seemed to follow his interpretive methodology in a constitutional case where it would lead to other than the conservative result.

I, of course, am not criticizing Justice Scalia for making value choices in deciding cases. Every member of the Court inescapably must do so in constitutional cases. Rather, my objection is that Justice Scalia is outspoken in denying that is what he is doing and by failing to admit what is actually happening he avoids defending the value choices made.

2. *The philosophy of original meaning*

Justice Scalia emphasizes that the meaning of the Constitution is static and that Justices should follow the "original meaning" behind constitutional provisions. Since he disavows a search for the Framers' intent, the evidence he looks to is historical practices at the time the Constitution was adopted. I believe that there are enormous problems with this as a jurisprudential philosophy.

First, the search for original meaning in contemporaneous practices assumes that the Constitution sought to codify those particular behaviors. Yet, there is no basis for this assumption. Even if a particular practice was universal at the time the constitutional provision was drafted and ratified, that still does not establish that the Constitution was meant to enshrine that behavior. It certainly is possible that the Framers might have wanted to embody a specific practice in the Constitution, but it also is possible that the Framers wanted the constitutional provision to disapprove the practice or that the Framers simply did not think one way or another about the specific practice when they adopted the particular constitutional provision.

Consider as an example a case where the Supreme Court's majority opinion focused on original meaning: *Wilson v. Arkansas*, which concerned whether the police must knock and announce before searching dwellings.[54] Justice Thomas wrote the opinion for the Court in which Justice Scalia joined. Justice Thomas' majority opinion expressly followed the philosophy of original meaning and said that the answer to the constitutional issue is to be found in the contemporaneous practices that existed in 1791. After reviewing this history, Justice Thomas' majority opinion concluded that "knock and announce" is a constitutional requirement because it was the practice in 1791 except when there were exigent circumstances.

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[53] *See* Maryland v. Craig, 497 U.S. 836 (1990) (Scalia, J., dissenting).

[54] *See* Wilson v. Arkansas, 514 U.S. 927 (1995).

It is conceivable that those drafting the Fourth Amendment had this common law rule in mind and wanted to include it in the Constitution. It also is plausible that they thought that the exceptions were too broad and that by enacting the Fourth Amendment they wanted to disapprove the on-going practice. And it also is possible that the Framers and ratifiers of the Fourth Amendment were not thinking about "knock and announce" at all. The existence of a practice tells nothing by itself as to its relationship to a constitutional provision.

Nor are practices soon after the enactment of the provision necessarily useful in determining its meaning. It certainly is possible that subsequent practice reflects the Framers' understanding of what was constitutionally permissible under the new provision. But it also is possible that the Framers meant the amendment to outlaw the practice, but the political realities were that in governing they saw no alternative but to engage in the forbidden behavior. There is a fundamental difference between constituting a government and governing. The choices made in creating a government may not necessarily be reflected in governing. The Alien and Sedition Act of 1798 might be indicative that the Framers of the First Amendment, many of whom were still in Congress, meant to allow punishment of seditious libel. But it also might mean that those with political power and an incentive to use it acted differently than when they were creating the government.

It seems even more dubious to rely on the absence of a practice in the first Congresses to establish a constitutional limit. In *Printz v. United States*, Justice Scalia's majority opinion stressed the absence of Congressional compulsion of states in the early Congresses as evidence of the meaning of the Tenth Amendment and the scope of Congress' powers.[55] There are countless reasons why the federal government did not require state action then, including they did not think of the possibility, or they thought that their goals could best be achieved by direct federal action, or they sought to establish the federal government's own authority, to act or political pressures at the time prevented specific mandates. To infer rejection of Congressional power from inaction is to assume the truth of one explanation to the exclusion of all others. The absence of a particular practice at a specific time does not mean that those then in power thought it unconstitutional. There are many explanations for why a type of law was not used at a given moment.

Second, the search for original meaning in contemporaneous practices assumes a unanimity or near unanimity, about what was occurring at the time of the ratification of the Constitution. As to most issues, this rarely was present. The result is that the Court simply looks back and finds some practices to support the conclusions it wants to reach. More than a quarter of

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[55] *See* Printz v. United States, 521 U.S. 898, 905-09 (1997).

a century ago, Alfred Kelly complained of what he called "law office" history practiced by the Supreme Court.[56] Practices often varied. The Court picks and chooses from its reading of history and selects those practices that confirm the conclusion that it wants for each. The Court purports that history is the basis for the discovery of its conclusion, when in reality history seems to be no more than a part of the justification for conclusions reached on other grounds.

A powerful example of this is a series of Supreme Court decisions according judges absolute immunity to suits for money damages.[57] The Supreme Court has based its holding of absolute immunity largely on its view that judges historically had absolute immunity at common law in 1871 when § 1983 was adopted. Yet, a closer look at history reveals that judges had absolute immunity in only thirteen of thirty-seven states that existed in 1871.[58]

The point is that Justice Scalia, and others who follow the philosophy of original meaning, look at history out of its context to support a particular conclusion. They tend to use history when it offers that support and ignore it when it doesn't. Consider Justice Scalia's approach to equal protection. He is a vehement critic of affirmative action, consistently finding it unconstitutional.[59] He also emphasized original meaning in his sole dissent in *United States v. Virginia*, in arguing that Virginia should be able to exclude women from the Virginia Military Institute.[60] From these cases, one gets the sense that Justice Scalia sees the original meaning of the Equal Protection Clause was to protect white males.

Yet, a far more persuasive argument can be made that the original meaning of the Equal Protection Clause was to help African-Americans. For example, legal historian, Professor Stephen Siegel has powerfully documented that the historical practices around the time of the ratification of the Fourteenth Amendment strongly support the constitutionality of affirmative action.[61] Yet for all his purported devotion to history as the guide for original meaning, Justice Scalia never mentions this history because it does not support his vehement opposition to affirmative action.

Third, it is not desirable to have the modern world governed by the practices of a vastly different time over 200 years ago. A commitment to following

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[56] *See* Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119.

[57] *See, e.g.*, Mireles v. Waco, 502 U.S. 9 (1991); Stump v. Sparkman, 435 U.S. 349 (1978).

[58] *See* Note, *Liability of Judicial Officers Under Section 1983*, 79 YALE L.J. 322, 326-27 (1969). *See also* J. Randolph Block, Stump v. Sparkman *and the History of Judicial Immunity*, 1980 DUKE L.J. 879, 899.

[59] *See* City of Richmond v. J.A. Croson, 488 U.S. 469, 520-28 (1989) (Scalia, J., concurring); Bush v. Vera, 517 U.S. 952, 999-1003 (1996) (Scalia, J., concurring in the judgment).

[60] *See* United States v. Virginia, 518 U.S. 515, 566-601 (1996) (Scalia, J., dissenting).

[61] *See* Stephen A. Siegel, *The Federal Government's Power to Enact Color Conscious Laws: An Originalist Inquiry*, 92 NW. L. REV. 477 (1998).

contemporaneous historical practices would lead to abhorrent conclusions. Justice Brennan explained this when he stated:

> [D]uring colonial times, pillorying, branding, and cropping and nailing of the ears were practiced in this country. Thus, if we were to turn blindly to history for answers to troubling constitutional questions, we would have to conclude that these practices would withstand challenge under the cruel and unusual clause of the [E]ighth [A]mendment.[62]

Under Justice Scalia's philosophy of original meaning *Brown v. Board of Education*[63] was clearly wrongly decided.

The same Congress that approved the Fourteenth Amendment also voted to segregate the District of Columbia public schools.[64] Similarly, under Justice Scalia's philosophy of original meaning, as expressed in his scathing dissent in *United States v. Virginia*, there is no constitutional protection for women under the Equal Protection Clause. There is no evidence that the drafters of the Equal Protection Clause sought to protect women from discrimination and in the 19th century discrimination against women was endemic.[65] I believe that any philosophy of constitutional interpretation that tells us that *Brown* was wrongly decided or that women are not protected under the Equal Protection Clause is simply unacceptable.

Moreover, for so many constitutional cases, there is no original meaning to be found. An example of the absurdity of the search for original meaning where none exists can be found in a decision from last Term in which Justice Scalia joined Justice Thomas' majority opinion: *Florida v. White*.[66] The issue is whether a warrantless seizure of an automobile violates the Fourth Amendment. Justice Thomas began his legal analysis by stating: "In deciding whether a challenged governmental action violates the Fourth Amendment, we have taken care to inquire whether the action was regarded as an unlawful search and seizure when the Amendment was framed."[67] He then goes on and describes a broad automobile exception to the Fourth Amendment's warrant requirement.

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[62] William J. Brennan, Jr., *Constitutional Adjudication and the Death Penalty: A View From the Court*, 100 HARV. L. REV. 313, 327 (1986).

[63] 349 U.S. 249 (1954).

[64] *See* RONALD DWORKIN, LAW'S EMPIRE 360 (1986). This legislation was later declared unconstitutional in *Bolling v. Sharpe*, 347 U.S. 497 (1954). *But see* Michael McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995) (arguing that the Framers of the Fourteenth Amendment did intend to desegregate public schools).

[65] *See, e.g.*, The Slaughter-House Cases, 83 U.S. 36, 81 (1872) (stating that the Equal Protection Clause was meant only to protect racial minorities and never would be extended beyond this).

[66] 526 U.S. 559 (1999).

[67] *Id.* at 563.

What relevance is original meaning in deciding First Amendment issues such as whether the government can prohibit indecent speech over the internet[68] or how the government can regulate commercial speech[69] or what types of campaign finance regulation reform are permissible.[70] All of these involve issues about which there is just no original meaning to be found. The only way to find an original meaning would be to state it at such a high level of abstraction that it could be invoked to support any conclusion the Court wants to arrive at.

Justice Scalia's purported search for original meaning provides little constraint on his decision-making. That is why, almost without exception, he can follow his original meaning philosophy and come to the conservative results he prefers. Another Justice could follow original meaning and use it to justify liberal results. Justice Scalia's constitutional jurisprudence falsely assumes an ascertainable original meaning that can be determined from historical practices and wrongly assumes that it should control modern constitutional decision-making.

IV. THE RHETORIC OF JUSTICE SCALIA'S OPINIONS

No Justice in Supreme Court history has consistently written with the sarcasm of Justice Scalia. No doubt, this makes his opinions among the most entertaining to read. He has a great flair for language and does not mince words when he disagrees with a position. But I think that this sends exactly the wrong message to law students and attorneys about what type of discourse is appropriate in a formal legal setting and how it is acceptable to speak to one another.

Examples of this abound. Consider a few. In dissenting opinions he describes the majority's approaches as "nothing short of ludicrous" and "beyond absurd"[71], "entirely irrational"[72] and not "pass[ing] the most gullible scrutiny."[73] He has declared that a majority opinion is "nothing short of preposterous" and that it "has no foundation in American constitutional law and barely pretends to."[74] He talks about how "one must grieve for the

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[68] *See* Reno v. ACLU, 521 U.S. 844 (1997).

[69] *See* Greater New Orleans Broadcasting v. United States, 527 U.S. 123 (1999).

[70] *See, e.g.*, Nixon v. Shrink Missouri PAC, 120 S. Ct. 897 (2000) (upholding state law limiting contributions to political candidates).

[71] Lee v. Weisman, 505 U.S. 577, 637 (1992) (Scalia, J., dissenting).

[72] Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 684 (1990) (Scalia, J., dissenting).

[73] Morgan v. Illinois, 504 U.S. 719, 748 (1992) (Scalia, J., dissenting).

[74] Romer v. Evans, 517 U.S. 620, 653 (1996) (Scalia, J., dissenting).

Constitution" because of a majority's approach.[75] He calls the approaches taken in majority opinions "preposterous"[76] and "ridiculous" and "so unsupported in reason and so absurd in application [as] unlikely to survive."[77] He speaks of how a majority opinion "vandalizes . . . our people's tradition."[78]

Perhaps most famously, in *Webster v. Reproductive Health Services*, he pointedly attacked Justice O'Connor for not joining him in overruling *Roe v. Wade* and said that her position "cannot be taken seriously."[79] He talks about how her opinion "preserves a chaos that is evident to anyone who can read and count."[80] He describes how "irrational is the new concept that Justice O'Connor introduces into the law" and complains that her approach is "the least responsible."[81]

In other cases, he says that he must "respond to a few of the more outrageous arguments in today's majority opinion, which it is beyond human nature to leave unanswered."[82] He describes majority opinions as "nothing less than Orwellian" and talks about how he is "appalled" by majority approaches.[83]

My question is a simple one: is this how we want to teach law students to speak in their briefs and in courts? One of the primary audiences for Supreme Court opinions is law students. The message that they take from reading Justice Scalia's opinions is that this is an acceptable way to characterize positions with which they disagree and to talk about their adversaries.

In some of these opinions, I agree with Justice Scalia's conclusions, in others I disagree. Nothing is gained substantively or rhetorically by calling a colleague's position "appalling" or "ludicrous" or "ridiculous." But in all of them, his sarcasm and his dismissive rhetoric are enormously troubling to me. At a time, when the bar is rightly increasingly concerned about civility among lawyers, Justice Scalia sets exactly the wrong example.

V. CONCLUSION

Justice Scalia has served on the Court since 1986 and now is in his fifteenth full Term. Undoubtedly, he is a hero to conservatives and a villain to liberals.

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[75] Morrison v Olson, 487 U.S. 654, 726 (1988) (Scalia, J., dissenting).

[76] Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 735 (1994) (Scalia, J., dissenting).

[77] Grady v. Corbin, 495 U.S. 508, 542, 543 (1990) (Scalia, J. dissenting).

[78] J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 163 (1994) (Scalia, J., dissenting).

[79] Webster v. Reproductive Health Services, 492 U.S. 490, 532 (1989) (Scalia, J., concurring in part and concurring in the judgment).

[80] *Id.* at 535.

[81] *Id.* at 537.

[82] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 981 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part).

[83] *Id.* at 995, 998.

Yet, if it is possible to put ideology aside, I'd suggest that Justice Scalia should be criticized by all – conservatives as well as liberals – for the constitutional philosophy he espouses which hides rather than defends value choices and for the tone and rhetoric of his opinions.

The Primacy of Political Actors in Accommodation of Religion

William K. Kelley*

In dealing with the Religion Clauses of the First Amendment,[1] judges and commentators have gone to great lengths, to put it mildly, to discern governing standards that are true to the text and history of the Constitution, the traditions and history of the people, and the principles the Clauses are thought to reflect. This paper is about the judicial role in an important category of cases implicating the Religion Clauses, those controversies arising from what is commonly called "accommodation of religion." Sometimes governmental actors in the political branches (either state or federal) engage in conduct which takes account of, or accommodates, the religious sensibilities of some citizens. Accommodation of religion raises fundamental questions regarding the role of religious freedom in American society and the limits on the government's power to take action to maximize the room for religion to flourish without compromising principles barring excessive governmental involvement with or advancement of religion.

My argument is that the Court's conduct in cases raising questions of accommodation reflects great suspicion of legislative (or political) power and great faith in judicial power. That attitude, however, has things generally backwards – there is less reason for suspicion of majoritarian institutions when those institutions are acting to protect minority sensibilities, especially in a way that visits no real world harm on those religious believers whose interests are not directly at stake. In such contexts, the Court is no better situated than non-judicial political actors to draw the constitutional lines. And it would do well to recognize that non-judicial actors are able – and indeed are required by their constitutional oaths – to reach sound constitutional judgments about the appropriate scope of accommodations of religion in American life.

Before turning to my analysis, it is important to be clear about what the article is *not* about, and why. First, my argument does not depend on the correctness or acceptance of the Court's current treatment of Free Exercise and Establishment Clause claims in the context of accommodation. Nor does it

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* Associate Professor of Law, University of Notre Dame. This paper is based on a talk given at a symposium on the Religion Clauses of the First Amendment, hosted by the William S. Richardson School of Law of the University of Hawai'i. I thank the dean, faculty, and students of the Law School for inviting me to the symposium and showing me splendid hospitality. I also thank my co-panelists, Kathleen Sullivan and Erwin Chemerinsky, for a lively discussion. I thank John Manning, John Nagle, Nicole Garnett, and Rick Garnett for helpful comments on a prior draft. I thank David Petron for valuable research assistance.

[1] U.S. CONST. amend. I ("Congress shall make no law respecting the establishment of religion, nor prohibiting the free exercise thereof . . . .").

depend on any historical understanding of the scope of permissible accommodations, nor on any historical understanding of the substantive meaning of the Religion Clauses.[2] Although compelling historical arguments support the legitimacy of broad accommodations of religion,[3] there is no consensus, nor any real prospect for one, on that question or even on whether that question matters.[4] Hence this paper steps back and considers, in light of that lack of consensus, whether there are compelling reasons why judges ought to be drawing the necessary lines. My suggestion is that the Court should largely defer to the political branches in their determination of how religion should be accommodated. Within the relatively broad boundaries described

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[2] There is, of course, an enormous literature on these questions, and it will do here only to cite a few examples of historical treatments, coming from diverse perspectives. *See, e.g.*, WALTER BERNS, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY (1976); GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA (1987); ROBERT L. CORD, SEPARATION OF CHURCH AND STATE (1982); LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE (1994); MICHAEL W. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT (1978); RICHARD P. MCBRIEN, CAESAR'S COIN: RELIGION AND POLITICS IN AMERICA (1987); JOHN T. NOONAN, JR., THE LUSTRE OF OUR COUNTRY (1998). One could fill pages, if not volumes, with additional citations.

[3] *See, e.g.*, Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1 [hereinafter McConnell, *Accommodation*]; Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990). Dean Choper notes that "proscribing exemptions would be inconsistent with much evidence in respect to original intent." JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY 114 (1997).

[4] *See* MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY (1965); STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 45-48 (1995) (arguing that the history of the Religion Clauses doesn't speak to the question of permissible lines of accommodation); MARK V. TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 32-36 (1986) (arguing that history of the Religion Clauses is too complex and ambiguous to constrain current interpretations of the scope of permissible accommodation); William P. Marshall, *Unprecedential Analysis and Original Intent*, 27 WM. & MARY L. REV. 925, 930-31 (1986) (arguing that there is ambiguity in history over the degree to which the Establishment Clause permits accommodations of religion); Mark V. Tushnet, *Religion and Theories of Constitutional Interpretation*, 33 LOY. L. REV. 221, 229 (1987) (arguing same as TUSHNET, supra). *See also* Stephen G. Gey, *Why is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 129 (1990) (arguing that originalist arguments are insufficiently precise to dictate one approach to the Establishment Clause, and stating that "although history helps to define the choices between these alternative traditions, it cannot make this choice for us"); Frank Guliuzza III, *The Practical Perils of an Original Intent-Based Judicial Philosophy: Originalism and the Church-State Test Case*, 42 DRAKE L. REV. 343, 372 (1993) (arguing that the historical evidence is conflicting). For an interesting argument that the historical issues surrounding the Establishment Clause's applicability to the States should be analyzed based on the drafting and ratification of the Fourteenth Amendment rather than the First Amendment, see Kurt D. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085 (1995).

below, the Court should be willing to allow the political branches to make the choice of the appropriate lines, subject to the proviso that what is going on is a true accommodation and not an establishment of religion in any significant sense.

I. THE COURT AND ACCOMMODATION

As Michael McConnell, the leading accommodationist scholar, put it, when the government accommodates religion, it "take[s] religion specifically into account, not for the purpose of promoting the government's own favored form of religion, but of allowing individuals and groups to exercise their own religion – whatever it may be – without hindrance."[5] Giving content to the line between permissible accommodation and impermissible establishment has troubled the Supreme Court's Religion Clause jurisprudence. The "foundation" of the Court's Establishment Clause jurisprudence is often said to be the principle that "the State may not favor or endorse either religion generally over nonreligion or one religion over others."[6] How does that principle square with religion-conscious government conduct of any sort? Any accommodation of religion beyond the demands of the Constitution itself, as reflected in the Free Exercise Clause, would seem to constitute government conduct favoring religion over non-religion. But always refusing to take any account of religion would be to prefer non-religion to religion – a position forbidden by the Speech Clause of the First Amendment,[7] as well as by the Religion Clauses.[8] Thus the doctrine finds itself in a familiar dilemma: To remain true to a clear principle that religion cannot ever be favored over non-religion, the Court would have to come into direct conflict with the demands of the Free Exercise Clause, which mandates that government sometimes take account of religion to protect religious freedom. Short of that extreme, however, some have taken the position that the Establishment Clause forbids

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[5] Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 688 (1992).

[6] Lee v. Weisman, 505 U.S. 577, 627 (1992) (Souter, J., concurring); *see also* County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 589-99, 598-602 (1989); Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 17 (1989) (plurality opinion); *id.* at 28 (Blackmun, J., concurring in judgment); Edwards v. Aguillard, 482 U.S. 578, 593 (1987); School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 389-92 (1985); Wallace v. Jaffree, 472 U.S. 38, 61 (1985); PHILIP B. KURLAND, RELIGION AND THE LAW 18 (1962); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990).

[7] *See, e.g.*, Capitol Square Rev. Bd. v. Pinette, 515 U.S. 753 (1995); Rosenberger v. Rectors and Visitors of the Univ. of Va., 515 U.S. 819 (1995); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).

[8] *See* Lemon v. Kurtzman, 403 U.S. 602 (1971) (providing as part of its famous test that government may not inhibit religion).

the government to ever take account of religion – and certainly not in any way that favors religion – except insofar as the Free Exercise Clause requires.[9] Even that position, however, would require the rejection of any number of long-accepted practices, including any accommodations of religion short of those required by free exercise. For example, it is difficult to see how to square the exemption for religious employers in Title VII with that view.[10] Indeed, it would seem that religious exemptions from any generally applicable laws, as well as any number of other traditional practices such as the reference to God on our currency, would be in jeopardy if the Court were to take seriously the position that religion can never be preferred to non-religion short of the requirements of free exercise. On the other hand, it is plain that the Establishment Clause must be understood to erect some meaningful barrier to government involvement with religion.[11] Although the Court has not been clear about the matter, its cases have agreed with Michael McConnell's observation that there must exist a category of permissible government facilitation of religion that lies "between the accommodations compelled by the Free Exercise Clause and the benefits to religion prohibited by the Establishment Clause."[12]

For purposes of this article, I am interested in just that category of cases – those in which the Free Exercise Clause does not require the government to accommodate religious sensibilities,[13] yet the government engages in conduct

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[9] *See Lee*, 505 U.S. at 627 (Souter, J., concurring).

[10] *Cf.* Corporation of Presiding Bishop v. Amos, 483 U.S. 327 (1987) (upholding the Title VII exemption).

[11] As for the cases, this point should go without citation. At the very least, the government is obliged to take account of religion insofar as it is necessary to do so to comply with the Free Exercise Clause. Perhaps the leading work suggesting such an absolute principle was done by Philip Kurland. *See, e.g.*, Philip B. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961). *See also* Mark V. Tushnet, *"Of Church and State and the Supreme Court": Kurland Revisited*, 1989 SUP. CT. REV. 373. As for the history, for just a sampling of the competing historical treatments, see ROBERT L. CORD, SEPARATION OF CHURCH AND STATE (1982); LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE (1994).

[12] McConnell, *Accommodation*, *supra* note 3, at 3.

[13] Since the decision in *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990), of course, this category of cases is much broader than many had previously thought. For just a smattering of the "mostly critical," see CHOPER, SECURING, *supra* note 3, at 54-57; Stephen L. Carter, *The Supreme Court, 1992 Term - Comment: The Resurrection of Religious Freedom?*, 107 HARV. L. REV. 118, 140-41 (1993); James D. Gordon, III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91 (1991); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1; Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743, 754 (1992) (providing academic commentary on *Smith*); Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against the Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 570-75 (1991); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990) [hereinafter McConnell, Free Exercise Revisionism]; Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional*

that nonetheless seeks to ease the burden on believers. Examples of accommodation include allowing religiously-motivated use of peyote notwithstanding general laws barring the practice.[14] An important historical example was the exemption from prohibition for the sacramental use of wine.[15] Because "[t]here have already been countless writings making the basic case (doctrinal and historical) for protecting religious exercise through accommodations from generally applicable laws,"[16] I will not here offer yet another general theoretical or doctrinal treatment of the problem of accommodation. Instead, as a way of exploring the underlying power assumptions in the Court's cases, I will simply analyze the Court's leading cases with a view toward understanding the Court's treatment of non-mandatory exemptions for religious actors.

In the decades immediately preceding the Court's landmark decision in *Employment Division, Department of Human Resources v. Smith*,[17] the Court confronted a series of cases raising two related questions involving accommodation. First, the Court was confronted with the question whether the Free Exercise Clause mandates exemptions from generally applicable norms for those whose religious beliefs impeded their willingness (or ability, from the perspective of the believer) to conform with the law. Second (and this line of cases post-dates *Smith* as well), the Court decided a series of cases dealing with the question whether the Establishment Clause barred government actions exempting religion from generally applicable norms. It threatens an

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Discourse, 140 U. PA. L. REV. 149, 231-37 (1991). For defenses of the historical basis of the free exercise doctrine of *Smith*, see Gerard V. Bradley, *Beguiled: Free Exercise Exemption and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245 (1991); Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992). *See also* MICHAEL J. MALBIN, RELIGION AND POLITICS (1978); Ellis West, *The Case Against a Right to Religious-Based Exemptions*, 4 NOTRE DAME J. L. ETHICS & PUB. POL'Y 624 (1990). For Professor McConnell's response to his academic and judicial critics, see Michael W. McConnell, *Freedom from Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 819 (1998).

[14] Although the Supreme Court rejected the argument that the Free Exercise Clause requires such an exemption, *see* Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990), it specifically referred to the common practice of providing accommodations. *See id.* at 890. By way of example, although federal law bars the use of peyote as a general matter, *see* 21 U.S.C. §§ 812, 841, 844 (1994), religious uses of peyote by members of the Native American Church is accommodated by regulation, *see* 21 C.F.R. § 1307.31 (2000), and arguably by statute, *see* 42 U.S.C. § 2000bb-2000bb-4 (1994) (codifying the Religious Freedom Restoration Act of 1993, 107 Stat. 1488).

[15] *See* National Prohibition Act of 1919, ch. 85, tit. 2, 3, 41 Stat. 305, 308 (1919) (repealed 1935).

[16] Thomas C. Berg, *The Constitutional Future of Religious Freedom Legislation*, 20 U. ARK. LITTLE ROCK L.J. 715, 717 (1998).

[17] 494 U.S. 872 (1990).

unconstitutional violation of free exercise not to exempt property owned by religious orders from general taxes,[18] or perhaps to apply the labor laws to religious employers,[19] but it is an unconstitutional establishment of religion to exempt religious publications from tax obligations unless other non-profit publications enjoy a similar tax break.[20] It is an unconstitutional violation of free exercise not to exempt Amish children from education requirements,[21] or Sabbatarians from a requirement that they be available for work as a condition for receiving public assistance;[22] yet it is an unconstitutional establishment of religion to require employers to provide a day of rest for religious observers[23] or to allow a religiously or culturally distinctive community to organize public affairs in a way that takes account of the group's distinctive identity.[24] In this part, I will examine and compare these two lines of cases. Let me start with my conclusion: The primary feature that distinguishes many of these cases is the Court's confidence in the judiciary's ability to make accommodations and a commensurate lack of confidence in the political process's ability to make accommodations in similar or even identical circumstances.

A. Free Exercise Exemptions

The Court's pre-*Smith* free exercise jurisprudence reflected a pattern of frequently engaging in scrutiny of government conduct to determine whether it violated the Free Exercise Clause, yet infrequently concluding that exemptions were required.[25] Only in two areas, compulsory education and unemployment benefits, was there any robust doctrine requiring exemptions.[26]

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[18] *See* Walz v. Tax Comm'n of the City of New York, 397 U.S. 664 (1970).

[19] *See* NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979).

[20] *See* Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (plurality opinion). *See also* Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987) (holding that it violates the Speech Clause to tax publications differently based upon their content).

[21] *See* Wisconsin v. Yoder, 406 U.S. 205, 236 (1972).

[22] *See* Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 141 (1987); Thomas v. Review Bd., 450 U.S. 707, 720 (1981); Sherbert v. Verner, 374 U.S. 398, 410 (1963).

[23] *See* Estate of Thornton v. Caldor, 472 U.S. 703 (1985).

[24] *See* Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 705 (1994).

[25] *See, e.g.*, Robert D. Kamenshine, *Scrapping Strict Review in Free Exercise Cases*, 4 CONST. COMMENTARY 147, 147 (1987) (noting that the Court rarely struck down government conduct as violating the Free Exercise Clause under strict scrutiny).

[26] In earlier years, the Court had held that the Free Exercise Clause required Jehovah's Witnesses who made their living by selling religious tracts door-to-door to be exempted from license taxes. *See* Follett v. Town of McCormick, 321 U.S. 573 (1944) (requiring city to exempt religious booksellers from tax on door-to-door salesmen); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (same); Jones v. Opelika, 319 U.S. 103 (1943) (same).

1. Compulsory education

In *Wisconsin v. Yoder*,[27] the Court held that it violated the Free Exercise Clause to require Amish children to attend school up to age sixteen. A group of Amish parents objected to sending their children to public school past the age of fourteen, even though Wisconsin's compulsory education law required their school attendance. The parents pointed to their "fundamental belief that salvation requires life in a church community separate and apart from the world and worldly influence . . . devot[ed] to a life in harmony with nature and the soil, as exemplified by the simple life."[28] The Court, in an opinion by Chief Justice Burger, agreed that the "Amish objection to formal education beyond the eighth grade is firmly grounded in these central religious concepts."[29] High school education "is contrary to Amish beliefs, not only because it places Amish children in an environment hostile to Amish beliefs . . . but also because it takes them away from their community, physically and emotionally, during the crucial and formative adolescent period of life."[30] While the Court agreed that "[p]roviding public schools ranks at the very apex of the function of a State," in the context of the Amish faith and community, the State's interest in seeing to the education of its citizens was insufficiently weighty to insist that the Amish conform.[31] Thus, the Free Exercise Clause demanded that the State's compulsory attendance law give way to the interests of parents in directing the education of their children.

On the one hand, the decision in *Yoder* is part of a long tradition protecting parental rights, particularly when it comes to the education of their children.[32] On the other hand, the case is an unusual example of the Free Exercise Clause being held to require an exemption from a generally applicable law. For present purposes the interesting aspect of the case is the Court's disagreement with the State's decision – reached through the legitimate processes of government – that it was more important to insist that young people be educated up to age sixteen than it was to accede to the demands for special treatment by religious believers.

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[27] 406 U.S. 205 (1972).

[28] *Id.* at 210.

[29] *Id.*

[30] *Id.* at 211.

[31] *Id.* at 213.

[32] *See, e.g.*, Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

2. Unemployment compensation

In *Sherbert v. Verner*,[33] the Court was faced with a conflict between state law that required those seeking unemployment benefits to be available for work, including on Saturdays, and the objections of a Seventh-Day Adventist whose religious beliefs barred her from working on Saturdays. The Court held that the South Carolina's requirement, while generally valid, must be strictly scrutinized to determine whether the State could insist on compliance in the face of religious objections.[34] Finding no compelling state interest to justify the State's insistence on enforcing its policy without exceptions, the Court held that the Free Exercise Clause required the State to provide the benefits.[35]

Unlike *Yoder*, the decision in *Sherbert* proved to have some progeny.[36] In a series of cases in the following years, the Court held that States must consider religious objections to the requirements of participating in state benefits regimes. For example, in *Thomas v. Review Board of the Indiana Employment Security Division*,[37] a Jehovah's Witness refused to accept a job transfer to a job that involved production of armaments on the ground that his pacifist religious convictions were inconsistent with participating in the production of war-making materials.[38] He challenged as a violation of the Free Exercise Clause the State's refusal to provide him with unemployment compensation benefits.[39] Indiana justified its refusal on the ground that the worker had voluntarily made himself unavailable for work.[40] Applying *Sherbert*'s analysis, the Court subjected the State's decision to strict scrutiny and concluded that the State's policy must give way in the face of the claimant's religious objection.[41]

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[33] 374 U.S. 398 (1963).

[34] Justice Brennan's opinion consistently referred to the "conscientious objection" of the individual rather than the "religious objection." *Sherbert*, 374 U.S. at 399, 403. The case, however, was plainly about the *religious* beliefs of the claimant, and the Court's reference to conscience is not important for purposes of this article.

[35] *See id.*

[36] The Court refused to exempt the Amish from the Social Security System in *United States v. Lee*, 455 U.S. 252, 258-61 (1982). The Court feared that allowing religious objectors to opt out of the Social Security System would lead to a wide variety of claims for religious exemptions from general tax schemes, or to the making of exceptions based on unprincipled lines. The practical difficulty of accommodating the Amish in the tax situation distinguished the case from *Yoder*. *See id.*

[37] 450 U.S. 707 (1981).

[38] *See Thomas*, 450 U.S. at 709-10.

[39] *See id.*

[40] *See id.* at 709.

[41] *See id.* at 718-19.

In *Frazee v. Illinois Department of Employment Security*[42] and *Hobbie v. Unemployment Appeals Commission of Florida*,[43] the Court followed suit. Both cases involved objections by believers to working on their Sabbath. In *Hobbie*, the claimant was another Seventh-Day Adventist who refused to work on Saturday because of his religious beliefs.[44] The employer and employee had unsuccessfully tried to accommodate the religious objections by arranging for flexible work hours; but the employee ultimately determined that he could not work the necessary hours.[45] The State concluded that the employee's refusal to work flexible hours was misconduct within the meaning of state law and that he was therefore disqualified from receiving benefits.[46] In *Frazee*, the claimant was a Christian who similarly objected to working on Sunday, his Sabbath.[47] The State objected that the claimant was not a member of any organized faith and thus that his faith did not forbid his working on Sunday.[48] The Court concluded that the claimant's beliefs were sincerely held, and refused to second-guess his objection to working on Sunday.[49] In both *Frazee* and *Hobbie* the Supreme Court concluded in straightforward applications of *Sherbert* and *Thomas* that the refusal to provide unemployment compensation violated the Free Exercise Clause.

As with *Yoder*, the unemployment compensation cases are significant because they reject the decision of the political process not to accommodate religious objections to complying with state law. The Court took as an unquestioned premise its role as final arbiter of the scope of the Free Exercise Clause. That has been true in each instance – rare as they have been – of the Court holding that a State has violated the Free Exercise Clause by insisting on enforcing generally applicable laws.[50]

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[42] 489 U.S. 829 (1989).

[43] 480 U.S. 136 (1987).

[44] *See id.* at 138.

[45] *See id.*

[46] *See id.* at 138-39.

[47] *See Frazee*, 489 U.S. at 829.

[48] *See id.*

[49] *See id.* at 834.

[50] Only once has the Court held that a state actor has imposed and enforced a general law with the explicit purpose of burdening religious exercise. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993). The Court found in *Lukumi* that animal sacrifice ordinances enacted by the City of Hialeah, Florida, "had as their object the suppression of [the Santeria] religion." *Id.* at 540. In every other instance where the Court has found a free exercise violation, it has found that the incidental burden of a law – and not its true object – was to burden religious exercise, and that notwithstanding the lack of ill motive the State had to yield to religious exercise.

B. Exemptions as Establishment?

1. Mandatory exemptions

For purposes of this article, it is more pressing to think about whether exemptions violate the Establishment Clause than it is to worry about the free exercise problem. The Court has been careful to conclude that exemptions mandated by the Free Exercise Clause do not constitute unconstitutional establishments.[51] The Court explained in *Sherbert* that "the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall."[52] The Court's view has been that there is no Establishment Clause problem with providing a mandatory exemption due to the government's obligation to treat religion in a neutral and non-discriminatory manner; the Court has been clear again and again that the Establishment Clause is no bar to neutral state programs where the failure to include religious actors in a scheme would be effectively to treat them worse on account of religion.[53] The insistence on neutral, not disfavorable, treatment of religion is the general explanation for why free exercise exemptions are not establishments.[54]

2. Permissive exemptions as establishment

In another category of cases, however, the Court has been hesitant to permit the government to accommodate religion where the Free Exercise Clause does not insist that it do so. The Court's record has not been uniform; there are examples in which the Court has either implied that it would accept, or has outright accepted, government accommodation. It is difficult to find principled lines between the cases, but one does not often see the Court referring to the legitimacy of the democratic process as a ground for permitting accommodation.

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[51] *See, e.g.*, Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 719-20 (1981). *See also* Wisconsin v. Yoder, 406 U.S. at 205, 220-21 (1972).

[52] Sherbert v. Verner, 374 U.S. 398, 409 (1963).

[53] *See* Capitol Square Rev. Bd. v. Pinette, 515 U.S. 753 (1995); Rosenberger v. Rectors and Visitors of the Univ. of Va., 515 U.S. 819 (1995); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); Witters v. Washington Dep't of Servs. for Blind, 474 U.S. 481 (1986).

[54] *See, e.g.*, Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 NOTRE DAME J. OF L. & PUB. POL'Y 341 (1999). *See also* Michael J. Perry, *Freedom of Religion in the United States*: Fin de Siecle *Sketches*, 75 IND. L.J. 295, 302 (2000); Kent Greenawalt, Quo Vadis: *The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 343-45.

In *Estate of Thornton v. Caldor*,[55] the Court struck down under the Establishment Clause a Connecticut state law that required employers to provide days off for employees whose religious scruples barred working on the Sabbath. The Court did not treat the case as particularly difficult; Chief Justice Burger wrote an opinion for eight Justices[56] that was brief and to the point: The government may not by statute insist that employers and other employees engage in conduct to facilitate the religious exercise of others.[57] By passing a statute granting a right to all to take off the Sabbath, the State preferred those engaging in conduct for religious reasons to others who, though they might want a guaranteed day off, had no religious ground for claiming one.[58] As Chief Justice Burger put it:

> In essence, the Connecticut statute imposes on employers and employees an absolute duty to conform their business practices to the particular religious practices of the employee by enforcing observance of the Sabbath the employee unilaterally designates. The State thus commands that Sabbath religious concerns automatically control over all secular interests at the workplace; the statute takes no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath. The employer and others must adjust their affairs to the command of the State whenever the statute is invoked by an employee.[59]

Finding no secular interest to support the statute, the Court struck it down as having the primary effect of promoting religion.[60] The Court's substantive analysis was about four paragraphs long.

The Court in *Thornton* did not address the *Sherbert* line of cases and the principle that one's eligibility for unemployment benefits cannot be affected by religious scruples.[61] There are formal distinctions between the situations, to be sure; for example, requiring benefits to be paid in the *Sherbert* situation imposed obligations on the *government* and no direct obligations on any private actors. And the Court's opinion did mention the fact that the statutory exemption imposed obligations on private actors to accommodate the religious faiths of others.[62]

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[55] 472 U.S. 703 (1985).

[56] Justice O'Connor filed a concurring opinion, which was joined by Justice Marshall. *See id.* at 711. Justice Rehnquist was the lone dissenter and he did not bother to write an opinion. *See id.*

[57] *See id.* at 708-09.

[58] *See id.*

[59] *Id.* at 709.

[60] *Id.*

[61] For a full and illuminating discussion of the issues raised by *Thornton*, see McConnell, *Accommodation*, *supra* note 3, at 50-58.

[62] *See Thornton*, 472 U.S. at 710 (quoting Otten v. Baltimore & Ohio R. Co., 205 F.2d 58, 61 (2d Cir. 1953)). The Court had earlier held that it would constitute an undue hardship to an

The Court did not deal, however, with the oddness of the result – the State is *required* by the Free Exercise Clause to accommodate religious belief by providing access to benefits to those whose religions make them unavailable for work at certain times, but *barred* by the Establishment Clause from arranging affairs so that the believer can continue to work without violating his or her religious tenets. As others have noted, the failure of the statute at issue in *Thornton* to provide for an exception mechanism could potentially have raised problems of fairness to the private actors who were required to provide the accommodation.[63] Our law frequently requires private individuals to incur costs, however, and sometimes substantial ones, to serve public ends. The necessity of providing unemployment compensation to employees who are unavailable for work due to religious commitments surely imposes costs on private actors, at least in the form of the general public; moreover, it is a common feature of unemployment compensation schemes that a particular employer's contributions are related to the costs imposed as the result of his or her employees.[64] In the end, the costs of the accommodation mandated by the *Sherbert* line of cases are not significantly different from the costs of the statutory accommodation that was struck down as an establishment of religion in *Thornton*.

Moreover, notwithstanding the Court's obliviousness to the point in both contexts, it was the government making the decision whether and how religion would be accommodated in both instances. In *Sherbert* and its progeny, the government, in the form of judges, insisted – in a legally binding way – that the religious tenets of individuals must be accommodated and respected. In the *Thornton* situation, again it was the government, this time in the form of the Connecticut legislature, which insisted that the religious tenets of employees needing the Sabbath off must be accommodated. The legally

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employer under Title VII's accommodation scheme to require it to alter a negotiated collective bargaining seniority system to accommodate the religious need of some employees to have the Sabbath off of work. *See* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977). The dissenters in *Hardison* noted that the Court's resolution of the statutory Title VII question avoided the question whether it would violate the Establishment Clause to impose substantial costs on an employer for a religious accommodation. *See id.* at 90 (Marshall, J., dissenting).

[63] *See* McConnell, *Accommodation*, *supra* note 3, at 57.

[64] For example, the Federal Unemployment Tax is a percentage of the total wages paid by an employer with respect to employment. *See* 26 U.S.C. § 3301 (1994). Further, many state unemployment compensation schemes vary the rates of contributions from employers based upon the benefits paid to former employees. *See, e.g.*, CAL. UNEMP. INS. CODE § 977 (West 1986 & Supp. 2000); FLA. STAT. ANN. § 443.131 (West 2000); MASS. ANN. LAWS ch. 151A, § 14 (Law. Co-op. 1996 & Supp. 2000); MICH. COMP. LAWS ANN. § 421.19 (West 2000); MINN. STAT. ANN. § 268.05 (West 2000); TEX. LAB. CODE ANN. §§ 204.041–204.043 (West 1996 & Supp. 2000). The effect of such programs is that "if relatively few former employees have become eligible for benefits, the employer's rate of contribution is adjusted downward." Easy Street West v. Commissioner of Econ. Sec., 345 N.W.2d 250, 253 (Minn. Ct. App. 1984).

binding nature of the governmental decision in both instances cannot be doubted.

The Court's indifference to the legitimacy of political resolutions to problems of accommodation is made even more clear when we recognize that in neither situation did the Court permit the political process to have its way. In the unemployment compensation cases, the political process had determined that benefits should not be paid, even after considering the religious objections of the individuals involved. Apparently taking heed of the Court's message that Sabbath work could not constitutionally be required, the political process in Connecticut moved to meet the constitutional challenge, by providing an accommodation before the issue of unemployment could even arise. There, too, the Court was unwilling to let the political process have its say. The message of the *Sherbert* line and *Thornton* in combination, in the end, can be reduced to the proposition that the Court will draw the lines of permissible and mandatory accommodation, and political actors need only follow along.[65]

Consider another example of exemption as establishment. In *Texas Monthly v. Bullock*,[66] the Court held that a Texas state law providing a tax exemption for religious periodicals violated the Establishment Clause. By singling out religious tracts for favorable treatment, the State was advancing religion for religion's sake, and in the absence of a secular purpose for exempting religious publications and not others, the regime was unconstitutional. The Court concluded that "[i]t is difficult to view Texas' narrow exemption as anything but state sponsorship of religious belief."[67] In addition to relying heavily on the focused nature of the exemption, the Court also found it important that the exemption was unnecessary to accommodate anyone's religious tenets. Unlike the situation in past accommodation cases, Justice Brennan's plurality opinion said, the Texas sales tax exemption relieves no burden on any believer's exercise of his or her religion.[68]

Faced with its past cases allowing tax exemptions for religious organizations, and indeed interpreting the Free Exercise Clause to mandate them in some circumstances, the Court was left both to distinguish and disavow prece-

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[65] The Court's later decision in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), reversed this lack of confidence in the political process as a general matter in determining whether exemptions are mandated by the Free Exercise Clause. (As for the *Sherbert* line, however, the Court distinguished those cases and refused to overrule them. *See id.* at 876-80). Indeed, the decision in *Smith* had much to say about the central importance of the political process, and the accountability that comes with it, in striking the line between conformance and exemptions. *See id.* at 890.

[66] 489 U.S. 1 (1989) (plurality opinion).

[67] *Id.* at 15; *see also id.* at 28 (Blackmun, J., concurring in the judgment) ("A statutory preference for the dissemination of religious ideas offends our most basic understanding of what the Establishment Clause is all about and hence is constitutionally intolerable.").

[68] *Id.* at 19-20.

dent. As for distinguishing prior law, the Court viewed its cases approving tax exemptions for religious organizations as not being about providing exemptions for religious activity, but as about providing exemptions for larger classes of activity that included within them religious actors. For example, in *Walz v. Tax Commission of New York City*,[69] the Court "sustained a property tax exemption that applied to religious properties no less than to real estate owned by a wide array of nonprofit organizations,"[70] not out of any desire to make life easier for religious actors; on the contrary, the property tax exemption was sustained – in the Court's own words – "*despite* the sizable tax savings it accorded religious groups."[71] Thus, for the *Texas Monthly* Court, exemptions from general tax obligations for religious groups depend upon there being a broad range of activities exempted; in fact, the religious character of any exemptee is a detriment to be tolerated rather than a benefit to be fostered. The Court distinguished its other cases upholding tax exemptions in the same way.[72]

The Court in *Texas Monthly* handled other cases providing for religion-specific exemptions a little differently. As for those exemptions, the Court emphasized that the burden on non-believers from the exemptions were minimal, and that the absence of the exemption would have imposed a significant burden (even if not an unconstitutional one) on the religious actor. For example, the release time program upheld in *Zorach v. Clauson*[73] imposed no costs on the students who were left behind in the public school. And the statutory exemption from employment discrimination laws upheld in *Corporation of the Presiding Bishop v. Amos*[74] was permissible even "though it had some adverse effect on those holding or seeking employment with those organizations (if not on taxpayers generally)," because it "prevented potentially serious encroachments on protected religious freedoms."[75]

The Court's explanation of the differences between *Texas Monthly* and the permissive accommodation cases was unpersuasive.[76] In the first place, the

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[69] 397 U.S. 664 (1970).

[70] *Texas Monthly*, 489 U.S. at 20.

[71] *Id.* (emphasis added).

[72] *See id.* ("In all of these cases, however, we emphasized that the benefits derived by religious organizations flowed to a large number of nonreligious groups as well. Indeed, were those benefits confined to religious organizations, they could not have appeared other than as state sponsorship of religion; if that were so, we would not have hesitated to strike them down for lacking a secular purpose and effect.").

[73] 343 U.S. 306 (1952).

[74] 483 U.S. 327 (1987).

[75] *Texas Monthly*, 489 U.S. at 18.

[76] Justice Scalia filed a spirited dissent arguing that the Court's treatment of precedent in *Texas Monthly* was unpersuasive and inconsistent with the prior cases and with longstanding American tradition. *See id.* at 29 (Scalia, J., dissenting). For present purposes, I am more interested in the Court's treatment of the theoretical question when exemptions are permissible (though not required) than in whether its treatment of prior cases was fair.

Court did not deal with the problem that the balancing of burdens involves incommensurates; the harm to, or burden on, non-believers from an accommodation is of a different sort from the burden imposed on religion from the failure to accommodate. It is hard to see how administration of the general principle that religion may not be favored over non-religion depends on whether government action imposes real world burdens on private actors.

Moreover, taking the question of burden on its own terms, as a matter of economics the general public absolutely subsidizes religion when religious organizations receive tax exemptions whether or not other organizations do.[77] The burden is diffuse and insignificant, but it exists. In the case of an exemption from employment discrimination laws such as the one in Title VII upheld in *Amos*, the person who does not get a job, or loses her job, due to her religion surely is burdened by the political judgment that religious organizations ought to be able to take account of religion in their employment decisions. Unless the Title VII exemption is required by the Free Exercise Clause, then, it is hard to see it as anything but favorable treatment for religion even if, as the *Texas Monthly* plurality noted, the absence of an exemption would threaten religious freedom values.[78]

As for disavowing its prior cases, the Court in *Texas Monthly* offered a narrow reading of its decisions in *Murdock v. Pennsylvania*[79] and *Follett v. McCormick*,[80] two cases that struck down under the Free Exercise Clause occupational taxes as applied to Jehovah's Witnesses who sold religious books door to door. The Court characterized the licensing schemes at issue as occupational taxes on practicing religion that therefore directly burdened its free exercise; there was no doubt, the Court said, that the government could include religion within general income or property taxes, but a specific tax on the occupation of being a minister was unacceptable.[81] But the Court in the prior cases had gone further, saying that it was unconstitutional to tax religious

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[77] *See* Mueller v. Allen, 463 U.S. 388, 404 (1983).

[78] The Court itself recognized this point when it pointed out in *Texas Monthly* that taxpayers were being asked to subsidize religion in the amount of decreased tax revenues from the exemption. *See Texas Monthly*, 489 U.S. at 18 n.8 (noting that the tax exemption "burdens nonbeneficiaries by increasing their tax bills by whatever amount is needed to offset the benefit bestowed on subscribers to religious publications").

[79] 319 U.S. 105 (1943).

[80] 321 U.S. 573 (1944).

[81] *See Texas Monthly*, 489 U.S. at 22-24.

publications at all.[82] That position, the Court said in *Texas Monthly*, was inconsistent with subsequent cases[83] and should be disavowed.[84]

Notwithstanding the Court's distinction of the broad reading of *Murdock* and *Follett*, there remains some tension in the principles underlying the *Texas Monthly* rejection of a tax exemption and the prior cases holding that tax exemptions are sometimes required by the Free Exercise Clause.[85] On the one hand, there is no doubt that the payment of taxes burdens religious exercise, and directly so. On the other hand, religious believers have long been required to conform their conduct to general law even where some burden on religion is the result. That is the basis for the Court's holding in *Smith* that the Free Exercise Clause does not generally mandate exemptions unless there is reason to believe that the law targets religion for religion's sake. But in the context of permissive accommodations, the Court has purported to adhere to the position that religion may not be fostered for its own sake, and certainly not at the expense of non-religion. That principle is violated when the government exempts religion even though the Free Exercise Clause does not require it to do so.

Texas Monthly reflects the Court's willingness to closely superintend the political process's resolution of accommodation questions. For the Court, it was unacceptable for Texas to decide as a matter of legislative policy not to tax religious publications unless the State could show that the exemption was provided despite religion rather than because of it. As Justice Scalia pointed out, the Texas scheme was not unusual.[86] The federal government and at least fifteen States had some close variant of the Texas scheme on their books. Perhaps some, but certainly not all, of those tax exemptions stemmed from a desire not to treat religion any worse than other charitable endeavors. But it seems reasonable to speculate that public actors sometimes exempt religion from legal burdens out of respect for religion and a desire to foster it. As Michael McConnell has argued, there is a long tradition of the government acting that way, and so long as there is no discrimination among

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[82] *See, e.g., Murdock*, 319 U.S. at 109, 111-12.

[83] *See* Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (rejecting claim that the government could not deny a tax exemption to entities that discriminate on account of race where the discrimination is claimed to be religiously based).

[84] *Texas Monthly*, 489 U.S. at 21.

[85] There is an additional difference between *Texas Monthly* and the other tax exemption cases. The nature of the burden imposed by the tax in *Follett* and *Murdock* was far more severe – devastating the believers' ability to make a living – than was the burden in *Texas Monthly*. In the latter case, the burden of the sales tax was real, but less practically devastating. The Court did not rely upon this distinction, however, and it is not one that makes a difference to my analysis.

[86] *See Texas Monthly*, 489 U.S. at 30-33 & nn.2, 3 (Scalia, J., dissenting) (discussing widespread tax exemptions that specifically mention religion and citing state laws that did so).

denominations, that is the sort of permissive accommodation that should be permitted.[87]

Whether or not the Court was correct in *Texas Monthly* as a matter of manipulating doctrine or as a matter of the original meaning of the Establishment Clause, the point here is that the Court did not consider deferring to the political process's resolution of the question. On the contrary, the political nature of the solution only made the Court more resolute in stepping in to protect what it viewed as constitutional principle.

That suspicious judicial attitude is carried over even in instances where the Court permitted a permissive accommodation of religion. Just a couple of examples will suffice. In *Corporation of the Presiding Bishop v. Amos*,[88] the Court upheld the exemption for religious employers from Title VII's ban on job discrimination based on religion.[89] The Court gave a variety of reasons for why the exemption did not violate the Establishment Clause. First, applying the three-part *Lemon* test,[90] the Court held that the exemption was supported by the secular purposes of the government's avoiding the position of "abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters," and of "alleviat[ing] significant governmental interference with the ability of religious organizations to define and carry out their religious missions."[91] Second, the Court held that the primary effect of the exemption was not to advance religion – though it was doubtless easier for religious employers to order their affairs without the threat of employment discrimination liability – because the exemption did not consist of the *government's* taking action to foster religion. The exemption was merely removing the government from the picture.[92] Third, far from entangling government with religion, the exemption was designed to minimize the occasions for government scrutiny of the activities of religious employers.[93]

On the question whether the statute as a general matter impermissibly favored religion as religion, the Court found "unpersuasive" the argument that the statute was questionable as "singl[ing] out religious entities for a benefit."[94] On the contrary, though the Court had to acknowledge that it had "given weight to this consideration in its past decisions,"[95] the Court claimed that:

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[87] *See generally* McConnell, *Accommodation*, *supra* note 3; McConnell, *supra* note 5.

[88] 483 U.S. 327 (1987).

[89] *See* Civil Rights Act of 1964, 78 Stat. 255, § 702, as amended, 42 U.S.C. § 2000e-1 (1994).

[90] *See* Lemon v. Kurtzman, 403 U.S. 602 (1971).

[91] *Amos*, 483 U.S. at 335.

[92] *See id.* at 336.

[93] *See id.*

[94] *Id.* at 338.

[95] *Id.* Here the Court cited a prior footnote in its opinion which in turn cited two cases which had relied upon the breadth of a program – that is, whether it included non-religious as

> it has never indicated that statutes that give special consideration to religious groups are *per se* invalid. That would run contrary to the teaching of our cases that there is ample room for accommodation of religion under the Establishment Clause . . . Where, as here, government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, we see no reason to require that the exemption come packaged with benefits to secular entities.[96]

It is worth noting that there was no claim in *Amos* that the statutory exemption was required by the Free Exercise Clause. In fact, the case was purely about a permissive exemption. That puts into stark relief the remarkable passage quoted above, which denies that the Court has treated favoring religion as religion as *impermissible* on that basis alone. *Any* exemption for religious actors or activity grants religion a benefit that others do not receive; that is, in fact, the point.

Turning to the question of political versus judicial power, again in *Amos* the Court gave no hint that the constitutional judgments of Congress – which had enacted the Title VII exemption, and later revisited the issue and broadened the exemption – might be entitled to judicial respect, much less deference. It is difficult to fault the Court for this, of course, because the legal culture and its precedents so uniformly treat the matter as entirely one for judicial resolution. And although the Court in the end concluded in *Amos*, and in other cases of legislative accommodation,[97] that the political judgment could stand, it did so after evaluating the matter independently and without reference to the role of the political actors on the stage.

Stepping back, one can see a pattern emerge. The Court is suspicious (though not uniformly so, as *Amos* exemplifies) of legislative accommodation of religion that is not mandated by the Free Exercise Clause. And it has been willing to interpose the judicial power both to *require* accommodations (though, again, the doctrine is not uniform and the *Smith* regime makes the

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well as religious actors within its beneficiaries – in determining whether it impermissibly advanced religion. *See id.* at 334 n.11 (citing Mueller v. Allen, 463 U.S. 388, 397 (1983), and Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 794 (1973)).

[96] *Amos*, 483 U.S. at 338 (citations omitted).

[97] *See, e.g.*, Agostini v. Felton, 521 U.S. 203 (1997); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); Witters v. Washington Dep't of Servs. for Blind, 474 U.S. 481 (1986). In the course of rejecting other claims that the Free Exercise Clause mandated an accommodation, the Court has sometimes suggested that a permissive accommodation would pass muster. *See, e.g.*, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987); Goldman v. Weinberger, 475 U.S. 503 (1986).

occasions for intervention much more rare[98]) and to *condemn* them as violative of the Establishment Clause.

As one compares the decision in *Thornton* with the *Sherbert* line, for example, it is difficult to see meaningful distinctions beyond faith in judicial power and lack of confidence in political power. *Thornton* tells us that the legislature cannot require that individuals be allowed to take off work on their Sabbath, but *Sherbert* tells us that individuals cannot be harmed in seeking unemployment benefits by the unwillingness to work on their Sabbath. The tension is made even more acute when one considers that the Court elsewhere has undercut its stated grounds for the decision in *Thornton*. *Thornton* said that the statutory exemption was too focused to protect religious observers, and nobody else; it also told us that the government may not require one private actor to bear the burden of another's exercise of religion. But *Amos* said just the opposite – if a statutory exemption removes burdens on religious exercise, it is permissible for legislature in effect to foster religious exercise. (One wonders how it could be otherwise.) Moreover, *Amos* acknowledges that the statutory exemption from employment discrimination laws for religious employers will inevitably harm some private individuals who are treated differently on account of their religion; but the Court says that such burdens are the inevitable product of the accommodation. Simply stated, it is hard to explain *Thornton*.

Much the same is true of *Texas Monthly*. There the Court relied heavily on the religion-specific nature of the tax exemption, and the lack of any explanation for it other than the advancement of religion. Under *Amos*, however, there is a ready secular justification for the tax exemption – it reduces the occasions on which the government will have to deal with the religious publication through audits, tax assessments, and the like. If, as *Amos* held, it is permissible to exempt religion as religion from employment discrimination laws, then how can it be impermissible to exempt a religious magazine from a sales tax? The same point holds for *Texas Monthly*'s reliance as a ground for finding an Establishment Clause violation on the fact that non-believing taxpayers would have to make up the slack for the lost revenues from the tax exemption. *Amos* says that non-believers sometimes must pay the price even for a permissive accommodation. Moreover, it is inevitably true that the taxpayers generally will pay the price of *any* accommodation, including requiring unemployment benefits to be paid to those who cannot work for religious reasons.

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[98] Although *Smith* is perceived as having substantially modified the law of free exercise, and although it surely, as a practical matter, made free exercise claims less likely to succeed, it is notable that *Smith* did not overrule any cases and instead specifically left on the books the mandatory accommodation cases reflected by *Yoder* and the *Sherbert* line. *See* Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 881-86 (1990).

For all the intricacies of the doctrine, and the copious commentary, let us reconsider the institutional arrangements by which the legal regime is administered. In the next part of this paper, I will turn to an analysis of the problem of accommodation that is grounded on the notion that courts are not necessarily better situated to decide these matters and thus ought not to interfere with the views of those who answer to the people.

II. ACCOMMODATION AND POLITICAL ACTORS

Thus far, this article has sought to illustrate the Court's default bias toward judges and against political actors in determining the appropriate scope of accommodation of religion under both the Free Exercise Clause and the Establishment Clause. In this part, I will turn to an analysis of that allocation of institutional roles in cases dealing with the constitutional law of religion.

The Court's treatment of questions under the Religion Clauses generally, and questions of accommodation of religion in particular, reflect its general approach to judicial review. When a case raising a constitutional question comes before it, the Court's tradition – with exceptions – has been simply to resolve the question in the course of deciding the case. The Court's confidence in judicial power and suspicion of political power rationalizes many seeming inconsistencies in the cases, particularly those between *Thornton* and the *Sherbert* line. But rather than rehearsing that argument here, I want now to suggest that the occasion for robust judicial review is less pressing in the context of accommodation of religion.

My argument depends on two factors, which I will consider in turn. First, it is inevitable that governmental actors will draw the final lines between permissible and impermissible accommodation; the options are either judges *or* politically accountable officials. Because it will be the government deciding the question in any event, there needs to be some reason why judges ought to have the final say and not the people through the democratic process. Second, in the context of true accommodations of religion, the reasons why judges are given the power of judicial review are less pressing and the reasons why the political process's resolution of the question should stand are strong. Thus, unless the accommodation is a mask for some denominational privilege, the Court ought to defer to the judgment that an accommodation of religion is appropriate once that decision has been made by the responsible political actors.

A. The Inevitability of Government Resolution of the Question

1. Courts as state actors

The standard account of judicial review sets judges above the political fray, treating them as non-political actors charged with vindicating constitutional principle against the attacks of the presumably less-nobly motivated political process.[99] As a corollary, it is often thought as part of our constitutional theory that the Court is generally better situated to resolve constitutional questions than political actors.[100] The fact that federal judges (and Supreme Court Justices in particular) enjoy life tenure and salary protection ensures independence from electoral pressure, and thus that constitutional issues are resolved fairly and impartially – in short, that our public law is untainted by political bias.

Scholars have long recognized, however, that courts are (at least interstitial) lawmakers despite their lack of political accountability, and that they cannot be entirely separated from political forces. For example, the great Alexander Bickel's work in the post-*Brown* era of judicial activism was largely an attempt to reconcile the demands of legal principle and the inevitability of politics.[101] More recently, scholars have increasingly come to argue that hearty judicial review is a mistake, and that the Court's role ought to be less robust, with the people, through their political institutions or even direct democracy, more often having the final say on constitutional issues.[102] Other work, while not going so far, has nonetheless emphasized a judicial role that is more modest and constrained than has been the convention during the last half-century.[103] These developments in constitutional theory have been partly about the need to reconcile the Court's role of sometimes rejecting the product of

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[99] *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507 (1997); Cooper v. Aaron, 358 U.S. 1 (1958); United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). *See* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980) (arguing that the Court should refrain from deciding cases raising questions of government structure and separation of powers in order to reserve its capital for protecting individual rights from majoritarian ill treatment); JOHN HART ELY, DEMOCRACY AND DISTRUST (1980) (articulating the Court's role in wielding judicial review as limited to correcting defects in the political process).

[100] *See, e.g., Cooper*, 358 U.S. at 1; *Carolene Prods.*, 304 U.S. at 152 n.4; ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (2d. ed. 1986, 1st ed. 1962); PHILIP BOBBIT, CONSTITUTIONAL FATE (1982); ELY, *supra* note 99.

[101] *See* BICKEL, *supra* note 100; ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970); ALEXANDER M. BICKEL, THE MORALITY OF CONSENT (1975).

[102] *See* RICHARD PARKER, "HERE THE PEOPLE RULE": A CONSTITUTIONAL POPULIST MANIFESTO (1994); MARK V. TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); JEREMY WALDRON, THE DIGNITY OF LEGISLATION (1999).

[103] *See, e.g.*, CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM AND THE SUPREME COURT (1999).

ordinary government processes, which are presumed to have democratic legitimacy, with its own anti-majoritarian status. They have also been about, however, the recognition that courts, as well as legislatures, are fundamentally lawmaking institutions.

Courts wield public power; in constitutional terms, they are state actors, just as surely as the President and Congress. And as state actors, they, too, are subject to the Constitution's commands in everything that they do.[104] To take an example close to this paper, nothing in the Constitution relieves courts, including the Supreme Court, from the responsibility to respect First Amendment freedoms. Thus, it violates the First Amendment unduly to restrict public access to trials,[105] or to place unduly restrictive gag orders on journalists[106] or parties;[107] nor does the First Amendment allow judges to establish religion or restrict its free exercise.

Thus we do well to remember that in any constitutional case (or any case, for that matter) the citizen cannot turn to a non-government actor for final resolution of his or her claim. The government – in the person of a court – will be making the decision. As Stephen Carter put it, "to file a lawsuit before a judge is the analytical equivalent of asking state permission to exercise a

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[104] *See* Shelley v. Kraemer, 334 U.S. 1, 14 (1948) ("The action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment . . . ."); Brinkerhoff-Haris Trust & Sav. Co. v. Hill, 281 U.S. 673, 680 (1930) ("The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government."); The Civil Rights Cases, 109 U.S. 3, 11 (1883) (explaining that state action extends to "the operation of state laws, and the action of state officers, executive or judicial"); Jones v. Evans, 932 F. Supp. 204, 206 (N.D. Ohio 1996) ("It is clear that the action of state courts and their officers is regarded as action of the State within the [F]ourteenth [A]mendment."). *See also* Russell W. Galloway, Jr., *The Government-Action Requirement in American Constitutional Law*, 30 SANTA CLARA L. REV. 935, 940 (1990).

[105] *See* El Vocero de Puerto Rico v. Puerto Rico, 508 U.S. 147 (1993); Press-Enterprise Co. v. Superior Court of Cal. for the County of Riverside, 478 U.S. 1 (1986); Globe Newspaper Co. v. Superior Court for the County of Norfolk, 457 U.S. 596 (1982); Richmond Newspapers v. Virginia, 448 U.S. 555 (1980).

[106] *See* Richmond Newspapers v. Virginia, 448 U.S. 555 (1980); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); Pennekamp v. Florida, 328 U.S. 331 (1946); JB Pictures v. Department of Defense, 86 F.3d 236, 239 (D.C. Cir. 1996) (dictum); Grove Fresh Distribs. v. Everfresh Juice, 24 F.3d 893 (7th Cir. 1994); *In re* Washington Post, 807 F.2d 383 (4th Cir. 1986); United States v. Edwards, 785 F.2d 1293, 1294 (5th Cir. 1986) (dictum); *In re* The Express-News Corp., 695 F.2d 807 (5th Cir. 1982); United States v. Hastings, 695 F.2d 1278, 1280 (11th Cir. 1983) (dictum); Katzman v. Victoria's Secret Catalogue, 923 F.Supp 580 (S.D.N.Y. 1996); United States v. McVeigh, 918 F. Supp. 1452 (W.D. Okla. 1996).

[107] *See* Seattle Times v. Rhinehart, 467 U.S. 20 (1984); Anderson v. Cryovac, Inc., 805 F.2d 1 (1st Cir. 1986); Farley v. Farley, 952 F. Supp. 1232 (M.D. Tenn. 1997); Grove Fresh Distribs. v. John Labatt Ltd., 888 F. Supp. 1427 (N.D. Ill. 1995).

constitutional right."[108] Because every question involving the Religion Clauses thus will be decided by a government actor, the question then becomes *which* government actor's answer ought to be given controlling weight. I turn now to a consideration of that question.

2. Courts as deferential actors

The answer to the question just posed – which government actor will authoritatively determine the constitutionality of government conduct – has generally been that courts have the final say on matters involving the constitutional law of religion. To support that point, one could cite virtually every religion case that the Court has ever decided. My argument here does not propose a change in that arrangement, except insofar as the Court determines that it need not play a primary role in certain contexts of accommodation of religion. Thus I do not claim that the Court lacks jurisdiction in these matters, or should not have the final say. In other words, this is no attack on *Marbury v. Madison*,[109] or *Cooper v. Aaron*[110] for that matter. In a contested case or controversy, the Court is bound to decide the case according to the dictates of the Constitution.

My argument is instead about the interpretive posture the Court should adopt. Or to put the matter another way, it is about whether the standard of review that the Court applies should take account of the circumstances and the relative institutional competence of the judge and the politically accountable actor whose decision has been challenged in litigation. It is not unthinkable that the judicial role ought to be secondary to that of the political branches. Even though that position in the abstract goes against our instincts, the judicial role is in fact decidedly secondary in any number of constitutional contexts. The rules of justiciability are only the most prominent among them.[111] In addition, rules of abstention and other equitable doctrines have frequently been invoked by the federal courts to avoid interference with the legitimate role of coordinate government actors.[112] The Court unquestionably has the power to

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[108] Stephen L. Carter, *Religious Freedom as if Religion Matters: A Tribute to Justice Brennan*, 87 CALIF. L. REV. 1059, 1066 (1999).

[109] 5 U.S. (1 Cranch) 137 (1803).

[110] 358 U.S. 1 (1958).

[111] *See, e.g.*, Nixon v. United States, 506 U.S. 224 (1993); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Baker v. Carr, 369 U.S. 186 (1962). *See also* RICHARD H. FALLON ET AL., HART & WECHSLER'S FEDERAL COURTS AND THE FEDERAL SYSTEM (4th ed. 1997).

[112] On abstention, see generally *Louisiana Power & Light Co. v. Thibodaux*, 360 U.S. 25 (1959); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). On equitable restraint, see generally *Hicks v. Miranda*, 422 U.S. 332 (1975); *Younger v. Harris*, 401 U.S. 37 (1971). *See also* FALLON ET AL., *supra* note 111, at 1230-308; David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985).

decide cases raising questions of accommodation of religion, but it is worth remembering that there is nothing revolutionary about the Court's giving great weight, or deferring to, the constitutional judgment of the political branches on some questions.

It is also worth remembering that legislatures and executives are under the same constitutional commands as are courts in making decisions about the scope of accommodation of religion. Every public officer, at both the state and federal level, is bound to take an oath (or affirmation) to support the Constitution.[113] And despite prominent examples to the contrary in our history,[114] our tradition in constitutional interpretation has been perhaps reflexively court-centric.[115] Public actors other than courts have the power, and indeed the responsibility, to interpret the Constitution in determining how to carry out their public functions; among those functions sometimes is the decision whether and how to accommodate the religious sensibilities of some of the governed. Thus, although "[i]t may seem odd to say that the legislative branch can engage in constitutional interpretation,"[116] it is inevitable that it will do so. This authority is particularly powerful at the federal level because the substantive lawmaking power in Section 5 of the Fourteenth Amendment[117] includes within it the power to make law to enforce the First Amendment. Thus, when Congress legislates on matters concerning religion, that is but "one instance of the general principle that each branch of government has the authority to interpret the Constitution for itself, within the scope of its own powers."[118] The question, then, is how the Court is to determine in the course of exercising its own constitutional function of deciding cases or controversies what weight to give the considered constitutional judgment of coordinate government actors.

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[113] U.S. CONST. art. VI.

[114] *See* GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 20-24 (13th ed. 1997) (gathering materials relating to the importance of extra-judicial constitutional interpretation, especially by Presidents).

[115] *See, e.g.*, Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 906-07 (1989-90) (recounting the "long tradition of presidential action on the basis of constitutional views, sometimes at variance with those of the courts"); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267 (1996); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 Geo. L.J. 217 (1994). *See also* Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 586 (1975).

[116] Michael W. McConnell, *The Supreme Court, 1996 Term: Comment: Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 171 (1997). *See also* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999).

[117] *See* U.S. CONST. amend. XIV, § 5 (stating that "Congress shall have the power to enforce, by appropriate legislation" the substantive commands of the Fourteenth Amendment).

[118] McConnell, *supra* note 116, at 171.

Of course, the *Marbury* presumption is that the Court must exercise independent judgment in order to decide cases in conformance with the law of the Constitution.[119] In light of that historic practice, it is important – lest my argument be taken as an assault on the *Marbury* power itself – to recall the ways in which the Court sometimes defers to the decisions reached by the political branches, even ones raising constitutional questions, while nonetheless adhering to its responsibility to decide cases or controversies in conformance with the Constitution.

It is plain that cases involving accommodation of religion are not beyond the Article III power of courts to decide. The rules of justiciability require absolute judicial deference to the political departments,[120] even though real and important constitutional questions are raised and even if the Court might disagree on the merits with the political resolution.[121] My argument involves a different kind of deference that also finds deep roots in our constitutional tradition. The Court has never interpreted the Constitution as requiring it independently to answer every constitutional question that comes before it. On the contrary, the Court has frequently concluded that its role ought to be

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[119] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); THE FEDERALIST NO. 78 (Hamilton).

[120] *See* FALLON, *supra* note 111, at 93-293.

[121] Consider the example of the Guarantee Clause, the constitutional provision that requires the federal government to guarantee to the States a republican form of government. *See* U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence."). Although the Court currently treats the question as unsettled, *see* New York v. United States, 505 U.S. 144, 185 (1992) (reserving the justiciability question and resolving an essentially frivolous Guarantee Clause claim on the merits), the Court has sometimes treated claims arising under the Guarantee Clause as non-justiciable political questions. *See, e.g.*, Colgrove v. Green, 328 U.S. 549 (1946); Luther v. Borden, 48 U.S. (7 How.) 1 (1849). *Cf.* Reynolds v. Sims, 377 U.S. 533, 582 (1964) (noting that "[s]ome questions raised under the Guaranty Clause are nonjusticiable"). But that does not mean that there is no answer to the constitutional question in light of the document's text and history whether a particular form of state government in fact calls into question federal obligations under the Clause. On the contrary, the Court has acted on the premise both that the question has a right answer and that it is not the Court's role to give it. The same is true of other political question categories, perhaps most saliently those that might arise relating to impeachment. *See* Nixon v. United States, 506 U.S. 224 (1993).

Or consider the doctrine of standing, which insists that there is no Article III power to resolve a dispute if the party bringing the challenge lacks standing. The Court has stated unequivocally that it has no power to decide constitutional questions – and thus that the answers produced by the political process are final – if the party before the Court lacks standing. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). And that is so, the Court says, even if "no one" would have standing to challenge the decision in question. United States v. Richardson, 418 U.S. 166, 179 (1974).

secondary to that of other government actors even in areas where there is no true non-justiciability.[122] As James Bradley Thayer noted over a century ago, the Court's power of judicial review is generally to be employed only in cases of clear error.[123] That tradition of Thayerian deference still holds as a matter of substantive constitutional doctrine in a number of areas. The most salient example is the standard for determining whether legislation touching upon non-fundamental rights or non-suspect classifications violates due process or equal protection. It is standard constitutional doctrine that the government needs only to have a rational basis for such legislation.[124] As the Court has put it, "absent some reason to infer antipathy," the Constitution presumes that "even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted."[125]

That treatment of legislation is perfectly consistent with our constitutional traditions, which set as our default preferences democratic and accountable decisionmaking. Justice Holmes once said that "undert[aking] to declare an Act of Congress unconstitutional . . . is the gravest and most delicate duty that th[e] Court is called on to perform."[126] The reason why that is so, Professor Bickel famously said, is the "root difficulty . . . that judicial review is a counter-majoritarian force in our system."[127] In circumstances where we cannot trust the outcome of the political process to be true to the fundamental law of the Constitution, however, we have a strong tradition of intrusive judicial review. In such contexts, the unaccountability[128] of courts leaves

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[122] *See supra* note 111.

[123] *See* James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

[124] *See, e.g.*, FCC v. Beach Communications, Inc., 508 U.S. 307 (1993); United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166 (1980); New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979) (addressing equal protection). *See, e.g.*, Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955); Railway Express v. New York, 336 U.S. 106 (1949); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (addressing due process). *See also* Kansas v. Hendricks, 521 U.S. 346 (1997).

[125] Vance v. Bradley, 440 U.S. 93, 97 (1979).

[126] Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J., concurring).

[127] BICKEL, *supra* note 100, at 16.

[128] Here, and throughout the paper, I have taken as a given that the court we should be worried about is the Supreme Court of the United States, which of course is a federal court whose judges enjoy life tenure and salary protection. *See* U.S. CONST. art III. The Supreme Court (and all federal courts) thus are unaccountable at the ballot box and answer to nobody for their salaries.

This analysis leaves state courts out of the picture. That is a significant omission, though it is not one that affects my analysis in this paper. State judges decide federal constitutional questions every day, and are generally obliged to do so when such issues arise in the ordinary course of their judicial business. Unlike federal judges, state judges can be, and ordinarily are,

them untainted by political motives in the discharge of their duties, and thus more worthy of trust in resolving constitutional questions.

B. Popular Outcomes and Accommodation of Religion

This general approach to the role of courts in constitutional law carries over to the law of the Religion Clauses. In that context, if there is reason not to trust the outcome of the democratic process, intrusive judicial review is a firm and warranted part of our tradition. The Court's decision in *Employment Division, Department of Human Resources v. Smith*,[129] however, established that incidental burdens on the exercise of religion – even highly significant ones – resulting from generally applicable laws do not implicate the right of free exercise of religion at all. Absent some reason to believe that the government action was directed toward religious exercise, the government need only have a rational basis for its regulation no matter what its impact on religious conduct. Although the decision in *Smith* has been widely criticized,[130] it remains the governing constitutional standard for free exercise exemptions and it fits comfortably with our general approach to constitutional adjudication.[131] Neutral, generally applicable laws that burden religious exercise are subject only to rational basis review precisely *because* there is no reason to believe in such circumstances that religious exercise has been singled out for disfavorable treatment. In this part of the paper, I consider whether accommodation of religion is a context in which we can trust the outcome of the democratic process, and thus one in which we should expect judicial deference rather than intrusion. I suggest that it is.

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accountable at the ballot box in some form. To the extent that my argument in this paper suggests that the unaccountability of federal judges is not enough reason to insist on their having the final word on questions of accommodation, the accountability of state judges makes the argument with respect to them *a fortiori* stronger.

[129] 494 U.S. 872 (1990).

[130] For examples of such criticism – as well as defenses of the decision – see *supra* note 13.

[131] It is beside the present point that *Smith* was rejected by federal statute (albeit unconstitutionally insofar as the States are concerned). *See* Religious Freedom Restoration Act of 1993 ("RFRA"), 107 Stat. 1488, codified at 42 U.S.C. §§ 2000bb-2000bb-4 (1994) (held unconsitutional as applied to the States in *City of Boerne v. Flores*, 521 U.S. 507 (1997)). That legislative decision reflected a disagreement with the Court about necessity in policy for accommodations, and perhaps a difference with the Court on the substantive meaning of the Free Exercise Clause. That disagreement, however, does not affect my analysis of the relative institutional competence of courts and legislatures. Indeed, as I shall argue below, the passage of RFRA cuts in favor of judicial deference on matters of accommodation.

1. Politics and accommodation of religion

The crucial question, then, is whether the circumstances of accommodation of religion make it appropriate for the Court to defer to the outcome reached in the political arena.[132] A related problem arises when the religious majority acts to provide exemptions for burdens on itself. Consider, for example, an ordinance that suspends parking restrictions around churches on Sunday mornings adopted in a predominantly Catholic town. Does such exemption deserve the judicial deference that I am suggesting that accommodations of minority practices ought to get? I think not, for the simple reason (absent facts suggesting otherwise) that the political process cannot be trusted in such a context. It does not follow, however, that such an ordinance would be unconstitutional. There are good secular reasons to support such an ordinance – for example, the need to control traffic and ensure safe pedestrian access to church – and the government therefore should be permitted to pursue those secular ends. That conclusion holds, however, only so long as the government has a reason apart from the identity of the exemption seeker for denying similar accommodations to other faiths (or other parties generally) when they seek them. The analysis of this question could easily collapse into a general discussion of whether accommodations are good policy in general, or good constitutional policy. Because part of my aim in this paper has been to avoid rehashing that general discussion, I will limit my argument here to the

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[132] In considering whether accommodation of religion shows impermissible favoritism for religion over non-religion, it is important to be clear about what we mean by accommodation. As I stated in section I, the notion of accommodation under consideration here includes "government laws or policies that have the purpose and effect of removing a burden on, or facilitating the exercise of, a person's or an institution's religion." McConnell, *supra* note 5, at 686. *See also* Lupu, *Reconstructing the Establishment Clause*, *supra* note 13, at 559 n.11. Like Professor Lupu, I limit my consideration to that government action which is not mandated by the Free Exercise Clause. *See id. See also* Lupu, *The Trouble With Accommodation*, *supra* note 13, at 749-53. *But cf.* McConnell, *supra* note 5, at 687 (including within his definition of accommodation government conduct taking account of religion that is mandated by free exercise, as well as that which is not, but noting that the definitional dispute makes little practical difference).

Hard cases can arise in circumstances where the political process results in the display of religious symbols such as creches or menorahs. *See, e.g.*, County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573 (1989). As a general matter, my argument reaches political *exemptions* for religion, and thus, like Professor McConnell, I do not include within the category of accommodation a state practice "that acknowledges or expresses the prevailing religious sentiments of the community, such as the display of a religious symbol on public property or the delivery of a prayer at public ceremonial events." McConnell, *supra* note 5, at 687. Although such practices might be constitutionally defensible, the argument here does not address them.

institutional features of courts and politics that might affect our analysis of the question where the decisionmaking focus ought to be.

It is worth repeating the kind of government action I am considering: Accommodation includes government conduct that reduces or relieves burdens on religious exercise, usually by providing an exemption from laws that have an inhibiting impact on the religious believer. The affirmative case for trusting the political process in this context is that accommodation, virtually by definition, protects minority interests in the community. In that situation – where the political judgment is made that the religious scruples of some citizens makes it appropriate to exempt them from the otherwise applicable requirements of law – the differences between judges and political actors do not justify giving the views of judges precedence. Because courts are subject to the same constitutional constraints as electorally accountable politicians, there ought to be some good reason for the views of judges to be given priority. If there is no real danger of the political process abusing minority interests, courts are institutionally unnecessary to police the limits of appropriate accommodation. In short, this is a circumstance in which the political process can generally be trusted.[133]

The objections most commonly made to accommodation of religion by political actors focus on two primary arguments. First, one might argue that accommodations prefer religion over non-religion in violation of fundamental Establishment Clause principles.[134] There is the fear that putting questions of accommodation on the political table is simply inappropriate in the American constitutional order; it is outside the bounds of constitutional decisionmaking, and leads to potential discord or conflict between sects as well as between the secular and religious.[135] As Kathleen Sullivan put it, religion is an inappropri-

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[133] *Cf.* ELY, *supra* note 99. I do not mean to defend entirely a process-based theory of constitutional law along the lines proposed by Professor Ely in his famous book. Although there is much power, particularly explanatory power, in his theory, it has been widely criticized as providing an inadequate general account of constitutional protection of individual rights. In the context where the majority has reached out to protect minority rights – and has done so generally, based upon real differences such as the ones reflected in different religious tenets – his theory has greater power. In that situation, a court can be more comfortable deferring than in a situation where it intervenes to reject a majoritarian decision to act (or not to). In the present context, however, it is not too simple to rely on the majoritarian nature of decisions to accommodate religion as justifying a lesser judicial role. I will explain why in the text.

[134] *See, e.g.*, Lupu, *Reconstructing the Establishment Clause*, *supra* note 13; Lupu, *The Trouble With Accommodation*, *supra* note 13; Tushnet, *supra* note 11; Mark V. Tushnet, *The Emerging Principle of Accommodation of Religion (Dubitante)*, 76 GEO. L.J. 1691 (1988).

[135] *See, e.g.*, Lupu, *Reconstructing the Establishment Clause*, *supra* note 13, at 596; Kathleen M. Sullivan, *God as a Lobby: The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion*, 61 U. CHI. L. REV. 1655 (1994) (book review); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195 (1992) [hereinafter Sullivan, *Religion and Liberal Democracy*]. *Cf.* Michael W. McConnell, *Religious Freedom at*

ate basis for public argument, and indeed religious liberty is justifiable only insofar "as it is consistent with the establishment of the secular public moral order."[136]

Second, there is the fear that leaving questions of accommodation to the political process will work to the advantage of mainstream religions and the detriment of minority religions. Unequal treatment of religious sects was one of the dangers that the Establishment Clause was designed against, and leaving matters of religion to the political process makes it more likely that political majorities will favor their own beliefs or beliefs that are comfortable to them.

a. *Permissive accommodation, properly understood, does not privilege religion over non-religion.* As for the first objection, it is important to recognize that accommodation, properly understood, does not intrinsically favor one religion over another, or affirmatively favor religion at all. As the Court has stated, the "clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."[137] As Professor Berg has reminded us, accommodations are permissible because they relieve burdens on religion rather than create incentives to practice it: "The government is forbidden, under settled Establishment Clause doctrine, from teaching any religious doctrine as true or trying to influence citizens to adopt religious beliefs."[138] That insight is reflected in the Court's doctrine. For example, it is a settled principle that the government must remain neutral toward religion – that the government may not take any action either to affirm or deny the truth of any religious proposition, that it may not reward or penalize religious conduct, that it may not compel people to pay for religion through their taxes.[139] It is also true, however, that the neutrality obligation

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the Crossroads, 59 U. CHI. L. REV. 115 (1992) (discussing and criticizing, *inter alia*, Dean Sullivan's views on establishment).

[136] Sullivan, *Religion and Liberal Democracy*, *supra* note 135, at 198.

[137] Larson v. Valente, 456 U.S. 228, 244 (1982).

[138] Berg, *supra* note 16, at 720.

[139] *See, e.g.*, Everson v. Board of Educ., 330 U.S. 1, 9 (1947) ("Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."). *See also* Berg, *supra* note 16, at 720-22. The literature on government neutrality toward religion is of course voluminous. Perhaps its most prominent exponent is Professor Laycock. *See, e.g.*, Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43 (1997); Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313 (1996); Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 GEO. WASH. L. REV. 841 (1992); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990);

sometimes permits, or even requires, the government to permit religious participation in public programs.[140] Even more to the present point, the Court has stated clearly that accommodations, properly understood, do not evince any government favoritism toward religion, but rather government respect for the need to avoid impinging unnecessarily on religious exercise.[141] In short, in cases of true accommodation, the principle that the government may not favor religion remains unsullied; to the extent that one believes otherwise, moreover, that is a function of the Court's doctrine whether or not it is political or judicial actors with the last word.

Yet there is a strong strand in the literature that accommodation harms non-believers by providing a special benefit to religion.[142] In the Court, moreover, the objection to preferring religion to non-religion centers on the harm done to the non-religious person. As Justice Stevens put it in his concurrence in

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Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1 (1986).

It is worth noting that the decision in *Everson*, which installed into our constitutional law the famous metaphor of wall of separation, *upheld* a government program that reimbursed parents for the cost of bus transportation to private schools, including Catholic ones; the program did not single out religious schools, and allowing their participation on a neutral basis was held not to offend the "wall of separation." *Everson*, 330 U.S. at 17-18.

[140] There are numerous subsequent examples (with some exceptions, *see, e.g.*, Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973)) of the Court upholding religious participation in neutral government programs. *See, e.g.*, Mitchell v. Helms, 530 U.S. 793 (2000); Agostini v. Felton, 521 U.S. 203 (1997); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); Witters v. Washington Dep't of Servs. for Blind, 474 U.S. 481 (1986). Sometimes that participation is required by the Speech Clause of the First Amendment. *See, e.g.*, Capitol Square Rev. Bd. v. Pinette, 515 U.S. 753 (1995); Rosenberger v. Rectors and Visitors of the Univ. of Va., 515 U.S. 819 (1995); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).

[141] *See, e.g.*, Corporation for the Presiding Bishop v. Amos, 483 U.S. 327, 338 (1987).

[142] *See, e.g.*, Ira C. Lupu, *The Case Against Legislative Codification of Religious Liberty*, 21 CARDOZO L. REV. 565 (1999) (expressing the view that legislative accommodations would likely survive facial Establishment Clause scrutiny); Ira C. Lupu, *Why the Congress Was Wrong and the Court Was Right - Reflections on* City of Boerne v. Flores, 39 WM. & MARY L. REV. 793, 806 (1998) ("Underprotecting religion presents free exercise problems; overprotecting it suggests Establishment Clause concerns. Every move raises the danger of discrimination among sects."); Jed Rubenfeld, *Antidisestablishmentarianism: Why RFRA Really Was Unconstitutional*, 95 MICH. L. REV. 2347, 2369 (1997) (suggesting that every accommodation of religion raises establishment issues because it favors religion over nonreligion); Suzanna Sherry, Lee v. Weisman: *Paradox Redux*, 1992 SUP. CT. REV. 123, 124 (claiming that when government exempts religious believers from generally applicable laws, it discriminates against those with nonreligious objections to the laws). *Cf.* Steven D. Smith, *The Restoration of Tolerance*, 78 CAL. L. REV. 305, 354 (1990) (noting that exemptions confer special benefits on religious believers); David E. Steinberg, *Rejecting the Case Against the Free Exercise Exemption: A Critical Assessment*, 75 B.U. L. REV. 241 (1995).

City of Boerne,[143] the Religious Freedom Restoration Act "provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to non-religion, is forbidden by the First Amendment."[144] Thus there is a powerful sense that singling out certain believers for special treatment ill treats those who are not granted the exemption.[145] Professor Sherry put the point provocatively when she summed up her objection to permissive accommodations with the simple point that, under a system of accommodation, "Jews lose."[146]

In focusing on the human reactions to accommodation, Professor Sherry's argument contains an important insight. She argues that Jewish traditions are quite different from the dominant Christian ones in American society, and thus that Jewish people generally have different reactions to permissive accommodation of religion from the reactions that can be expected of Christians. Among the important differences, she says, are the more private and non-evangelical nature of Judaism in comparison with most forms of Christianity; she also says that Jewish people are more likely to base their views of sound public policy exclusively on arguments based on reason in the Enlightenment tradition, whereas appeals to argument based on faith are more common among Christians.[147] Accepting her description of the dominant strands of Jewish and Christian thought, it is important to take account of the real differences in attitudes that might prevail among people of different (or no) religious beliefs.

In a constitutional regime that presupposes that accommodations of some sort will occur, however, the important question is whether the harms described by Professor Sherry will be any greater if accommodations find their genesis in the legislature or in the courts. There is no reason to assume that courts are better situated to make those judgments than legislatures; nor is there any reason to think that those who are burdened by an accommodation

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[143] 521 U.S. 507 (1997).

[144] *City of Boerne*, 521 U.S. at 537 (Stevens, J., concurring) (citing Wallace v. Jaffree, 472 U.S. 38, 52-55 (1985)).

[145] *See* William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 319 (1991).

[146] Suzanna Sherry, *Religion and the Public Square: Making Democracy Safe for Religious Minorities*, 47 DEPAUL L. REV. 499, 503 (1998) ("What sorts of political outcomes might we expect if we allow religious appeals to influence public policy? The answer may be summarized in two words: Jews lose.").

[147] *Id.* at 507-16. Professor Sherry says that:

> What makes a return to pre-Enlightenment faith problematic, however, is that a reliance on faith rather than reason is quintessentially Christian. Modern American Judaism - especially Reform Judaism, but also Conservative Judaism (which together account for more than ninety percent of American Jews) - has so incorporated Enlightenment ideals that it has become largely a religion of reason.

Id. at 511.

will feel better about it if the decision comes from a judge rather than from popularly accountable officials. One might suppose that those who are unhappy with the outcome – whether they were for or against the accommodation – will find it more acceptable precisely *because* they had a say, and *because* they can hold the decisionmakers accountable.

Taking Professor Sherry's argument on its own terms, moreover, the question is really one of determining whether the harm done by accommodation to non-believers is greater or more important than the harm done to believers from the failure to grant the accommodation. On the merits of that question, one might argue that legislative accommodation of religion imposes no substantial real-world harm or obligations on other actors. The impact upon others from being required to respect the religious views of one who is granted an accommodation is, as Professor Sherry notes, largely psychic. Non-believers doubtless might feel slight or offense,[148] but the message being sent is not one of exclusion but of tolerance and equal respect.[149] Moreover, we are bound all the time in our society to suffer frustrations from not having our way in matters of public policy. The staunch Republican (or Democrat) doubtless feels great psychic harm when the other party is in control of one or another part of the government. We are expected to understand, however, that such frustrations are part of living in a pluralistic society – even though the First Amendment prohibits us from being ill-treated on account of our political beliefs.[150] The law distinguishes, in other words, between the frustration we feel at not getting our way – or feeling as though we are not being as highly valued by the government on account of our partisan beliefs – and being *treated differently* by the government on those grounds. Thus, one might reasonably argue, religion is not unique in exciting feelings of frustration and isolation when the government acts in a way contrary to your own outlook.

Whether or not these arguments are persuasive, the important question for present purposes is *who* will make the judgments about human nature, about the likely reaction to accommodations by non-believers, about how best to balance the complex factors that one must consider in drawing the lines.[151] The

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[148] *See* William P. Marshall, *The Concept of Offensiveness in Establishment and Free Exercise Jurisprudence*, 66 IND. L.J. 351, 365 (1991).

[149] *See* CHOPER, *supra* note 3, at 101-03.

[150] *See, e.g.*, Board of County Comm'rs v. Umbehr, 518 U.S. 668 (1996); O'Hare Truck Serv. v. City of Northlake, 518 U.S. 712 (1996); Rutan v. Republican Party of Ill., 497 U.S. 62 (1990); Elrod v. Burns, 427 U.S. 347 (1976).

[151] In light of my arguments in the text, I am unpersuaded by Professor Lupu's argument that courts not only should be the preferred locus for government decisions to accommodate religion, but that political actors should *ipso facto* be disqualified from considering questions of accommodation. *See* Lupu, *Reconstructing the Establishment Clause*, *supra* note 13, at 600-07. *See also* Lupu, *The Trouble With Accommodation*, *supra* note 13, at 759-63 (discussing and

reasons why we might be expected to tolerate accommodation even when it does us no immediate good are accessible to believers and non-believers alike, as are the counter-arguments. Legislatures, and the public square generally, are the places where differences like these are generally resolved.[152]

Perhaps the proper role of religion and its accommodation, however, is uniquely ill-suited for resolution in the public square. Religion *is* unique, the argument goes, and singled out in the First Amendment as an impermissible ground for government treatment of people. And as Dean Sullivan has emphasized, differences in religious beliefs have historically led to civil strife and even war.[153] Although there is certainly power in this view, in the context of accommodation its force is nonetheless muted. The first problem is that the argument addresses the *government* generally, and not simply political actors. The same sense of harm and isolation produced by legislative exemptions exists when exemptions are judicially imposed.[154] And the same difficulty of the tyranny of the majority exists when the government actors at issue are judges rather than legislators. Thus the uniqueness of religion, and the harm done by exemptions, is a powerful argument against just that: exemptions, whether judicially or politically mandated. As Professor Marshall said in objecting to judicially imposed exemptions, "[g]ranting exemptions only to religious claimants promotes its own form of inequality: a constitutional

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criticizing what he calls the "non-justiciability thesis" for questions of free exercise accommodation). Although Professor Lupu describes features of courts that might make them good at resolving legal questions, *see id.*, his argument does not recognize that many of the predictive judgments about human reactions are not inherently judicial in nature. More fundamentally, he does not recognize that in cases of accommodation, there is good reason to trust the outcome of the democratic process and thus less reason to impose the views of unaccountable judges on the society as a whole.

On the question of legislative versus judicial competence in these matters, it is important to consider Professor Volokh's powerful argument for judicial development, in a common law model, of the law of exemptions. *See* Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465 (1999). Among the many points he makes is that the flexibility provided by case-by-case adjudication is better suited to the particular context of accommodation. Professor Volokh's argument is explicitly based, however, on the premise that the common law decisions of courts are subject to legislative amendment so that the last word lies with democratically accountable officials. *See id.* at 1469-71. He is skeptical, however, of the constitutionality of any regime which grants exemptions on religious grounds without also providing similar benefits to others who object on non-religiously based grounds of conscience. *See id.* at 1492-94.

[152] *See generally* WALDRON, *supra* note 52 (developing an argument that we should prefer legislation, with all its tumult and messiness, to judicial supremacy); JEREMY WALDRON, LAW AND DISAGREEMENT (1999) (developing argument that legislatures are the preferred locus in a democracy to resolve fundamental disagreements).

[153] *See generally* Sullivan, *Religion and Liberal Democracy*, *supra* note 135.

[154] I shall consider presently whether the differences between political actors and judicial actors in this context cut against permitting legislative exemptions. *See infra* section II.B.1.b.

preference for religious over non-religious belief systems."[155] As we have seen, however, constitutional doctrine has not, and is not likely to, insist that accommodation only be permitted insofar as the Free Exercise Clause requires it. The question here is whether courts or legislatures will draw the necessary lines.

The fact still remains, however, that religion as a subject of widespread political debate is a subject that has proven divisive in history. And political majorities in this country have shown themselves capable of intolerance on matters of religion.[156] There is, moreover, a rich literature on the appropriate place of religion in public discourse.[157] Again, however, my argument for deference is not one that applies generally to government action that advances religion for its own sake. Instead, the deference I suggest is limited to cases of accommodation of religion, in which by definition the community at large makes the judgment that the religious sensibilities of some will be respected.[158]

It is nonetheless possible that open acknowledgment of the legitimacy of that political choice might lead to greater, and more deleterious in some sense, participation of religion in public policy; that is a predictive judgment, however, about which it seems to me any confident assessment is premature. Taking up that speculation, the next part of this article will sketch the performance of the political process in accommodating religion in recent years and argue that the record provides more reason for optimism if we look to political actors than if we look to judges.

b. *Political accommodation protects minority religions at least as well as judicial accommodation.* The next objection to political accommodation of religion is that it will inevitably favor majority religions and disfavor minority ones. Even defenders of political accommodation have sometimes conceded this point, and it appears to have intuitive appeal.[159] In *Smith*, the Court

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[155] *See* Marshall, *supra* note 145, at 319.

[156] *See, e.g.*, CHARLES LESLIE GLENN, JR., THE MYTH OF THE COMMON SCHOOL (1988); LLOYD P. JORGENSON, THE STATE AND THE NON-PUBLIC SCHOOL 1825-1925 (1987); DIANE RAVITCH, THE GREAT SCHOOL WARS (1974).

[157] *See, e.g.*, STEPHEN L. CARTER, THE CULTURE OF DISBELIEF (1993); JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? (1997); KENT GREENAWALT, PRIVATE CONSCIENCES AND PUBLIC REASONS (1995) [hereinafter GREENAWALT, PRIVATE CONSCIENCES]; KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE (1988); H. JEFFERSON POWELL, THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM (1993). A few citations of leading books cannot possibly do justice, of course, to the enormous literature on the proper role of religion in political life.

[158] As a matter of prudence the political process ought to frame its debates in terms that are accessible to non-believers. *See* GREENAWALT, PRIVATE CONSCIENCES, *supra* note 157, at 151-64. It seems reasonable to think that accommodations will be more acceptable to those who do not benefit from them if they are explained and justified in terms that will appeal to the body politic and not just believers.

[159] *See* McConnell, *Accommodation*, *supra* note 3.

asserted, "[i]t may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in."[160] And Professor McConnell has conceded that "[l]aws that impinge upon the religious practices of larger or more prominent faiths will be noticed and remedied. When the laws impinge upon the practice of smaller groups, legislators will not even notice, and may not care even if they do notice."[161]

Experience both before and after the decision in *Smith* shows, however, that the intuition that minority religions are badly off in the political process appears to be mistaken. And even if that proposition is not certainly true, there seems to be little room for disagreement on the point that the political process has, by and large, been much more hospitable to the interests of minority religions than has the Supreme Court. I will consider these points in turn.

The most prominent example of the political process's solicitude for religion without regard to its mainstream status is the passage of RFRA.[162] In the wake of *Smith*, a broad coalition – even a consensus – emerged that it would be appropriate to pass a statute to protect religious liberty more broadly than the Court had interpreted the Free Exercise Clause to require.[163] The product was RFRA, which generally provided that government action imposing a substantial burden on free exercise was invalid unless it was narrowly tailored and supported by a compelling interest.[164]

As commentators have noted, RFRA powerfully reflects the political process acting to protect minority religions.[165] Professor Rubenfeld captured the point of RFRA as follows: "RFRA sought to eradicate state favoritism of majority religious practices. It did so, moreover, in the name of religious freedom, of minority religious practices, and of the equal respect due to all

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[160] Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 890 (1990).

[161] McConnell, *Free Exercise Revisionism*, *supra* note 13, at 1136. *See also* Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 21 (1994) (assuming that majority religious practices are better treated in the political process than minority religions); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 15 (stating that "[t]he majority's deeply held beliefs will normally be reflected in legislation without an exemption.").

[162] Religious Freedom Restoration Act of 1993, 107 Stat. 1488, 42 U.S.C. § 2000bb-2000bb-4 (1994).

[163] The vote on RFRA was unanimous in the House; in the Senate it passed by a vote of 97-3. *See* Peter Steinfels, *Clinton signs boost for religious freedom/Liberals, conservatives back new law*, HOUS. CHRON., Nov. 17, 1993, *available at* 1993 WL 2130296.

[164] *See* RFRA, 42 U.S.C. § 2000bb-1(a)-(b) (1994).

[165] *See, e.g.*, Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 MONT. L. REV. 39, 91 (1995) (stating that "RFRA demonstrates that contemporary American values support the protection of religiously motivated conduct even from laws of general application"); Rubenfeld, *supra* note 142, at 2358.

religions."[166] One can argue over whether it is a good idea in policy to impose such a broad exemption as a general matter,[167] and over whether RFRA's exemption is constitutional under the Establishment Clause.[168] And of course the Court struck down the statute as it applied to the States in *City of Boerne*.[169] It seems clear, however, that RFRA rebukes the idea that adherents of majority faiths will act only to protect their own. On the contrary, RFRA, as well as its state counterparts,[170] reach out broadly to protect religious freedom from unnecessary burdens regardless of how non-mainstream a particular faith may be.

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[166] Rubenfeld, *supra* note 142, at 2387.

[167] For an argument cataloguing the real world benefits of RFRA and similar legislation, see Thomas C. Berg, *State and Federal Religious Liberty Legislation: Is it Necessary? Is it Constitutional? Is it Good Policy? The New Attacks on Religious Freedom Legislation, and Why They Are Wrong*, 21 CARDOZO L. REV. 415 (1999). For a contrary assessment of the performance of RFRA, see Ira C. Lupu, *The Failure of RFRA*, 20 U. ARK. LITTLE ROCK L.J. 575 (1998). For a thorough attack, mainly on policy grounds, on religious freedom legislation, see Lupu, *supra* note 132.

[168] For attacks on RFRA, and broad legislative accommodations, as establishment, *see, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 539 (1997) (Stevens, J., concurring); Christopher L. Eisgruber & Lawrence G. Sager, *Congressional Power and Religious Liberty After* City of Boerne v. Flores, 1997 SUP. CT. REV. 79 (1997); Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437, 457-58 (1994); Marcia Hamilton, *The Religious Freedom Restoration Act is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1 (1998); William P. Marshall, *The Religious Freedom Restoration Act: Establishment, Equal Protection and Free Speech Concerns*, 56 MONT. L. REV. 227, 242 (1995); Aurora R. Bearse, Note, *RFRA: Is it Necessary? Is it Proper?*, 50 RUTGERS L. REV. 1045 (1998); Edward J.W. Blatnik, Note, *No RFRAF Allowed: The Status of the Religious Freedom Restoration Act's Federal Application in the Wake of* City of Boerne v. Flores, 98 COLUM. L. REV. 1410 (1998). For a careful and skeptical evaluation, see Scott C. Idleman, *The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power*, 73 TEX. L. REV. 247 (1994). *See also* Thomas C. Berg, *The Constitutional Future of Religious Freedom Legislation*, 20 U. ARK. LITTLE ROCK L.J. 715 (1998) (arguing that RFRA is constitutional as applied to the federal government); Erwin Chemerinsky, *Do State Religious Freedom Restoration Acts Violate the Establishment Clause or Separation of Powers?*, 32 U.C. DAVIS L. REV. 645 (1999) (defending the constitutionality of state RFRAs).

[169] 521 U.S. 507 (1997). The Court held that RFRA was not properly within the power of Congress, pursuant to Section 5 of the Fourteenth Amendment, *see* U.S. CONST., amend. XIV, § 5, to enforce the incorporated First Amendment against the States.

Because the decision in *City of Boerne* (and its rationale) reached only the statute's constitutionality as it applied to the States, it is an open question whether RFRA, in its continuing application to the federal government, violates the Establishment Clause. Justice Stevens believes that it does. *See City of Boerne*, 521 U.S. at 536 (Stevens, J., concurring). One court of appeals has rejected such a challenge. *See In re* Young, 141 F.3d 854 (8th Cir. 1998).

[170] *See* Eugene Volokh, *Intermediate Questions of Religious Exemptions - A Research Agenda With Test Suites*, 21 CARDOZO L. REV. 595, 597 n.2 (1999) (gathering state RFRAs).

In addition to broad laws like RFRA, the political process has also shown itself to be hospitable to the need to accommodate religion, even minority religions, more narrowly.[171] There is no need to catalogue anew this story. As Dean Choper has shown, there are any number of examples of legislative bodies, both state and federal, reaching out to protect minority religions from disparate impacts without there having been any constitutional compulsion to do so.[172] That is not to say that the record of accommodation has been uniform; of course, it has not, and nor should it have been. Absent compulsion of the Free Exercise Clause, a regime of permissive accommodations takes as a possibility that sometimes accommodations will not be granted.[173] Thus, notwithstanding federal law to the contrary, a State might well conclude that it is more important to have an extremely stringent anti-drug regime than it is to exempt the religious use of peyote.[174] Apart from the peyote example – as to which there do not seem to be many good arguments against an exemption – one can readily imagine situations in which the government might reasonably decide not to accommodate religious sensibilities. There is a limit in costs and safety after which the religious claimant might reasonably be asked to yield.

Regardless of what one thinks about the legislative record of accommodation, the record in courts gives no reason for partisans of exemptions to prefer judges. In the first place, notwithstanding rhetoric to the contrary prior to *Smith*, the Court rarely came through with ringing protections for religious freedom, particularly for non-mainstream and untraditional sects.[175] In fact, the Supreme Court held that the Free Exercise Clause requires

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[171] I do not wish to join the interesting debate over whether broad or narrow statutory protection of religious liberty is preferable. *See generally* Thomas C. Berg, Symposium, *The New Attacks on Religious Freedom Legislation, and Why They are Wrong*, 21 CARDOZO L. REV. 415 (1999). For my purposes, the point here is that the legislative process has shown itself hospitable to legitimate demands for religious freedom, regardless of whether the religion in question is minority or mainstream.

[172] *See* Jesse H. Choper, *Brennan Center Symposium on Constitutional Law: Comments on Stephen Carter's Lecture*, 87 CALIF. L. REV. 1087, 1089-90 (1999) (gathering and discussing examples); CHOPER, *supra* note 3, at 112-13. *See also* Volokh, *supra* note 170, at 596-99.

[173] As I will argue below, however, the importance of ensuring that government extends exemptions without invidiously discriminating between religions justifies judicial supervision of *denials* of exemptions.

[174] In the *Smith* litigation, Oregon originally determined on certification from the Supreme Court, *see* Employment Div., Dep't of Human Resources v. Smith, 485 U.S. 660 (1988), that its drug laws applied to religious use of peyote. *See* Smith v. Employment Div., 307 Ore. 68, 763 P.2d 146 (1988). After the Supreme Court's second decision – the one which excited the last 10 years of legislation and scholarship on religious freedom – the State changed its mind and enacted a statutory exemption for peyote use. *See* OR. REV. STAT. 475.992(5) (1991).

[175] *See* Robert D. Kamenshine, *Scrapping Strict Review in Free Exercise Cases*, 4 CONST. COMMENTARY 147, 147 (1987) (noting the Court's practice of failing to require exemptions

exemptions on only five occasions.[176] Four of those cases involved Sabbatarians whose practices did not seem terribly threatening – not like bigamy, for example.[177] And in *Yoder*, the fifth case, the Court's rhetoric in tribute to the Amish way of life was almost embarrassing.[178] Against these five cases stand many more in which the Court denied claims of free exercise exemption.[179]

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even in cases where strict scrutiny applied); Lupu, *Reconstructing the Establishment Clause*, *supra* note 13, at 560 (noting Court's practice of rejecting free exercise claims); McConnell, *Free Exercise Revisionism*, *supra* note 13, at 1110 (noting paucity of successful free exercise claims); Steinberg, *supra* note 142, at 248-50 (noting the Court's pattern of refusing to grant free exercise exemptions prior to *Smith*); Sullivan, *Religion and Liberal Democracy*, *supra* note 135, at 215 (noting that "[t]he Supreme Court has overwhelmingly rejected free exercise exemption claims").

[176] *See* Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829 (1989) (upholding claim that public benefits could not be denied on account of individual's refusal to work on certain days for religious reasons); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987) (same); Thomas v. Review Bd., 450 U.S. 707 (1981) (same); Sherbert v. Verner, 374 U.S. 398, 403-10 (1963) (same).

On one occasion since *Smith*, the Court has struck down a law on free exercise grounds. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993). There, the Court concluded that city ordinances barring certain forms of animal sacrifice were targeted at the Church of Santeria and were therefore unconstitutional under the free exercise doctrine explained in *Smith*.

[177] *See* Reynolds v. United States, 98 U.S. 145, 161 (1878) (rejecting free exercise claim by Mormon who claimed that it was his religious duty to have multiple spouses).

[178] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 225 (1972) ("Indeed, the Amish communities singularly parallel and reflect many of the virtues of Jefferson's ideal of the 'sturdy yeoman' who would form the basis of what he considered as the ideal of a democratic society. Even their idiosyncratic separateness exemplifies the diversity we profess to admire and encourage.") (footnote omitted). Even the Amish did not fare so well in their next go round before the Court, in which the Court rejected a religious freedom claim of exemption from the social security system. *See* United States v. Lee, 455 U.S. 252, 257-61 (1982).

[179] *See, e.g.*, Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378 (1990) (holding that California need not exempt a religious organization's sales of religious materials from the state's sales and use taxes); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (refusing to exempt Muslim inmates from prison work rules, even though these rules prevented the inmates from attending obligatory prayer services); Goldman v. Weinberger, 475 U.S. 503 (1986) (refusing to exempt an Orthodox Jewish officer from Air Force dress regulations that prevented the officer from wearing his yarmulke indoors); Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290 (1985) (refusing to exempt religious employees from requirements of the Fair Labor Standards Act); United States v. Lee, 455 U.S. 252 (1982) (refusing to exempt an Amish employer from obligations imposed by the social security system). *See also* Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680 (1989) (refusing to recognize the deductibility under the Internal Revenue Code of certain fees paid to the Church of Scientology because the money was not a religious donation but was instead for goods and services rendered); Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (upholding denial of tax exemption on grounds of racial discrimination, despite the claim that the University's discriminatory rules were religiously-grounded). *See generally* Steinberg,

Thus, it is fair to say that the Court has been less than aggressive in protecting religious freedom in the form of mandating exemptions.[180] The legislative record becomes even better when we consider the reaction to several of the decisions declining to mandate exemptions. As I have already noted, after *Smith*, the State of Oregon provided a legislative exemption for religious peyote use.[181] And the reaction to a number of leading cases in which the Supreme Court rejected free exercise claims was similar. After the Court declined to mandate an exemption from the Air Force's uniform regulations for an Orthodox Jewish officer who wished to wear a yarmulke while on duty,[182] Congress passed a statute providing an exemption.[183] Although the Court held in *United States v. Lee*[184] that the Amish did not have a free exercise right to opt out of the social security system, Congress later enacted a general exemption for employers and employees opposed to participation in social security on religious grounds.[185] After the decision denying the free exercise claim in *Lyng v. Northwest Indian Cemetery Protective Association*,[186] the Executive Branch decided to reroute the road that was at issue so as not to impinge upon sacred Native American lands.[187] Moreover, as Dean Choper points out, the exemption from compulsory attendance laws that was ordered as a matter of free exercise in *Yoder* was already available in most States; and the exemption that was denied as a matter of free exercise in *Smith* was provided by about half the States and the federal government.[188] These are examples not only of accommodation of religion, but of non-mainstream, minority religious practices.

It might well be that the anecdotal evidence recounted here is insufficient to establish that legislatures are prone to accommodate legitimate demands for religious exemptions. The point here, however, is a comparative one – whether legislatures or courts are more open to accommodation of religion, particularly of non-mainstream religious practices. The evidence suggests that there is no reason to suppose that legislatures are *less* responsive than courts in accommodating non-mainstream religious practices. Indeed, we might

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supra note 142, at 248-50 (gathering materials).

[180] As I discussed in section I, *infra*, moreover, the Court has struck down any number of attempted exemptions as impermissible establishments.

[181] *See supra* note 174 and accompanying text.

[182] Goldman v. Weinberger, 475 U.S. 503 (1986).

[183] *See* Pub. L. No. 100-180, 101 Stat. 1086 (1987) (codified at 10 U.S.C. § 774) (allowing service members to wear religious garb subject to exceptions).

[184] 455 U.S. 252 (1982).

[185] *See* 26 U.S.C. § 3127 (2000).

[186] 485 U.S. 439 (1988).

[187] *See* Choper, *supra* note 172, at 1089 (describing executive decision to reroute road to accommodate religious objections).

[188] *See id.* at 1089-90.

reasonably expect, as the anecdotal evidence suggests, that legislatures will be *more* responsive. Courts do not generally have the power to *order* an exemption unless the Free Exercise Clause demands one, but legislatures *do* have that power. Under current free exercise doctrine – which only rarely requires exemptions – it would be quite surprising if the situation were otherwise.

To sum, the experience with legislative accommodation indicates that we have reason to be confident that majoritarian institutions can deal fairly and prudently with legitimate demands for accommodation of religious exercise, including practices engaged in by minority religions. The passage of general laws protecting religious exercise like RFRA and its state law counterparts is particularly powerful evidence of the legislative process's ability to provide for situations beyond the familiar practices of Christianity or other common religions. And there is evidence that more narrow accommodation of non-mainstream religions is possible, even normal, at the legislative level. Thus, the intuitively powerful objection to legislative accommodation based upon fear of majority religions tending to their own interests at the expense of others does not withstand analysis.

3. The appropriate scope of judicial scrutiny

Our capacity to trust legislatures in matters of accommodation is, of course, contingent upon a lack of evidence of discrimination among religions. In light of the unquestioned proposition that the First Amendment does not permit the government to pick and choose which religions it will favor on grounds related in any way to the content of their religious doctrines or beliefs,[189] it is important in dealing with decisions to accommodate to ensure that invidious discrimination is not at work.

It is established that an array of constitutional doctrines stand ready to condemn any government distinctions between religions except on neutral grounds. Such discrimination violates the Establishment Clause[190] and the Free Exercise Clause,[191] and it sometimes violates the Speech Clause[192] and the Equal Protection Clause.[193] Simply put, there is no place for non-neutral

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[189] Citations for this point should not be necessary. I will just note that the entire basis for the oft-criticized decision in *Smith* is the necessity of neutral government treatment of religion. For the *Smith* Court, lack of neutrality is just about the definition of a free exercise violation.

[190] *See, e.g.*, Larson v. Valente, 456 U.S. 228 (1982).

[191] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993); Torasco v. Watkins, 367 U.S. 488 (1961).

[192] *See, e.g.*, Capitol Square Rev. Bd. v. Pinette, 515 U.S. 753 (1995); Rosenberger v. Rectors and Visitors of the Univ. of Va., 515 U.S. 819 (1995); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).

[193] *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 911 (1995) (dictum); Peyote Way Church of

distinctions between religions.

That is not to say, however, that the government must always treat all religions the same. The norm against discrimination reaches only invidious discrimination. Thus it is no violation to ban the use of peyote along with other illicit drugs, despite the heavy practical impact of such a ban on the Native American Church.[194] That is so despite the fact that the sacramental practices of other religions do not suffer commensurate harm from other regulations. If there is reason to believe, however, that neutral legislative action in fact is a mask for intentionally disparate treatment, then the Court does (and should) stand ready to intervene. The treatment of the Church of the Santeria by the City of Hialeah, Florida, is the perfect example of this.[195]

The task of distinguishing between intentional government discrimination among religions and simple disparate impacts knows familiar analogues in constitutional law. For one example, consider standard equal protection doctrine, in which the distinction between intentional discrimination and disparate impact is foundational.[196] For another, consider symbolic expression. If the government acts to suppress conduct because of the message it expresses, the government must satisfy the "most exacting" First Amendment scrutiny;[197] but if the government regulation is neutral and unrelated to the content of the symbolic expression, the government need only satisfy a far less demanding standard of review.[198] In each situation, the Court has developed

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God, Inc. v. Thornburgh, 922 F.2d 1210 (5th Cir. 1991) (dictum). *See also* John H. Garvey, *Freedom and Equality in the Religion Clauses*, 1981 SUP. CT. REV. 193 (finding an equality principle inherent in the Establishment Clause); Ira C. Lupu, *Keeping the Faith: Religion, Equality and Speech in the U.S. Constitution*, 18 CONN. L. REV. 739, 741-55 (1986) (reading the Establishment Clause to embody the principle of "equal religious liberty"); Lupu, *Reconstructing the Establishment Clause*, *supra* note 13, at 586-87 (same); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311 (1986) (elaborating a similar argument). *But cf.* Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049, 1104 (1996) (arguing that equal protection norms cut against providing protections for religious employers who wish to discriminate on the basis of religion and wondering what "is so special about religious freedoms that religious employers are permitted to exceed the limits of tolerance set for all others?").

[194] *See* Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 890 (1990).

[195] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (striking down under the Free Exercise Clause ordinances against certain animal sacrifices, which while neutral on their face had the purpose of impinging upon the religious rites of the Church of the Santeria).

[196] *See* Personnel Admin'r of Mass. v. Feeney, 442 U.S. 256 (1979); Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976).

[197] *See* Texas v. Johnson, 491 U.S. 397, 412 (1989) (quoting Boos v. Barry, 485 U.S. 312, 321 (1988)).

[198] *See* United States v. O'Brien, 391 U.S. 367 (1968).

the law to take account of the particular context. In the context of accommodation of religion, the need to ensure equality and neutrality of treatment makes it appropriate for the Court to step in once such a showing has been made.[199] Absent a finding of disparate treatment of meaningfully indistinguishable cases, however, there is no need for the Court to interfere.

The last point would benefit from some further explanation. The Court has sometimes invalidated legislative accommodations on the ground that they are not broad enough. For example, in *Board of Education of Kiryas Joel Village School District v. Grumet*,[200] the Court struck down a New York State law that permitted the members of the Satmar Hasidim, an insular orthodox sect of Judaism, to establish a public school district coterminous with the geographic area in which their adherents lived.[201] Part of the Court's reasoning rested on the lack of any assurance that the State would treat favorably future requests for similar accommodations by other religious groups or non-religious groups.[202] As Justice Souter put it in his majority opinion, "the fact that this school district was created by a special and unusual Act of the legislature also gives reason for concern whether the benefit received by the Satmar community is one that the legislature will provide equally to other religious (and nonreligious) groups."[203] The lack of any assurance that the government would heed the next call for accommodation in similar circumstances thus led the Court to find an establishment in the first accommodation. A similar impulse lay behind the Court's decision in *Estate of Thornton v. Caldor*,[204] where Connecticut had provided an exemption for some religions – those which observed a Sabbath – but not for all.

Ordinarily, of course, the government is permitted to tackle problems without also assuring that "all evils of the same genus be eradicated or none at all."[205] The government is normally permitted to regulate "one step at a time," with its obligation being to refrain from engaging in "invidious discrimination."[206] As I have noted, however, in the Establishment Clause

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[199] *See* CHOPER, *supra* note 3, at 112-13.

[200] 512 U.S. 687, 706 (1994).

[201] The point of the legislative accommodation (whether it was of religion or culture, *see id.* at 732 (Scalia, J., dissenting)) was to permit disabled Satmar children to take advantage of publicly-funded special education programs. Under the then-current doctrine (*see* Aguilar v. Felton, 473 U.S. 402 (1985); School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985), both overruled by Agostini v. Felton, 521 U.S. 203 (1997)), special education services could not be provided in a religious school.

[202] *Grumet*, 512 U.S. at 702.

[203] *Id.*

[204] 472 U.S. 703 (1985).

[205] *See* Railway Express Agency v. New York, 336 U.S. 106, 110 (1949).

[206] Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955). *See also* FCC v. Beach Communications, Inc., 508 U.S. 307 (1993). The Court's classic statement in *Williamson* bears quoting at length:

context the Court has generally taken a far different approach. The Court has repeatedly insisted that the breadth of a government exemption is important in determining its constitutionality. As Justice Brennan put it in *Texas Monthly*, if a statutory benefit "is confined to religious organizations," it is unconstitutional on that ground alone;[207] only if the "benefits derived by religious organizations flow[] to a large number of nonreligious groups as well" can an exemption program be justified.[208] Thus the Court's doctrine rejects the one-step-at-a-time approach.

In situations of accommodation of religion, however, the lack of breadth of an exemption should not count decisively against its constitutionality. In the first place, the Court in its own conduct – as state actors bound by the First Amendment – does not adhere to the principle that exemptions are permissible only if they are provided up front in every situation in which they might be sought. Of course, because courts decide cases as they come, it would be quite odd for judges to order as part of a free exercise exemption not only that Amish children should be exempted from compulsory attendance laws but that other children of farmers who needed their labor must be as well. To put the point a little differently, it did not violate the Establishment Clause for the decision in *Yoder* to reach only the situation before the Court.

The same should be true of legislative accommodations. As Professor McConnell has noted, "[i]t is only natural for legislatures to address free exercise problems as they arise."[209] In striking down the New York law creating the school district at issue in *Grumet*, however, the Court emphasized that it "ha[d] no assurance that the next similarly situated group seeking a school district of its own will receive one."[210] Thus the Court required New York not only to agree that others who are similarly situated to the Satmars will get similar treatment in the future, but that it also demonstrate its bona fides by anticipating and providing such accommodations here and now – regardless of whether calls for similar accommodation have been heard from anyone.[211] It is unnecessary for the Court to insist on such assurances in order to uphold specific accommodations.

> The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.

Williamson, 348 U.S. at 489 (citations omitted).

[207] Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 11 (1989).

[208] *Id.*

[209] McConnell, *supra* note 5, at 707.

[210] Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 703 (1994).

[211] *See id.* at 702-05.

If a similarly situated group seeks accommodation in the future, the Court has readily at hand the tools to deal with discriminatory treatment when the need arises. Although the Court in *Grumet* noted that it does not have the power to insist that a legislature pass a law providing an accommodation in the future,[212] it is standard doctrine that the Court has the power to strike down the prior government conduct as non-neutral once that fact has been established in the real world.[213] To hold otherwise "would effectively insulate underinclusive statutes from constitutional challenge."[214] In light of this general approach, it is difficult to see why insufficient breadth should doom an accommodation at the outset.[215]

Although neutrality among religions is required, one should not underestimate the complexity of determining just what it means for a future claimant to be "similarly situated" to one who received a prior accommodation. As Dean Choper has argued, it is necessary that the Court confront this difficulty with common sense and a recognition that "the dynamics of the political process . . . and the wide diversity of religious beliefs in our society makes it inevitable that government accommodations will result in some degree of differential treatment of religious faiths."[216] While different treatment of religious practices that cannot be meaningfully distinguished from one another should not be tolerated,[217] "[t]he requirement of denominational neutrality must . . . be applied realistically."[218] As Professor McConnell has argued, "[n]ot all religious practices have the same impact on government policy, and too exacting a requirement of equal treatment would likely discourage sensible and beneficial accommodations."[219]

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[212] *See id.* at 703.

[213] *See Texas Monthly*, 489 U.S. at 7-8 (striking down a tax exemption for religious publications at the behest of a non-religious publication which did not receive the same benefit); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987); Orr v. Orr, 440 U.S. 268 (1979).

[214] *Ragland*, 481 U.S. at 227. Once the Court has found the prior accommodation unconstitutional, however, it has acknowledged that it is up to the State to decide "whether the correct response as a matter of state law to a finding that a state tax exemption is unconstitutional is to eliminate the exemption, to curtail it, to broaden it, or to invalidate the tax altogether." *Texas Monthly*, 489 U.S. at 8. Professor McConnell has argued that the proper course in such a situation is to extend the accommodation to the denied group under the Free Exercise Clause. *See* McConnell, *supra* note 5, at 708.

[215] *See* CHOPER, *supra* note 3, at 110-13 (arguing that insufficient breadth should not be fatal to an accommodation absent reason to believe that it is actually motivated by a lack of neutrality).

[216] *Id.* at 113.

[217] *See id.* at 113-33 (analyzing this complex inquiry).

[218] McConnell, *supra* note 5, at 707.

[219] *Id.*

III. CONCLUSION

For those who believe that it is never appropriate for the government to single out religion, questions of accommodation are not difficult. But "deeply rooted aspects of our constitutional tradition and religion clause jurisprudence" hold that government does not "favor religion over non-religion" when it accommodates religion.[220] In cases of true accommodation, the reasons why we are suspicious of political power and reliant on judicial power dissipate. Judges are state actors just like legislators. And judges have shown themselves able to treat legislative power with greater suspicion than is warranted, and judicial power with more confidence than is warranted. In light of these points, if we step back and survey the terrain, we see that there is good reason for judges to defer to political accommodations of religion. Those reasons go away if discrimination is afoot; but courts can stand ready to intervene if such situations develop. Accommodation of religion makes it inevitable that the government sometimes will treat religion differently from non-religion, and that is true whether or not the final word is spoken by judges or legislators.

[220] *See* Timothy L. Hall, *Omnibus Protections of Religious Liberty and the Establishment Clause*, 21 CARDOZO L. REV. 539, 543 (1999).

Justice Scalia and the Religion Clauses

Kathleen M. Sullivan*

Interpretation of the Religion Clauses currently divides the Supreme Court roughly into four camps. Why four? There are two religion clauses: the Free Exercise Clause, which protects the liberty of religious practice, and the Establishment Clause, which bars coercive or symbolic government union with religion.[1] And the Court can take two approaches to judicial enforcement of either clause: strong or weak, interventionist or deferential. The Court can intervene actively to protect free exercise or to prevent establishment, applying tests of strict scrutiny or presumptive invalidity to challenged laws. Or it can take a weak stance toward claimed free exercise or establishment violations, deferring to political outcomes or applying tests of mere rationality review.

The structure of judicial review under the Religion Clauses – two clauses and two possible stances toward judicial intervention – thus yields four possible positions:

1. strong on free exercise enforcement/strong on establishment enforcement;
2. weak on free exercise enforcement/strong on establishment enforcement;
3. strong on free exercise enforcement/weak on establishment enforcement;
4. weak on free exercise enforcement/weak on establishment enforcement.

Each of these four positions has at least one adherent on the current Court. And each of these four positions carries with it an implicit theory of religion's role in our political and social life.

Justice Antonin Scalia is indisputably the founding father and leading exponent of the fourth position. Author of the controversial decision in *Employment Division, Department of Human Resources v. Smith*,[2] which upheld the application of Oregon's drug laws to religious peyote use, Justice Scalia disfavors judicially enforced free exercise exemptions from generally applicable laws.[3] And in the Establishment Clause cases that have arisen in his tenure on the Court, he has never met a modern law he would label an establishment of religion.[4] Thus he takes a symmetrical

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[1] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

[2] 494 U.S. 872 (1990).

[3] *See id.* at 885 (holding that a state need not show a compelling interest in applying its drug laws to peyote use by Native Americans).

[4] In no opinion that he has authored while on the Court has Justice Scalia found an Establishment Clause violation in a challenged law. *See, e.g.*, Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995) (Scalia, J.) (holding that Establishment Clause

approach to the two clauses: he favors weak judicial enforcement of the Free Exercise and Establishment Clauses alike.

This article explores Justice Scalia's religion clause jurisprudence against the backdrop of the competing positions taken by other members of the Court

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concerns could not justify rejecting a Ku Klux Klan application to place an unattended cross in a plaza next to the Ohio statehouse); Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 732-52 (1994) (Scalia, J., dissenting) (disagreeing with the holding that New York's creation of a school district coextensive with a community of adherents of Satmar Hasidism constituted an establishment of religion); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 397-401 (1993) (Scalia, J., concurring in judgment) (agreeing with the holding that including religious films in a family-values film series on public school property did not constitute an establishment of religion); Lee v. Weisman, 505 U.S. 577, 631-46 (1992) (Scalia, J., dissenting) (disagreeing with the holding that an official prayer at a public middle-school graduation constituted an establishment of religion); Texas Monthly Inc. v. Bullock, 489 U.S. 1, 29-45 (1989) (Scalia, J., dissenting) (disagreeing with the holding that a state sales tax exemption for religious periodicals constituted an establishment of religion); Edwards v. Aguillard, 482 U.S. 578, 610-40 (1987), (Scalia, J., dissenting) (disagreeing with the holding that Louisiana's Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act violated the Establishment Clause).

Nor has Justice Scalia ever voted to find an establishment of religion in any case in which he has joined other opinions rather than writing separately. First, Justice Scalia has voted with the Court in upholding state programs that include religious activities in general benefit programs. *See* Agostini v. Felton, 521 U.S. 203 (1997) (permitting public employees to provide remedial instruction to students on religious school premises); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (permitting state-funded sign-language interpreter to aid deaf student in parochial school); Bowen v. Kendrick, 487 U.S. 589 (1988) (upholding the Adolescent Family Life Act's provision of grants to religious organizations to advise teenagers on chastity). Justice Scalia likewise has voted with the Court in rejecting government attempts to use the Establishment Clause as a justification for denying free-speech rights. *See* Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819 (1995) (holding that Establishment Clause concerns did not justify a public university's denial of student activity funding to an evangelical Christian student publication); Board of Educ. of Westside Community Sch. v. Mergens, 496 U.S. 226 (1990) (rejecting a school's Establishment Clause defense to a law granting religious student groups rights to use school facilities for extracurricular activities).

Justice Scalia has also joined majority opinions declining to find Establishment Clause violations in other areas, such as where Congress exempts religious organizations from generally applicable laws. *See* Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos, 483 U.S. 327 (1987) (upholding a broad reading of religious organizations' exemption from Title VII religious nondiscrimination requirements). He has also joined opinions that find no establishment problems with religious symbols in public settings, for example where state property is used for the privately funded display of religious symbols, *see* Allegheny County v. ACLU, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in part and dissenting in part) (joining the majority in upholding the constitutionality of a Chanukah menorah displayed next to a Christmas tree, but dissenting from the Court's judgment forbidding a separately displayed Christmas creche), or where public schools encourage prayer at official events, *see* Santa Fe Indep. Sch. Dist. v. Doe, 120 S. Ct., 2266, 2283 (2000) (Rehnquist, C.J., dissenting) (disagreeing with the Court's invalidation of pre-football-game prayer-leaders chosen by student vote).

in contemporary religious controversies. Part I describes the terrain on which current religion clause claims are contested. Part II describes the four competing modern models of judicial intervention under the Religion Clauses and their implicit political and social theories of religion, examining Justice Scalia's religion jurisprudence last in order to contrast it with the other three. Part III outlines possible explanations of Justice Scalia's approach, and concludes that it takes a view of religion quite different from that of the founding generation.

I. LEADING AREAS OF CURRENT RELIGION CLAUSE CONTROVERSY

Current controversies over free exercise and establishment do not center on the most egregious examples of forbidden government behavior toward religion. In the contemporary United States, free exercise controversies rarely arise from the overt suppression of religious practices. Catholics are no longer tarred and feathered by angry mobs nor Mormons driven over mountains into exile. Religious bigotry is rarely expressed in this nation through violence, as it still is in so many other parts of the world. Nor is it typically expressed in legislation, for there is no dispute on the Court that express classifications against religion are forbidden. In the rare instance where a law can be identified as aimed selectively against a religious practice, the Court readily strikes it down as a free exercise violation, and in this sort of case, Justice Scalia is as robust a defender of free exercise rights as any Justice.[5]

Free exercise claims tend to arise instead mostly from requests for exemption from generally applicable laws. Such claims arise when generally applicable laws impede a religious practice even if not intended to do so – for example, the bans on drug use that were challenged in *Smith* for effectively forbidding peyote ingestion by Native Americans. Where general laws have disproportionately adverse effects on religious practitioners, the question is whether the Free Exercise Clause requires judicially enforced exemptions for religionists that the legislature or executive agency has failed to provide voluntarily.

Similarly, Establishment Clause controversies do not arise today over flagrant examples of clearly forbidden official sectarianism. The erection of a Latin cross on the roof of a state capitol or city hall would not present a hard case, and would not divide the Justices. But such cases tend simply not to arise in this nation, even though fights over such official theocratic symbolism still persist elsewhere in the world. Rather, the big debates in our Establish-

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[5] *See* Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) (invalidating city ordinance forbidding ritual animal slaughter of a kind practiced by adherents of Santeria faith).

ment Clause litigation typically concern the question whether government may subsidize the private practice of religion, either through in-kind subsidies such as grants of public space to privately sponsored creches, menorahs or other religious symbols, or cash subsidies such as grants of educational aid to parochial schools. Legislative or executive extension of public benefit programs to religious beneficiaries as well as non-religious organizations raises the question whether the Establishment Clause requires the judicially enforced exclusion of religionists.

The following discussion of divisions among the Justices assumes that they agree broadly on extreme cases of express antireligious discrimination or official sectarianism, and focuses instead upon the contested cases of free exercise exemptions from generally applicable laws and inclusion of religious entities in general benefit programs.

II. Four Approaches To The Religion Clauses

The four positions a Justice might take on the enforcement of the religion clauses may be labeled separationism, secularism, accommodationism, and assimilationism. Separationism favors both strong enforcement of free exercise exemptions and strong enforcement of the Establishment Clause to exclude religion from general benefit programs. Secularism favors weak enforcement of free exercise exemptions and strong enforcement of religious exclusions to avoid establishment. Accommodationism takes the opposite position, favoring strong enforcement of free exercise exemptions but weak enforcement of religious exclusions under the Establishment Clause. Finally, assimiliationism, which is the position embraced by Justice Scalia, favors weak enforcement both of free exercise exemptions and of establishment-based religious exclusions. Each of these positions in turn suggests a political and social vision of the role of religion in public life.

A. Separationism

The separationist position, strong on both free exercise and establishment enforcement, would robustly exempt religionists from general laws and obligations that inhibit their practices, and likewise robustly purge religious recipients from public subsidies and sponsorship. This position corresponds with the Supreme Court's predominant rhetoric and decisional practices from roughly the 1940's to the 1970's. It is exemplified on the free exercise side by cases applying strict scrutiny to government failure to exempt religionists from de facto burdens on their practices. And it is exemplified on the establishment side by cases applying skeptical review to any inclusion of

religious use in general benefit programs, no matter how large or small the effective public subsidy to religion.

The Court took the strong view of free exercise exemptions in *Wisconsin v. Yoder*,[6] which held that the Free Exercise Clause required an exemption from state truancy laws that would allow Old Order Amish parents to keep their children home from high school, lest continued mandatory public schooling create irreconcilable conflict with the practices of their religious community. The Court held similarly in *Sherbert v. Verner*[7] that free exercise required exemption of a Seventh-Day Adventist who observed her Sabbath on Saturday from the requirement that she work that day of the week, lest she be viewed as voluntarily unemployed and thus ineligible for unemployment benefits. This approach to free exercise is antithetical to that taken in such cases as *Reynolds v. United States*,[8] which declined to exempt from federal criminal law applicable to the then-territory of Utah the religiously motivated practice of polygamy by members of the Church of Jesus Christ of Latter-Day Saints. It is likewise the opposite of that taken in *Employment Division, Department of Human Resources v. Smith*,[9] the peyote case, which grandfathered *Yoder* and *Sherbert* but otherwise required deferential scrutiny of claims to religious exemption from generally applicable laws.

The establishment side of the separationist position is captured by the metaphor of a wall of separation between church and state, and by the notion, famously stated in *Everson v. Board of Education*, that "no tax in any amount, large or small," should be used to support religious proselytization.[10] Even though *Everson* in fact upheld the use of public transportation to take children to and from religious schools, its oft-cited dicta suggested that most public subsidies to religion were unconstitutional because detrimental both to religion and to public life: "Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*."[11] The separationist view thus favors the strong prohibition of state symbolic sponsorship or financial support of religion.

Taken together, the strong enforcement of both free exercise and establishment has the effect of treating religious organizations as distinctively powerful forms of private association. Like other associations, they occupy a ground intermediate between individuals and the state. But they are not just garden-variety interest groups, like the Republican Party, the American Civil Liberties Union, or the National Association of Manufacturers. On the

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[6] 406 U.S. 205 (1972).
[7] 374 U.S. 398 (1963).
[8] 98 U.S. 145 (1878).
[9] 494 U.S. 872 (1990).
[10] 330 U.S. 1, 15 (1947).
[11] *Id.* at 16.

separationist view, religion operates as a more powerful force in people's lives than does membership in a Kiwanis Club, a fraternity, or a cheerleading organization. A faith is instead a form of intermediate organization with unique power to interpret the world and express shared understandings, and with unique power to command allegiance and obedience. On this view, religious communities serve as normative enclaves outside of and apart from secular society. Unlike other affiliations, religious organizations exert a kind of sovereign authority over their members. They therefore function as quasi-governments, posing a potential rivalry with the state when the commands of God and Caesar conflict.

On this view of religion, free exercise exemptions for religious practitioners are ultimately a safety valve for the civil order. They allow people who do not think they can conscientiously comply with general laws to have, at least on selected matters, a kind of a normative enclave of their own. In the extreme case, religion might even be a threat to state sovereignty if that release valve were not provided, and free exercise exemptions an alternative to revolution or civil war. But even in less extreme circumstances, viewing religious communities as separate and distinctive normative enclaves might serve valuable social functions. It might foster epistemic diversity, or variety among interpretive world views. This is a value also served more generally by freedoms of speech and association. Religious pluralism might also serve a related political function: helping to check the tyranny of the state. Competition among sects, like competition among other factions of passion or interest, and like competition among the states under federalism, helps to prevent the entrenchment of any central regime.[12] Free exercise exemptions operate as allocations of alternative jurisdiction to religious entities that help keep the values promoted by the central government from becoming too monolithic.

While the separationist position holds that courts should broadly enforce religious exemptions from generally applicable laws, it holds at the same time that courts should vigilantly police against any symbolic or financial allegiance between religion and the state. The Establishment Clause, on this view, bars the religious capture of political spoils. Of course, religionists have the freedom of speech to espouse explicitly religious positions in political debates. But on the separationist view, no legislation may be premised expressly on a religious position, and no legislation may be enacted without an independently sufficient nonreligious justification. Nor may religions carve up public benefits among themselves in the same way as management and labor, landlords and tenants, or old industry and new internet companies. On this view, religion is not a garden-variety interest group, and the danger of

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[12] *See generally* THE FEDERALIST PAPERS, NO. 10 (Madison) (C. Rossiter ed. 1961).

civil fissure is too great if it is treated as one. The danger of religious rivalry expressed through political means is that there will be a resumption of the sectarian warfare the Establishment Clause was meant to put to rest.[13]

In short, the separationist view would give religion exit, but not voice.[14] If not merely individual beliefs but an entire Old Order Amish subculture is at risk if truancy laws are enforced against its young people, then allow them withdrawal to their own Amish ways. If peyote ingestion is central to Native American rites, then permit this community an exception to narcotics laws. If the Catholic Church does not believe women should be ordained as priests, exempt it from employment discrimination laws. The more physically or spatially isolated or insular the religious subculture, the more powerfully the strong free exercise view permits the creation and maintenance of normative enclaves apart from the dominant civil order. At the same time, the separationist view entails that religious communities be barred from religiously driven victories in the making and enforcement of general laws.

The combined stance of strong enforcement of free exercise and establishment might seem internally contradictory at first glance – as simultaneously favoring and disfavoring religion from the perspective of religionists. But on closer inspection, the two propositions can be seen as mutually reinforcing. Strong establishment enforcement entails that religion may not drive political outcomes nor reap political spoils. The ban on establishment of religion affirmatively establishes a secular civil order that ends the war of all sects against all. But strong free exercise enforcement entails that religion will receive some exemption from general laws as a kind of compensation. The judicially enforced exit option offsets the limitations upon religion's exercise of political voice.[15]

Indeed, the establishment side of this approach helps to explain why courts are needed on the free exercise side. If religion were considered fully capable of protecting its own interests in politics, or gaining exemption or accommodation from the political majority by political means, then there would be little need for judicially mandated exemptions. But if the Establishment Clause limits religious victories in politics, then religion endures a kind of forced political incompetence that makes judicial intervention to ensure free exercise appropriate. Just as courts intervene to

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[13] *See* Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 197-99 (1992).

[14] *See generally* ALBERT O. HIRSCHMAN, EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970) (describing exit or departure from the jurisdiction, voice or speaking up, and loyalty or deference or obedience, as three forms of response to political dictates with which one might disagree).

[15] *See* Sullivan, *supra* note 13, at 222.

protect other groups systematically hobbled in politics, so they might intervene to protect religion.[16]

Nor is it clear that the separationist position would necessarily be considered anti-religious even from the religious perspective. In its most extreme version, this view would entail religious observers' complete withdrawal from participation in the affairs of state – alternative rather than dual sovereignty. This approach resonates with some strands of the American evangelical tradition that view religious participation in politics as risking fatal corruption. Assuming that religion flourishes on the other side of the wall of separation, there is little reason to fear that separationism will weaken or undermine its power to shape the lives of its members.

The justice on the current Supreme Court who appears most clearly committed to the separationist position is Justice David Souter. He has urged overrule of the Court's decision in *Smith* requiring a deferential judicial stance toward denials of religious exemptions, and advocated instead a return to strict scrutiny of free exercise challenges to the unyielding application of generally applicable laws.[17] At the same time, Justice Souter has expressed the view that he would enforce the Establishment Clause vigorously against state symbolic or financial support of religion.[18] No other justice takes a stance so clearly consistent with the Court's prior separationist tradition.

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[16] *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938) (noting the possible need for "more searching judicial inquiry" when there is some structural impediment to "those political processes ordinarily to be relied upon to protect minorities").

[17] *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 565 (1997) (Souter, J., dissenting); Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 559 (1993) (Souter, J., concurring).

[18] For example, Justice Souter wrote the decision of the Court in *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994), holding that New York's creation of a school district coextensive with a community of adherents of Satmar Hasidism constituted an establishment of religion. He also has dissented consistently from recent decisions of the Court allowing state financial aid to religious indoctrination. *See, e.g.*, Mitchell v. Helms, 120 S. Ct. 2530, 2572 (2000) (Souter, J., dissenting) (maintaining that the Establishment Clause should have barred the provision to parochial schools of publicly funded computer hardware and software and other teaching aids that could be diverted to religious use); Agostini v. Felton, 521 U.S. 203, 241 (1997) (Souter, J., dissenting) (maintaining that the Establishment Clause should have barred public employees from providing remedial instruction to pupils at religious schools); Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819, 863 (1995) (Souter, J., dissenting) (maintaining that the Establishment Clause should have justified a public university's denial of student activity funding to an evangelical Christian publication).

B. Secularism

The second position, which may be labeled secularist, favors weak judicial enforcement of free exercise exemptions and strong judicial enforcement to prevent establishment. On this view, courts need not give religion exit or voice. Religious choices should be protected from direct interference but should benefit neither by compelled exemptions nor permitted subsidies.

Justice John Paul Stevens most consistently expounds this position on the current Court. It was no surprise that he joined the majority in *Smith*, for he had previously shown skepticism toward judicially mandated free exercise exemptions. For example, he wrote a notable concurrence in a decision of the Court denying an exemption from Air Force headgear regulations to an Orthodox Jewish officer who sought to wear a yarmulke,[19] cautioning that uniformity was needed to avoid a slippery slope to allowing Sikhs to wear turbans and Rastafarians to wear dreadlocks. Justice Stevens also would enforce the Establishment Clause more vigorously than the current Court, including against legislative grants of religious exemptions. He was the only justice to view the Religious Freedom Restoration Act as violating the Establishment Clause as well as exceeding Congress's civil rights enforcement authority.[20] Justice Ruth Bader Ginsburg is the justice most closely resembling Stevens in this pattern; she likewise reads establishment strictly, and unlike several of her colleagues on the Court, has shown no interest in revisiting the deferential standard of review of free exercise exemption claims set forth in *Smith*.[21]

The view that free exercise should be weakly and establishment strongly enforced arguably sees religious commitments as private, like other fraternal or intimate commitments. On this view, religion is akin not to a quasi-government but rather to a family unit – a locus for decisional autonomy that government respects best by leaving alone. This view sees government as abstinent toward religion, and religious commitments as worth little if they have to be shored up by the state. Religious flourishing is not the business of the state, for good or ill. The object of the Religion Clauses is to affirmatively establish a secular public order, leaving religious choices to be made without government support. The courts should not come to the rescue of religious minorities as they might for other minorities. Nor should they protect religious prevalence in political disputes. Both compelled exemptions and

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[19] *See* Goldman v. Weinberger, 475 U.S. 503, 510 (1986) (Stevens, J., concurring).

[20] *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (Stevens, J., concurring).

[21] In *City of Boerne v. Flores*, 521 U.S. 507 (1997), Justice Ginsburg joined the majority in invalidating the Religious Freedom Restoration Act and did not join the separate opinions of Justices Souter and O'Connor stating that *Smith* had been wrongly decided.

voluntary subsidies for religion undermine the secularist vision of neutrality as government indifference.

B. Accommodationism

The third, or accommodationist, position favors strong enforcement of free exercise exemptions but weak establishment enforcement, and thus would permit broad legislative inclusion of religion in public programs. This is the position most likely to be endorsed by the political arms of religious organizations today. Accommodationism favors broad religious exemptions from general laws, and thus holds that *Smith* was wrongly decided. Unlike a secularist, an accommodationist would broadly permit legislative accommodations of religion; like a separationist, an accommodationist would also have courts mandate accommodations of religion when religionists cannot conscientiously comply with general laws. Accommodationism depends upon weak Establishment Clause enforcement, and would favor proposed constitutional amendments that would forbid the denial of equal access to public benefits on account of religious belief, expression or exercise. The most pro-religious of the four possible positions, the accommodationist approach makes courts into backstops against religion's political failures while removing them as obstacles to religion's political victories. This approach would give religion both exit and voice.

On this view, religionists are allowed to seek and retain public benefits when they achieve political victories. If government distributes funds to encourage teenagers to abstain from sex, for example, then recipients may include religious family life counselors as well as Planned Parenthood.[22] Similarly, if government grants funds or tax benefits for feeding the poor, recipients may include not only Oxfam but also a soup kitchen in the basement of a church where prayers are said with dinner. And perhaps most important, if parents receive tax funds or "vouchers" to support sending their children to private schools, they may apply them to parochial as well as secular school tuition. In short, in this view, religion should participate in all the spoils of the modern welfare state, and no distribution of a benefit to religion should count as an establishment, so long as it is part of a general program.

The justice on the current Court who best exemplifies this approach is Justice Sandra Day O'Connor. Like Justice Souter, she favors a strong compelled exemption jurisprudence and thus has stated that *Smith* should be overruled.[23] But she also favors judicial deference to state aid to religious

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[22] *See* Bowen v. Kendrick, 487 U.S. 589 (1988).

[23] *See City of Boerne*, 521 U.S. at 545 (O'Connor, J., concurring).

organizations, even those with evangelical missions, so long as the aid is part of a more general benefit program.[24]

The accommodationist view, like the separationist view, shares the epistemology of *Everson*, not *Smith*. The strong position on free exercise enforcement assumes that religion is distinct from and more commanding than other social enterprises, and that sectarian diversity is a good. Hence courts ought to protect religious flourishing in normative enclaves. But at the same time, this view would permit religion to win in politics, at least on an equal footing with other interest groups. Thus, the accommodationist, unlike the separationist, does not view religion as a quasi-government, threatening to displace the secular state and in need of strong antiestablishment checks. Nor does the accommodationist take the secularist view that religion is merely something that people should practice in private without affirmative state support.

Rather, the accommodationist view sees religion as a kind of endangered species. On this view, religionists are jeopardized by a secular majority likely to be indifferent to religious practices and desires, and thus need judicial protection in the form of strong free exercise exemptions. But when the still small voice of religion actually ekes out a legislative victory, this view holds, it ought not be struck down in the name of establishment.

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[24] For example, Justice O'Connor wrote the opinion of the Court in *Agostini v. Felton*, 521 U.S. 203 (1997), which upheld against Establishment Clause challenge a program in which public school teachers taught remedial classes in parochial schools. In that opinion, she declared that the premises of a prior decision to the contrary, *Aguilar v. Felton*, 473 U.S. 402 (1997), had been undermined by intervening decisions such as *Witters v. Washington Department of Servicess for the Blind*, 474 U.S. 481 (1986), which upheld a vocational rehabilitation grant to a chaplaincy student attending a Christian school; *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), which upheld public payment of a sign-language interpreter for a deaf student attending a Catholic school; and *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), which upheld grant of student fee support at a public university to an evangelical Christian magazine – all decisions whose majority she joined.

Justice O'Connor recently distinguished herself from the strongest version of the view that the Establishment Clause should not bar any inclusion of religious entities in benefit programs with more general application. In *Mitchell v. Helms*, 120 S. Ct. 2530 (2000), Justice Clarence Thomas wrote a plurality opinion suggesting that religious subsidies that are part of general benefit programs are constitutional per se: "If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government." *Id.* at 2541. Justice O'Connor, joined by Justice Stephen Breyer, took pains to concur separately, insisting that this position was too simplistic and that the Establishment Clause still might bar such aid when divertible to use for actual religious indoctrination. *See id.* at 2556-60 (O'Connor, J., concurring). Whether Justice Thomas should count as an accommodationist remains to be seen; he plainly favors weak establishment enforcement, but has yet to express a view on whether *Smith* was rightly decided.

Accommodationism assumes that the rise of the welfare state has led to a wide range of public substitutes for formerly private, including religious, activities such as education, health care and charity or philanthropy. To the extent that secular institutions substitute for religious functions, the accommodationist fears, they have the power to displace religious activity. Thus, leaving religious flourishing to private ordering as in the separationist view is not enough; flourishing in a shrinking sphere is a losing proposition. Accommodationism pictures religious flourishing as dependent in large part on incentives and disincentives created by political decisions.

On this view, the joint goal of the two religion clauses is to minimize government distortion of prepolitical religious choices despite political expansion of the public sphere to encompass a greater range of activities that might have been provided by religious institutions.[25] Secularization and the rise of the welfare state threaten to distort those religious choices through displacement. On this view, courts should broadly exempt religious normative enclaves from secular commands but also ensure that religions can compete fairly with secular substitutes under the welfare state's expanding umbrella. A relaxed establishment bar to religious participation and welfare subsidies acts as an offset to the monopoly power of secular institutions to inculcate secular beliefs.

Accommodationism yields a political theory of religion as neither a quasi-government (as in the separationist view) nor an ordinary interest group, but rather as a discrete and insular minority.[26] This position echoes the rhetoric of other civil rights movements, arguing both that religion should not be "discriminated against" in politics, nor denied "equal access" to public benefits. Indeed, by permitting legislative accommodation of religion under the Establishment Clause and by compelling some accommodation of religion under the Free Exercise Clause, accommodationism argues not only for equal rights for religion, but "affirmative action" for religion. This position assumes that religion will enjoy some limited effectiveness as a lobbying force, but that courts are required nonetheless to shore up its weaknesses.

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[25] For the leading scholarly articulation of the accommodationist view, see Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990). Professor McConnell has also successfully advanced this position in his role as the prevailing Supreme Court advocate in such decisions as *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), and *Mitchell v. Helms*, 530 U.S. 793 (2000).

[26] *Cf.* United States v. Carolene Products, Inc., 304 U.S. 144, 152-53 n.4 (1938) (suggesting the need for judicial solicitude for the rights of religious, national, racial, or other "discrete and insular minorities" that might be unable to vindicate their own interests fully in the political process).

D. Assimilationism

The fourth possible permutation of judicial review under the Religion Clauses would enforce free exercise weakly but likewise intervene little to enforce establishment. Unlike the Supreme Court of the 1940's to the 1970's, the current Court has predominantly taken this position, holding that democratic processes should receive judicial deference whether they selectively show indifference or favoritism toward religion. This may be called the assimilationist position, for it in effect treats religion as an ordinary interest group in politics. Justice Scalia is the leading exponent of this position on both sides of the pair.

The author of the Court's *Smith* decision extending deferential review to free exercise exemption claims, Justice Scalia has made clear his belief that generally applicable laws, as opposed to laws facially discriminating against religion, should not be strictly reviewed merely because they happen to sideswipe a religious practice, as do drug laws that restrict peyote ingestion even when religiously motivated.[27] Justice Scalia would also confine the Establishment Clause to a limited ban on oaths, tithes, and explicit sectarian discrimination, and thus uphold a wide range of religious participation in public programs.[28] He has never voted to find any financial support to religious use an establishment of religion, and he would go further than the Court in allowing the symbolic endorsement of religion.[29]

On this view, religion is not epistemically distinct from other associational activities, as the separationist or accommodationist positions would hold. Indeed, on Justice Scalia's view, religion may be difficult for courts to distinguish from secular substitutes, leading to problems of fraud and anarchy if religious exemptions are too widely allowed, and religious intrusion if they are allowed too narrowly.[30] Sincere claims are easily imitated by the fraudulent, and the inability to make principled distinctions between Saturday sabbatarians and soccer moms, Quaker pacifists and conscientious objectors, Rastafarians and regulars at the Cannabis Club, means that, if religion is exempted from the ordinary bonds of public life, it will act as an incubus for deviance from general norms, with the potential to bring down all of society with it. On this view, such horrors are best avoided by not even starting down

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[27] *See* Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990).

[28] *See* note 3 *supra*.

[29] *Compare* Mitchell v. Helms, 530 U.S. 793 (2000) (upholding public subsidy of computers and other instructional aids to religious schools), *with* Santa Fe Indep. Sch. Dist. v. Doe, 120 S. Ct. 2266 (2000) (invalidating student-led prayer at public high school football games). Justice Scalia joined the majority in *Mitchell* and the dissent in *Santa Fe*.

[30] *See Smith*, 494 U.S. at 886-89.

the road of constitutionally compelled exemptions for religion from generally applicable laws.

But if religious associations are not so different after all from other garden-variety interest groups with intense but narrowly focused interests, the assimilationist view suggests, then organized religion might as well be allowed to participate openly and freely in politics on a par with other groups and bring home its fair share of the spoils. The doctrinal implication is that courts should relax any Establishment Clause barriers to state financial or symbolic support of religion. As under the accommodationist approach, if government provides food relief, church soup kitchens should be able to participate. If the government funds chastity advice, there should be no bar to including religious counselors who might include religious reasons in their counseling. If the city allows United Way signs on the public square, then there should be no bar to the erection of temporary creches or crosses either.[31]

Again, as with the separationist pair, the two parts of the argument are mutually reinforcing: if religion has voice, it doesn't need exit. On the assimilationist view, if religious organizations may participate fully in politics, then they should take their lumps like other groups, and not complain if they do not persuade the political majority that they deserve exemptions. An equal shot at influencing political outcomes ex ante means no sour grapes ex post. And if religionists muscle in to receive benefits or public sponsorship alongside other groups, then they should keep their political gains.

While the assimilationist position might give religion more leeway in political outcomes than the separationist position, it might be thought to take a less favorable view of religion than the separationist position in two respects. First, it strikingly declines to view religious attachments as distinctive and more powerful than other group associations. Rather, the assimilationist position assumes that religious inclusion in public programs poses little threat to the state because religious groups will operate as pluralistic competitors alongside other groups. It assimilates religion to ordinary politics.

Second, it assumes that members of small, unorthodox faiths or fringe sects will be able to fend for themselves in the political process despite the political disability of their minority status and their vulnerability to popular prejudice and sectarianism. To understand organized religion as a whole as a garden-variety interest group may be to understate the discreteness and insularity of religious organizations taken one by one. The assimilationist would likely answer that cross-religious alliances are possible, as the nearly unanimous passage of the since-invalidated Religious Freedom Restoration Act itself

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[31] *See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995).

attested.[32] Religious interests taken wholesale might make up for the political weakness of any one religion at retail. Thus, Justice Scalia might well observe with irony, *City of Boerne v. Flores*, in purporting to overrule *Smith*, actually proved its political premises correct: the religious lobby was able to achieve stunning political unanimity in passage of a law designed to force a greater number of and scope for religious exemptions. And to those who wonder whether such political success would be more dubious in case-by-case exemption claims, an adherent to Justice Scalia's approach might well note the frequency of executive and legislative exemptions for the religious practices of religious minorities.[33]

So, does Justice Scalia's endorsement of weak Free Exercise enforcement and weak Establishment Clause enforcement signal a low regard for religion in American public life? That would seem a surprising stance for a justice who is personally a devout Roman Catholic and who often bridles at what he perceives as anti-religious bigotry. It might appear that the explanation for his stance has nothing to do with religion. Three alternative possibilities might be offered.

First, it might appear that his deferential stance toward political decisions challenged on either free exercise or establishment grounds follows not from his view of religion but from his attitude toward judicial review. If he disfavors judicial activism and believes in deference to legislative majorities, then he might be willing to uphold legislative exemptions of religion from general law, but not to allow judges to override legislatures by compelling such exemption. He might defer to religious accommodations, religious symbols and religious subsidies less out of deference to religion than out of deference to political majorities.

But that cannot be entirely right. Justice Scalia has authored various opinions for the Court that demonstrate his willingness to invalidate acts of political majorities, for example under expansive readings of the Takings Clause,[34] and under expansive readings of federalism principles.[35] Indeed, he has been willing to be a judicial activist even in the context of religion: after

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[32] *See* City of Boerne v. Flores, 521 U.S. 507 (1997).

[33] In response to the decision rejecting the free exercise claim of a Jewish Air Force lieutenant to wear a yarmulke in *Goldman v. Weinberger*, 475 U.S. 503 (1986), for example, Congress enacted a statute permitting members of the military to wear items of religious apparel while in uniform. Pub. Law 100-180. Similarly, in the wake of *Smith*, Oregon exempted from its drug laws the use of peyote "in connection with the good faith practice of a religious belief." Or. Rev. Stat. § 475.992 (5).

[34] *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (holding that a coastal anti-erosion law that destroyed economically beneficial use of property must undergo strict scrutiny).

[35] *See, e.g.*, Printz v. United States, 521 U.S. 898 (1997) (invalidating federal requirement that local law enforcement officials perform background checks on handgun purchasers).

all, he vigorously joined in the Court's invalidation of the Religious Freedom Restoration Act, an act of Congress that was passed with one of the largest majorities in the history of Congress and signed expeditiously by the President.[36]

Second, it might appear that Justice Scalia's preference for deference under both religion clauses follow from his jurisprudential preference for rules, rather than standards or balancing tests.[37] He has argued forcefully that bright line rules and categorical tests achieve greater certainty, predictability, and fairness than flexible, multi-factored balancing tests.[38] He has extended this preference even to the religion context. For example, he ridiculed the majority in *Lee v. Weisman*,[39] which invalidated official prayer at a public middle-school graduation, for espousing too loose and flexible a conception of coercion under the Establishment Clause.[40] And he grounded his *Smith* opinion partly on the need to avoid a jurisprudence of exceptions to rules that would allow each individual to become a law unto himself.[41]

And yet that cannot be the entire explanation either, for Justice Scalia himself has authored opinions in the religion area as elsewhere that are not entirely rule-like. After all, in *Smith* itself, he wrote that generally applicable laws may not be challenged for having a disproportionate impact on religionists in violation of the Free Exercise Clause – only to qualify that rule with exceptions for "hybrid" claims, such as free exercise claims that are coupled with free speech claims or privacy claims.[42]

A third possibility might be that Justice Scalia simply seeks substantive consistency with his views in other areas of constitutional law. For example, in both the equal protection context and in the free speech context, he favors deference to generally applicable laws challenged for having a disparate impact. In the equal protection context, he agrees with precedent applying mere rationality review to laws having a disproportionate impact on racial minorities or other groups who claim to be systematically disadvantaged in the

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[36] *See* City of Boerne v. Flores, 521 U.S. 507 (1997); *id.* at 537 (Scalia, J., concurring in part). Justice Scalia might claim personal privilege on this score because Congress was trying to overrule his own opinion in *Smith*, but still, at a minimum, his vote here was not consistent with a mere posture of legislative deference.

[37] *See* Kathleen M. Sullivan, *The Supreme Court: 1991 Term – Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 24, 62-66 (1992).

[38] *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

[39] 505 U.S. 577 (1992).

[40] *See id.* at 636 (Scalia, J., dissenting) (referring to the majority's approach as "psychology practiced by amateurs").

[41] *See* Employment Div., Dep't of Human Resources v. Smith, 494 US. 872, 881, 885 (1990).

[42] *Id.* at 882.

political process.[43] Indeed, in *Smith*, he drew an explicit analogy to equal protection law on this point.[44] And in the First Amendment area, he is more willing than other justices to uphold generally applicable regulations of conduct that merely happen to have an adverse impact on speakers. For example, he has twice concurred in cases upholding the application of public nudity bans to nude erotic dancing, writing separately to express his view that such regulations should be subject to no First Amendment scrutiny at all because they are not specifically directed at expression or anything that nude dancing communicates.[45]

But this explanation too seems wanting, for Justice Scalia's religion jurisprudence departs from his general constitutional jurisprudence in important respects. For example, he is willing to defer to affirmative action for religion, but not to affirmative action on the basis of race. As detailed earlier, he does not regard explicit legislative or executive accommodation of religion as a violation of the Establishment Clause. But he has taken the consistent position that the Equal Protection Clause bars all race-based preferences, even those that might be thought to "accommodate" past race-based disadvantage,[46] and even though religious accommodations and racial preferences alike might be thought to be the outcomes of political processes in which the majority has permissibly bestowed benefits upon minorities at its own expense.[47]

Thus, no religion-neutral explanation of Justice Scalia's approach to religion clause interpretation seems entirely satisfactory. His opinions instead implicitly outline a specific view of religion as a player in politics on a par with other organized associations.

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[43] *See* Washington v. Davis, 426 U.S. 229 (1976) (upholding on rationality review a civil service exam that disproportionately screened out African-American police officer candidates).

[44] *See Smith*, 494 U.S. at 886 n.3 ("Our conclusion that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest is the only approach compatible with these precedents," including *Washington v. Davis*).

[45] *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 572, 574-75 (1991) (Scalia, J., concurring in the judgment); City of Erie v. Pap's A.M., 120 S. Ct. 1382, 1498 (2000) (Scalia, J., concurring in the judgment).

[46] *See* Adarand Constuctors, Inc. v. Pena, 518 U.S. 200, 239 (1995) (Scalia, J., concurring in the judgment) ("In my view, government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction."); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 520 (1989) (Scalia, J., concurring in the judgment) (disputing the proposition that racial preferences can "help 'to even the score'").

[47] If anything, there might be more danger of political process failure in the religious context, where religious majorities might bestow benefits upon the majority at the expense of minority religions and atheists.

III. CONCLUSION

Justice Scalia's approach to the Religion Clauses – favoring weak enforcement of free exercise exemptions and establishment prohibitions alike – would treat religion as a garden-variety interest group, participating in the political process just like any other lobby. On his view, religious lobbyists might seek vouchers for religious schools in the same way that, say, farmers lobby for agricultural subsidies, or other nonprofit groups lobby for income or property tax exemptions. Given a voice in politics, it need not be given exit. So long as courts are weak on Establishment Clause enforcement, they ought also be reluctant to grant free exercise exemptions.

Justice Scalia's stance on Religion Clause interpretation cannot be explained entirely satisfactorily as an instance of his adherence to majoritarianism, his preference for rules over standards, or his efforts to achieve consistency with other substantive constitutional law doctrines. Given the problems with such religion-neutral explanations, it would seem fair to conclude that his stance reflects, at least implicitly, a specific vision of religion and religious politics. In this view, religion is assimilated into the give and take of modern political life.

This vision of religion is not one that the Framers would have recognized. And it may not be a view of religion that religionists ought to endorse. This view assumes that religion will have a relatively benign role in politics. On this view, a little bit of accommodation here and there, or a little bit of school prayer, is not going to hurt the body politic. Religion is not a fearsome force that government need keep at bay.

Such a vision of religion might be a good policy under certain assumptions. Viewing religion as a kind of benign, garden-variety interest group might help to curb religious rivalries that tear societies apart. If one views being a Catholic or Protestant or Muslim or Jew as little different from being a Kiwanis or Elk or Jaycee, or a Republican or a Democrat, it might help us avoid becoming Beirut or Belgrade or Belfast – places where religion determines people's entire life prospects and locks them in ancient tribal animosities.

But such a view of religion does not much resemble the one that the Framers had in mind. At least one of the principal reasons for the founding was escape from religious persecution in regimes where religious differences were taken very seriously. Thus the separationist and accommodationist positions, which favor strong free exercise exemptions, are arguably more loyal to the original intent of the Framers than Justice Scalia's assimilationist position, because they recognize that religion has a different force from other kinds of interests, and thus commands a different kind of loyalty. After all, the engagement of religion in lobbying activity might lead otherwise disparate sects to find their

least common denominator – the overlapping consensus of their religious views – thus diluting religion and diluting the role it plays in individual lives.[48]

Justice Scalia's assimilationist approach thus might have virtues, but fidelity to the original intent is not one of them. Whether or not it is a good idea to be see religion as just another interest group – to let it win in politics when it can, but not plead for mercy from courts if it loses – it is not the one truest to our history.

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[48] *See* Kathleen M. Sullivan, *God as a Lobby: The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion*, 61 U. CHI. L. REV. 1655, 1668-69 (1994) (book review).

Full and Equal Rights of Conscience

Aviam Soifer*

"By superficial and purposive interpretations of the past, the Court has dishonored the arts of the historian and degraded the talents of the lawyer."[1]

Thus did Mark DeWolfe Howe – generally renowned for his graciousness – begin his famous series of lectures reviewing the United States Supreme Court's treatment of the social and intellectual history of church and state. The Court's decisions since the 1965 publication of *The Garden and the Wilderness* make Howe's critique seem understated.

Despite a flood of illuminating and directly relevant scholarship about religion in the last decade,[2] the Supreme Court now has inserted significant

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* Professor of Law, Boston College Law School. It is a genuine pleasure to be included in this exceptionally strong symposium. My gratitude at being invited is increased considerably because this helps me to continue my association, at least symbolically, with the extraordinary feeling of *'ohana* within the W.S. Richardson School of Law. This engaged group of diverse students, faculty, staff, and alumni also know how to welcome visitors warmly and well, as they did throughout my sabbatical year. They also taught my family and me a great deal about community, for which we are most grateful.

I also would like to thank my fine research assistants, Meredith Geller and George Linge; Nancy Rosenblum, in particular, as well as all the others present at the initial conference at Brown University from which this paper grew; the participants in the Harvard Law School Faculty Workshop who responded generously when I presented an early draft; and the very helpful staff of the *University of Hawai'i Law Review*.

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[1] MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY 4 (1965).

[2] *See, e.g.*, ARLIN M. ADAMS & CHARLES J. EMMERICH, A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGION CLAUSES (1990); BETTE NOVIT EVANS, INTERPRETING THE FREE EXERCISE OF RELIGION: THE CONSTITUTION AND AMERICAN PLURALISM (1997); JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? (1997); THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM (Merrill D. Peterson & Robert C. Vaughan eds., 1988); NANCY ROSENBLUM, MEMBERSHIP AND MORALS: THE PERSONAL USE OF PLURALISM IN AMERICA (1998); Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477 (1991); Philip Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992) [hereinafter Hamburger, *Constitutional Right*]; Philip Hamburger, *Equality and Diversity: The Eighteenth-Century Debate About Equal Protection and Equal Civil Rights*, 1992 SUP. CT. REV. 295 (1992) [hereinafter Hamburger, *Equality and Diversity*]; Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106 (1994); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990); Ira C. Lupu, *Where Rights Begin: the Problem of Burden on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1988); Michael

new ahistorical "synthetic strands into the tapestry of American history."[3] The interplay of *Employment Division, Department of Human Resources v. Smith*[4] and *City of Boerne v. Flores*,[5] for example, suggests a current Court majority that disregards not only history in general, but also in particular, as well as the Court's own precedents and the usual demands of internal consistency.

After a majority of the Justices relegated religious freedom claims to the majoritarian political process in *Smith*, the Court in *Boerne* invalidated one of the clear products of that process – the Religious Freedom Restoration Act, passed after extensive hearings by a nearly-unanimous Congress. The Court acted in the name of abstract versions of separation of powers and federalism. As in other recent opinions about religion, the Court in *Smith* and *Boerne* relied on tub-thumping about its responsibility in guarding constitutional turf, a key component within the Court's proclaimed role as guarantor of neutral laws of general application. Instead of close consideration of particular disputes in the context of living communities, the Court has adopted a breathtakingly broad New Formalism. With a few possible exceptions,[6] the fundamental premise of the *Smith/Boerne* approach is that religious matters may be left to majoritarian political processes, but only at the state level.

Critical to this New Formalism maneuver is concern with jurisdiction, an abstract construct that is used and abused most comfortably by those with legal

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McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990); David C. Williams & Susan H. Williams, *Volitionism and Religious Liberty*, 76 CORNELL L. REV. 769 (1991).

[3] HOWE, *supra* note 1, at 4.

[4] 494 U.S. 872 (1990) (stating that Oregon need not demonstrate compelling state interest to deny unemployment benefits to members of Native American Church for use of peyote in religious ceremony). I should mention that I co-authored an amicus curiae brief for the American Civil Liberties Union before the Supreme Court in this case.

[5] 521 U.S. 507 (1997) (invalidating Religious Freedom Restoration Act of 1991, in which Congress attempted to return to pre-*Smith* requirement that government demonstrate compelling state interest and narrowly tailored regulation to overcome legitimate Free Exercise Clause claim).

[6] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (invalidating local "religious gerrymander" banning ritual animal sacrifice as violation of "fundamental nonpersecution principle" of First Amendment). To meet the test announced in *Lukumi*, however, there must be convincing proof of an overt governmental effort to "infringe upon or restrict practices because of their religious motivation." *Id.* at 533. The *Smith* decision leaves a further possible future opening for governmental intrusions impinging upon what the Court might consider "hybrid" constitutional rights, i.e., rights that combine, for example, freedom of expression with free exercise. If this judicial innovation is unduly complicated and formalistic, it is also not at all convincing as a way to distinguish key precedents such as *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), from *Smith*. Ironically, the Court's sweeping proclamations in *Boerne* seem, in turn, to be anchored largely on defensiveness about the brave new constitutional world proclaimed in *Smith*.

training. Decisions couched as questions of jurisdiction allow judges to claim that they are the exclusive gatekeepers, patrolling essential binary choices between the states and the federal government and among the separate branches of the federal government. Neither the lower federal courts nor Congress may continue to require that state and local authorities justify general intrusions on religious freedom, so long as any such limitations are unintended or not aimed specifically at religious belief and conduct.

In the name of the basics of constitutionalism, judges now purport to maintain a different kind of wall of separation, a Great Wall high above the messy intricacies of daily life. Our marblecake of federalism[7] – a mishmash of intersecting federal, state, and local powers and the intricate crisscrossing by private individuals with multiple memberships, loyalties, and moral commitment – can hardly be discerned from the judicial watch post high atop the Great Wall. This Great Wall eventually may separate nothing lasting, and it could well become the functional legal equivalent of a tourist attraction. For the moment, however, the new Great Wall casts a giant shadow in constitutional law.

To be sure, the very complexity of contemporary life underscores how important it is for some legal order amid the chaos, and for what at least appear to be final decisions about vexing conflicts.[8] Moreover, any formal legal system – and for that matter any regimen of norms, customs, and usages whether formal or not – must rely upon jurisdictional assumptions at or near its foundation.[9] Just as most modern lives involve shifting and repeatedly negotiated boundaries of loyalty, membership, and kinship, however, most legal disputes occur in the shadow of at least several different normative sources.

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[7] Morton Grodzins apparently first offered the image of American federalism as a "chaotic marble cake" in response to cleaner, less realistic "layer cake" metaphors. *See* Morton Grodzins, *Centralization and Decentralization in the American System*, *in* A NATION OF STATES: ESSAYS ON THE AMERICAN FEDERAL SYSTEM 1, 4 (R. Goldwin ed., 1963).

[8] This helps explain what was particularly noteworthy about the Court's innovative use of the Federal Rules of Civil Procedure Rule 60 (b)(5) in *Agostini v. Felton*, 521 U.S. 203 (1997), as it overruled several Establishment Clause decisions about aid to sectarian schools for remedial programs. The *Agostini* majority held that under that Rule, which is couched in terms of relief from a decision "no longer equitable," parties challenging a Supreme Court precedent were entitled to relief from a District Court injunction on the grounds that the precedent might be and should be overruled. *See id.*

[9] The biblical command, "You shall not displace your neighbor's boundary-marks which your forerunners have set up," nicely illustrates the concern, for example, as well as some of the basic conservatism of customary legal systems. *Deuteronomy* 19:14. As the Hellenist commentator Philo explained, "For customs are unwritten laws, the decisions approved by men of old, not inscribed on monuments nor on leaves of paper which the moth destroys, but on the souls of those who are partners in the same citizenship." JAMES L. KUGEL, THE BIBLE AS IT WAS 512 (1997).

We have traveled a great distance from vigilance concerning "a gap in the hedge or wall of separation between the garden of the church and the wilderness of the world."[10] Indeed, there have been numerous recent attacks upon the very metaphor of a wall of separation, now generally attributed to Thomas Jefferson without acknowledgment of its earlier appearance in the radical religious thought of Roger Williams. It has become almost a standard trope to pin Jefferson to the "wall of separation" and then to proclaim, for example: "[i]t is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years."[11]

I. TENDING ONE'S GARDEN: "FULL AND EQUAL RIGHTS OF CONSCIENCE"

The Court's lack of concern for the fragility of both hedges and walls protecting full freedom of conscience suggests a pressing commitment to assert the Court's own homogenizing authority. At such a time, Candide's famous advice to withdraw and to tend one's own garden[12] is enticing, but dangerous. Instead of quiet acceptance of the New Formalism, at least for the time being, it is worth pondering Mark DeWolfe Howe's clear warning: "the importance of the Court's work lies not merely in the results of its deliberations but in the processes by which it reaches them. The complexities of history deserve our respect."[13]

What is most striking about the New Formalism is how rigidly statist the current Court turns out to be. This Court is fundamentally statist in a double sense: in its willingness to defer to government decision-makers generally over claims anchored in religious beliefs,[14] and in its enthusiastic embrace of the

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[10] Roger Williams, *Mr. Cotton's Letter Lately Printed, Examined and Answered*, *in* PERRY MILLER, ROGER WILLIAMS: HIS CONTRIBUTION TO THE AMERICAN TRADITION 89, 98 (Atheneum 1953) (reprint 1970) (1644).

[11] Wallace v. Jaffree, 472 U.S. 38, 91-92 (1985) (Rehnquist, J., dissenting). Then-Justice Rehnquist's choice of a 40-year timeframe is somewhat curious. Clearly, however, he very much dislikes the results of decisions during these 40 years, particularly given that his opening quote of the "wall of separation" metaphor is from *Reynolds v. U.S.*, 98 U.S. 145, 164 (1879), a case more than a century old. To Rehnquist, Jefferson "would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment." *Wallace*, 472 U.S. at 91-92 (Rehnquist, J., dissenting). We will return to the role of Jefferson and James Madison, and the issue of detached observers, shortly.

[12] *See* VOLTAIRE, CANDIDE 120 (Lowell Bair, trans., Bantam Books 1959).

[13] HOWE, *supra* note 1, at 174, 176.

[14] The Court emphasized and relied upon what it termed "internal government matters" in *Lyng v. Northwest Indian Cemetery Association*, 485 U.S. 439, 448 (1988), and *Bowen v. Roy*, 476 U.S. 693, 699-700 (1986). For a powerful critique, see Williams & Williams, *supra* note 2.

power of states *qua* states to regulate and even to penalize religious action and belief. What is even more startling, however, is how often the Court's recent decisions seek to chop through the Gordian knots of Free Exercise and Establishment Clause interpretation. Sweeping initial premises and simplified binary choices now dominate. These decisions are hardly true to text, precedent, history, or even logic, but the demands of the perceived metes and bounds of formal neutrality rule the day.

This essay does not claim that we are firmly bound by the Framers' original intent, even were we able to discern it. This is so whether or not those present at the creation – whenever that was and whoever they were – intended to bind the future with their words or intentions.[15] Instead, by briefly examining a largely overlooked strand of intellectual and social history concerning a guarantee of full rights that directly connects texts surrounding the First Amendment to texts surrounding the Fourteenth Amendment, I seek to illustrate how the formal neutrality desperately sought by the current Court begins to seem much more the problem than part of the solution to legal controversies about religion.

Attention to historical nuances emphasizes the importance of multiple perspectives and the need for sensitivity to different contexts within the realm of freedom of conscience. The approach taken in this essay is quite different from the current fad for pronunciamentoes – in the name of neutrality, detachment, and objectivity – that now dominate judicial discourse. Stories of origins have great significance in any society and, for that matter, for individuals and families, too.[16] Rather than ignoring such elemental accounts, I suggest that we should attend to them and their histories with care. This

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[15] *See, e.g.*, JACK RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 3-34, 339-68 (1996); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1984). It may be relevant that, at the time of the American Revolution, church membership and even church attendance in the United States was remarkably low. Tom Paine was a runaway best-selling author – despite or perhaps in part because of his scathing attacks on religion, and the population of non-Protestants was infinitesimal – 25,000 Roman Catholics and 2,000 Jews – within a white population beginning to approach 3 million people. *See* JAMES MACGREGOR BURNS, THE VINEYARD OF LIBERTY 7 (1982). As Burns put it, "From the start the colonies had been alive with religious controversies, doctrinal disputes, sectarian splits and secessions, revivalism and evangelism, the importation of new creeds and dogmas from Europe, along with their carriers – alive also with rationalist, deist, and atheistic counterattacks on religion." *Id.* at 8. Much changed, of course, by the end of the Civil War, yet our filiopietistic approach to "the Framers" has all but blinded us to fundamental changes not only in the structure and relationships within the constitutional document, but within society. *See* CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM (1997); CHARLES MILLER, THE SUPREME COURT AND THE USES OF HISTORY (Simon and Schuster 1972) (1969).

[16] Such stories are "how one generation tells another how the future shapes the present out of the past." MILNER BALL, CALLED BY STORIES 6 (2000) (quoting Paul Lehmann).

different historical vector contrasts sharply with the current Court's freeze-dried version of Framers' intent.

If we were to grapple with early commitments to "freely and fullye have and enjoy his and their owne judgments and consciences, in matters of religious concernment,"[17] for example, or if Madison's proposed guarantee of "full and equal rights of conscience"[18] were to be taken seriously, it would be much more difficult to propagate the New Formalism's intransigent commitment to statism. Instead, we would have to consider specific cases in context while heeding the perspectives of those whose beliefs and actions are protected by the Free Exercise Clause; particularly because, in the words of Justice Jackson, "freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."[19] Let me explain.

II. BURDENS AND HISTORY: "THE DUNG HEAPE OF THIS EARTH"[20]

A. Origins

Roger Williams was extraordinary. A generation ago, Williams's role as the founder of Rhode Island who led the little colony to unprecedented toleration for religious dissent seemed quite significant, and Howe, Perry Miller, and Edmund S. Morgan provided accessible detail about Williams's ideas and actions. Yet today, hardly anyone seems to know or care that Williams actually forged toleration out of his deep religiosity and his unyielding belief in predestination.

Massachusetts Bay Colony, populated largely by Puritan dissenters, actually went further than had any other government in the western world in separating church and state, yet Roger Williams's brand of separatism proved too radical

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[17] Office of the Rhode Island Secretary of State, RHODE ISLAND CHARTER OF 1663, 1996.

[18] 1 ANNALS OF CONG. 486 (Gales & Seaton eds., 1789) (Madison's proposal for what became the First Amendment). There are two printings of the first two volumes of the *Annals of Congress*. This article cites to the 1834 "Gales & Seaton" edition.

[19] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[20] EDMUND S. MORGAN, THE PURITAN DILEMMA 130 (1958). When John Winthrop urged Roger Williams to consider whether everyone else could be wrong except Williams himself as Williams pursued the logic of his separatist beliefs, Williams urged Winthrop to join him in splendid isolation: "[A]bstract yourself with a holy violence from the Dung heape of this earth." *Id.* Williams's views on the need for purity in the Church had become quite extreme. It was at this point that Williams "having, a little before, refused communion with all, save his own wife," according to Winthrop, decided that "now he would preach to and pray with all comers." *Id.* at 131.

for Massachusetts. Williams was banished and headed south in the dead of winter, 1635-36.[21]

It was indeed a radical move for Williams to assert that the link between church and state had been improper from the start and was a grave disservice to Christ. When Constantine adopted Christianity, Williams argued, "then began the great Mysterie of the Churches sleepe, the Gardens of Christs Churches turned into the Wildernesse of Nationall Religion, and the World (under Constantines Dominion) to the most unchristian Christendome."[22] To Williams, God's true religion could and would take care of itself. It should not be defended with anything but spiritual weapons.

"By accepting the alleged help of the temporal sword," Williams believed, "a church proclaimed itself false."[23] In following his radical ideas about the role of Christ to their logical conclusions, Williams severed not only the connection between God and the established Church, but also the nexus between God and secular government. The theory of the divine right of kings that James I developed during Williams's lifetime partially as a bulwark against Roman Catholic hierarchical claims was but a logical extension of the overlapping authority of church and state that permeated English life. Williams liked to cite his own banishment from Massachusetts to emphasize the wrongheadedness of any such use of secular power for sectarian ends.

Given Williams's own experiences, together with the developing role of Rhode Island as a haven for dissenters, it is hardly surprising that when the colony finally procured a royal charter from Charles II, protection for both "*free*" and "*full*" enjoyment of judgment and conscience – individual and collective – had become a central concern. The 1663 Charter, which had been obtained primarily through the efforts of the Baptist Dr. John Clarke, to assure "full liberty, in religious concernments," even trumped contrary law, custom, or usage, at least to the point that the exercise of free and full liberty of conscience might interfere with public peace or cause civil injury or disturbance to others.[24] The Charter thus formalized Williams's evocation of a long-

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[21] Edmund S. Morgan offers an admirably clear and succinct account of the complicated series of confrontations between Massachusetts Bay governmental and religious authorities. *Id.* at 115-33.

[22] EDMUND S. MORGAN, ROGER WILLIAMS: THE CHURCH AND THE STATE 96 (1967) (quoting Roger Williams).

[23] *Id.* at 98. Thus, Williams anticipated Kathleen Sullivan's position that on current church-state issues "[w]e should have more faith in faith." Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 223 (1992).

[24] From the Rhode Island Charter:

> [T]hat noe person within the colonie, at any time hereafter shall be in any wise molested, punished, disquieted or called in question for any differences in opinions in matters of religion . . . but may from time to time, and at all times here after, freelye and fullye have and engage in his and their own judgments and consciences, in matters of religious

standing Christian tradition that differentiated between two tables of the Decalogue: the first four commandments were taken to refer to duties to God, the fifth through tenth to duties owed to fellow human beings. The first table was religious; only the second table was properly subject to legitimate civil coercion. From his own firm religious position, therefore, Roger Williams developed the crucial importance of a sharp separation between the commands of church and state.

Though sorely pressed at times (particularly by the troublesome radical views and actions of Quakers), Rhode Island thus began a tradition of religious tolerance for which the colony soon became notorious. A leading legal scholar recently claimed that "[i]t is unlikely that the Rhode Island provisions had much direct influence on subsequent developments of the free exercise principle."[25] Yet the very words of the Rhode Island Charter – particularly its

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concernments . . . not useing this libertie to licentiousnesse and profanenesse, nor to the civil injurye or outward disturbance of others.

2 CHARLES M. ANDREWS, THE COLONIAL PERIOD OF AMERICAN HISTORY 46 (1936). After quoting this portion of the Rhode Island Charter in her dissent in *City of Boerne v. Flores*, 521 U.S. 507, 552, (1997), Justice O'Connor made the point that other colonies "similarly guaranteed religious freedom, using language that paralleled that of the Rhode Island Charter of 1663." *Id.* (O'Connor, J., dissenting). Concurring, Justice Scalia countered by emphasizing the "'provisos' that significantly qualify the affirmative protections" granted in the early "'free exercise' enactments." *Id.* at 539 (Scalia, J., concurring). Scalia relied primarily on Hamburger, *A Constitutional Right*, *supra* note 2, at 915, and on Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 591, 624 (1990). Neither of these scholars dealt with the issues presented by the "full" guarantee.

[25] McConnell, *supra* note 2, at 1427. McConnell relies primarily on WILLIAM GERALD MCLOUGHLIN, NEW ENGLAND DISSENT: THE BAPTISTS AND THE SEPARATION OF CHURCH AND STATE, 1630-1833 (1971). McConnell adds, however, that the language of the Rhode Island Charter "had a second and third life elsewhere in the colonies," and that "the substance of these early provisions later re-emerged as the most common pattern in the constitutions adopted by the states after the Revolution." McConnell, *supra* note 2, at 1427. It is difficult to prove or disprove "direct influence," of course: and the standard McConnell invokes – "subsequent developments of the free exercise principle" – defies easy calibration. Moreover, leaders in the Great Awakening of the 1740s and then again within the successful activism of Baptists in the Revolutionary era rediscovered Williams and celebrated the experiments in religious freedom in Rhode Island and Pennsylvania. Isaac Backus, for example, "utilized also the long-forgotten arguments of Roger Williams to defend the doctrines of separation," and these were arguments which Backus "knew thoroughly," according to his biographer, who claims in his preface that Backus merits comparison with Williams. WILLIAM GERALD MCLOUGHLIN, ISAAC BACKUS AND THE AMERICAN PIETISTIC TRADITION 124, 191, xii (1967) [hereinafter MCLOUGHLIN, ISAAC BACKUS].

Some experts have emphasized the broad familiarity of those at the Constitutional Convention with the religious freedom guarantees of Rhode Island and Pennsylvania, *see, e.g.*, LEO PFEFFER, CHURCH, STATE, AND FREEDOM 88 (1953); 1 ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES 231 (1964). Others have emphasized a direct link between a long-standing Christian tradition and Williams's radical ideas as to how to make freedom of

guarantee of protection for manifestations of free and full conscience, including actions as well as beliefs – began to recur in other texts. Moreover, toleration proved difficult to contain within a New World full of relative diversity, generally anxious for more settlers, and affording numerous avenues of escape.[26]

B. Echoes: Jefferson and Madison

Extensive recent scholarship has been devoted to the history and meaning of the Free Exercise Clause, tracing in particular its roots in the vehement, even revolutionary, controversies surrounding religious freedom and the disestablishment of the Church of England and its successors in Virginia.[27] Indeed, we have been treated to an unusually direct clash within the Court over who or what constitutes the relevant history for the First Amendment's

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conscience real in a new world literally surrounded by the wilderness. According to a religious studies expert, for example, the Jefferson-Madison "one-two punch on behalf of religious freedom in the 1780s" had its "strongest connection . . . to the 'free church' strand of the tradition, represented most characteristically by Roger Williams." David Little, *Religion and Civil Virtue in America: Jefferson's Statute Reconsidered, in* THE VIRGINIA STATUTE, *supra* note 2 at 249. Even Perry Miller, who asserted in the early 1950s that Williams "exerted little or no direct influence on theorists of the Revolution and the Constitution," went on to explain that "as a figure and a reputation he was always there to remind Americans that no other conclusion than absolute religious freedom was feasible in this society. . . . As a symbol, Williams has become an integral element in the meaning of American democracy, along with Jefferson and Lincoln." PERRY MILLER, ROGER WILLIAMS: HIS CONTRIBUTION TO THE AMERICAN TRADITION 254-55 (1953).

[26] For example, as William Penn set about to create a haven for Quakers in the New World, who at the time were still being banished, whipped, and occasionally hung in Massachusetts, the initial laws of Pennsylvania unsurprisingly emphasized freedom of conscience. Yet in 1705, the Pennsylvania General Assembly adopted a new law concerning "Liberty of Conscience" guaranteeing that, in addition to not being molested or prejudiced for conscientious persuasion, any of the populace could henceforth "[f]reely and fully enjoy his or her Christian liberty in all respects, without molestation or interruption." THE EARLIEST PRINTED LAWS OF PENNSYLVANIA, 1681-1713 36 (John D. Cushing ed., 1978).

[27] The best recent account of the history of the Free Exercise Clause is McConnell, *supra* note 2. For a careful critique of McConnell, see Hamburger, *Constitutional Right, supra* note 2, and for McConnell's reply see Michael McConnell, *Accommodation of Religion: An Update and A Response to the Critics*, 60 GEO. WASH. U. L. REV. 685 (1992). These and other scholars have not much heeded earlier important work such as that by Leo Pfeffer and Mark DeWolfe Howe. There are numerous gems concerning the antecedents, context, and conflicts over ideas of religious freedom in the late eighteenth century within a fine series of essays published for the bicentennial of the Virginia Statute for Religious Freedom, written by Thomas Jefferson in 1777 and pushed through the thickets of Virginia politics by James Madison in 1785. THE VIRGINIA STATUTE, *supra* note 2.

Religion Clauses.[28] Even the Library of Congress has been pulled into the fray.[29]

This is surely not the place to respond systematically to the sustained assault on the "wall of separation" metaphor launched in recent years by "conservative" Justices and commentators,[30] though some refutation beyond Justice Souter's careful and quite gentle response seems in order. Perhaps the most striking recent revisionist effort has been the attempt to drive apart the thought of Jefferson and Madison, and thereby to lower or poke holes in what is alleged to be Jefferson's more insistent "wall of separation" by emphasizing Madison as more prominent for constitutional purposes and as more inclined to favor religion.[31] This purported division between Jefferson and Madison seems dubious at best.[32]

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[28] *Compare* Wallace v. Jaffree, 472 U.S. 38, 91 (1985) (Rehnquist, J., dissenting), *with* Lee v. Weisman, 505 U.S. 577, 609 (1992) (Souter, J., concurring). See also the competing opinions of Justices Thomas, concurring, and Justice Souter dissenting – joined by Justices Stevens, Ginsburg, and Breyer – in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995).

[29] *See* Diego Ribadeneira, *New Debate Flares Over Jefferson's View of Church and State*, BOSTON GLOBE, Aug. 1, 1998, at B2.; Laurie Goldstein, *Fresh Debate on 1802 Jefferson Letter*, NEW YORK TIMES, Sept. 10, 1998, at A20 (reporting letter from two dozen historians criticizing paper by James Huston, chief of the Library's manuscript division, about Thomas Jefferson's 1802 Letter to the Danbury Baptist Association that contains the famous "wall of separation" metaphor).

[30] *See, e.g., Wallace*, 472 U.S. at 91 (Rehnquist, J., dissenting) (building upon an argument made in a brief filed on behalf of Douglas T. Smith and other intervenors in the *Wallace* case); *Rosenberger*, 515 U.S. at 852 (Thomas, J., concurring). *But see, e.g.*, Justice Souter's reply *id.* at 868-74. This campaign is said to contrast to that of "ideological plaintiffs," who insist on a strict separation approach to school funding issues. For a particularly irascible example of the argument, see RICHARD E. MORGAN, DISABLING AMERICA: THE "RIGHTS INDUSTRY" IN OUR TIME 22-45 (1984). *See also* Glendon & Yanes, *Structural Free Exercise, supra* note 2, at 482 (1991).

[31] Michael McConnell, for example, insists on the importance of "the contrasting positions of Jefferson and Madison regarding the religion issue." McConnell, *supra* note 2, at 1449. He associates Jefferson with Locke, and with an "Enlightenment-deist-rationalist stance toward religious freedom." *Id.* at 1452. McConnell claims that, by contrast, Madison had a "more affirmative stance toward religion" and a "more generous vision of religious liberty" that "more faithfully reflected the popular understanding of the free exercise provision that was to emerge both in state constitutions and the Bill of Rights." *Id.* at 1453, 1455.

[32] *See, e.g.*, JACK RAKOVE, JAMES MADISON AND THE CREATION OF THE AMERICAN REPUBLIC 14 (1990); Dumas Malone, *The Madison-Jefferson Friendship, in* JAMES MADISON ON RELIGIOUS LIBERTY 303, 304 (Robert S. Alley ed., 1985) ("The two men may not have been entirely consistent about other forms of freedom, although they were powerful advocates of them, but on religious freedom they were absolutely consistent."); ADRIENNE KOCH, THE GREAT COLLABORATION 30, 49 (1950). While those who would divide the two Virginians stress that Jefferson derived his ideas from John Locke, other experts note that John Locke

> was not merely a religious man. He was a master theologian with his own view of revelation and its exposition, with his own very clear, very moderate, very persuasive

It is helpful first to take a step back: As Thomas Jefferson grudgingly awaited his first and perhaps most noteworthy brush with greatness in Philadelphia in the late spring and summer of 1776, he could hardly contain his frustration at being obliged to be away from Virginia while a new Virginia Constitution was in the works. Failing in his effort to be recalled, Jefferson prepared and sent three draft constitutions to the convention, but it remains unclear when his drafts actually arrived. It is clear, however, that Jefferson's third draft – sent via George Wythe and Richard Henry Lee – reached the delegates before they had formally finished their work, and parts of it were added as a preamble to the Virginia Constitution, albeit not enough of it to quell Jefferson's serious doubts about the constitution as it was enacted.

For our purposes, however, it is striking that Jefferson's draft echoed Rhode Island and Pennsylvania when it provided: "[a]ll persons shall have full and free liberty of religious opinion; nor shall any be compelled to frequent or maintain any religious institution."[33] The similarity is hardly surprising. Lawyers tend to look to what others have done in similar situations, and Jefferson was exceptional for many things, including his dogged willingness to do extensive historical research and to take pains about his writing, often invoking phrases he had heard or read elsewhere.[34]

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vision of the essentials of Christianity free from the dogma and the controversies, the elaborations, and, as he thought, the quibbles that had marred that exposition up to his time. That he constantly appeals to reason and makes reasonableness his criterion should lead no one to suppose that he is a rationalist in the sense of a critic of Christianity superior to its influences.

JOHN T. NOONAN, THE BELIEVER AND THE POWERS THAT ARE 76 (1987). Moreover, an earlier attack on the "wall of separation" approach criticized Madison precisely because of the closeness of his thought to that of John Locke. *See, e.g.*, John Courtney Murray, *Law or Prepossessions?*, 14 LAW & CONTEMP. PROBS. 23, 29 (1949). For the initial disagreement between Jefferson and Madison about clergy serving in public offices, see *McDaniel v. Paty*, 435 U.S. 618, 624 (1978). Madison eventually convinced Jefferson that clergymen should not be banned on grounds both of protecting free exercise of religion and because "it violate[s] another article of the plan which exempts religion from the cognizance of Civil power." 11 PAPERS OF JAMES MADISON 288 (Robert A. Rutland & Charles F. Hobson eds., 1977).

[33] THE VIRGINIA STATUTE, *supra* note 2; *see also* NOONAN, *supra* note 32 at 76.

[34] *See* PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE (1997); Thomas E. Buckley, S.J., *The Political Theology of Thomas Jefferson*, *in* THE VIRGINIA STATUTE, *supra* note 2, at 85. Jefferson had no doubt that "[i]f is *unalienable right* . . . is religious," as he put the point in his cryptic debate notes for a speech in the Virginia House of Delegates in the Fall of 1776. 1 THE PAPERS OF THOMAS JEFFERSON 537 (Julian P. Boyd ed., 1950) (emphasis in original). Philip Hamburger provides a careful, illuminating study of the role of natural rights claims for religious freedom in the context of an ongoing dispute between advocates of equal protection and equal civil rights. *See* Hamburger, *Equality and Diversity*, *supra* note 2. However, Hamburger does not discuss the contemporaneous attention given to the vindication of "full" and "complete" religious freedom.

If anything, however, James Madison sought to go further, though his language was quite similar to what Jefferson proposed. As Madison overcame his shyness in his fight to amend George Mason's proposed language for the Virginia Constitution, Madison suggested the following:

> That Religion or the duty which we owe to our Creator, and the manner of discharging it, being under the direction of reason and conviction only, not of violence or compulsion, all men are *equally entitled to the full and free exercise* of it, according to the dictates of Conscience; and therefore that no man or class of men, ought, on account of religion to be invested with peculiar emoluments or privileges, nor subjected to any penalties or disabilities, unless under colour of religion, the preservation of equal liberty and the existence of the State be manifestly endangered.[35]

Like Jefferson, his trusted ally in the long campaign for religious freedom in Virginia, Madison thus invoked the old Rhode Island "full and free" formula. Madison went further in that he attached the "full and free" guarantee to the exercise of one's reason and conviction – explicitly covering more than did Jefferson's connection of the "full and free" guarantee only to "opinion."[36] Madison also sought to link the new guarantee directly to the demands of equal entitlement. Moreover, for Madison, religion could not be the basis either for favorable emoluments or privileges, or for any penalties or disabilities. The only limitation upon this sweeping Madisonian principle, in fact, was when it was necessary to preserve equal liberty *and* if the existence of the state were otherwise to be "manifestly endangered."[37]

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[35] 1 THE PAPERS OF JAMES MADISON 177 (William T. Hutchinson & William M.E. Rachal eds., 1962) (emphasis added). (I have generally referred back to the Madison Papers whose first volume is cited here, though the series had many different editors since it began in 1962). Madison later went out of his way to annotate in his own hand a printed version of the 1776 enactment, and to claim it emphatically as his own. The editors of the Madison Papers assume that Madison penned what they call this "remarkable footnote" many years later, and that his memory was not entirely accurate. *See id.* at 174-79. There is a similar problem, of course, in the frequent reliance on Madison's notes of the Constitutional Convention – the best source we have – which he edited and did not make available until many decades later. In any event, the version quoted, which the editors consider "a largely meaningless whole," reflects Madison's mature reflection as to what at least he wished he had done as a young man. As illustrated in quotations *infra* notes 36-37, Madison did recall accurately the parts of his contemporaneous 1776 amendments that are directly relevant.

[36] *See id.* at 174. The quotation is from Madison's first proposed amendment, dated between May 29 and June 12, 1776.

[37] Madison's second proposed amendment, which also dates from between May 29-June 12, 1776, would have protected "the free exercise of religion, according to the dictates of conscience, unpunished and unrestrained by the magistrate, unless the preservation of equal liberty and the existence of the State are manifestly endangered." *Id.* at 174-75. It thus somewhat anticipates the "compelling state interest" test, the standard of review used in free exercise cases generally for decades until that standard was rejected in *Smith*. Though much

It is well-known that Madison got his start as a vocal proponent of religious freedom when, as a 22-year-old, he was shocked to discover five or six "well meaning" Baptists in close confinement in the jail in a neighboring Virginia county. In his famous letter to his Princeton friend William Bradford, Madison revealed his "unaccustomed fervor" as he wrote concerning "[t]hat diabolical Hell conceived principle of persecution rages among some and to their eternal Infamy the Clergy can furnish their quota of Imps for such business."[38] Madison early in life thus experienced and viscerally identified with those persecuted for their religious beliefs. Madison's strong reaction – "[t]his vexes me the most of any thing whatsoever"[39] – apparently anchored his lifelong fervor in favor of religious freedom. There may have been political advantages, to be sure, but it is striking that Madison repeatedly demonstrated an unusual ability to understand the demands of various points of view about religion, even when they differed markedly from his own perspective. Empathy with dissenters, for example, helps explain Madison's insistence that government could not incorporate the Episcopal Church, give land to a Baptist Church, or even run the risk of being seduced by the "laudable" motive of supporting the chaplaincy in the armed forces and Congress.[40]

Despite all the recent revisionism, there seems little disagreement as to the central constitutional role played by James Madison. After all, he was the initial proponent of language that, following redrafting, became the text of the First Amendment. Yet there has been little notice of some of the most suggestive wording of the constitutional guarantee as James Madison first proposed it during the First Congress in June 1789.[41] Madison moved to

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has been written in recent years about the breach of the peace limitation on religious freedom, *see, e.g.*, Hamburger, *Constitutional Right*, *supra* note 2, Madison's explicit rejection of that standard as early as 1776 has received little if any notice.

[38] 1 THE PAPERS OF JAMES MADISON, *supra* note 35, at 106.

[39] *Id.*

[40] 1 MESSAGES AND PAPERS OF THE PRESIDENTS 489-90 (J.D. Richardson ed., 1900); *see also* Elizabeth Fleet, *Madison's "Detached Memoranda,"* *in* 3 WILLIAM AND MARY QUARTERLY (3d Series) 559 (1946).

[41] Those who seek to undermine or to breach the "wall of separation" approach to the Establishment Clause emphasize the fact that once, during the War of 1812, Madison invoked God in a presidential proclamation. It seems more telling that Madison several times refused such proclamations on grounds of his fear of religious establishment, and later expressed his great regret that he had abandoned his principles under political pressure during wartime. *See* Lee v. Weisman, 505 U.S. 577, 609 (1992). Madison's 1813 Thanksgiving Proclamation hardly counteracts his long campaign against religious establishment throughout his adult life, just as a stipend to support a religious chaplain to an Indian tribe does not outweigh Jefferson's manifold objections to religious establishment. Such arguments tend to isolate each historical figure at a particular moment and to extrapolate very liberally from some specific deed, rather than to attend to the substantial efforts and great pride these two men invested throughout their lives in the pursuit of freedom of religion.

amend the Constitution as follows: "[t]he civil rights of none shall be abridged on account of religious belief or worship; nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."[42]

Most revealing for our purposes is Madison's proposed guarantee of "*full and equal* rights of conscience." The guarantee reads as absolute. It disallows any pretext or any manner of infringement. This is noteworthy in itself, particularly because this guarantee was not redundant, but rather an addition to the proposal's initial protection against infringement of civil rights on account of religious belief or worship. Still more significantly, however, Madison's phrase "full and equal" encapsulates an approach to freedom that, in its very terms, appears to extend beyond formal equal treatment.

Madison's draft was altered significantly, of course, in the process of becoming the First Amendment that we all know. Yet it is likely that, as Professor McConnell put it, "the deletion of 'full' by the [Select] Committee was no more than stylistic and that the word 'equal' was deleted so as not to

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Those who doubt Madison's rigorous opposition to the establishment of religion, for example, have to explain away his eloquence in his Memorial and Remonstrance, in which Madison invoked the proofs of history in the "American Theatre" that had demonstrated already how much the "equal and compleat liberty" of religion could successfully counter the "malignant influence on the health and prosperity of the state, which was discoverable throughout history whenever the secular arm sought to 'intermeddle with Religion.'" NOONAN, *supra* note 32, at 110. They also must overlook Madison's successful joint venture with Jefferson during which they advocated vigorously on many fronts and persuaded Virginia to adopt its pioneering Statute for Religious Freedom. Ironically, one does not find those who would cast asunder Jefferson and Madison, purporting to be bound by original intent, and who tend to favor states rights and even, at times, to question the application of the First Amendment to the states through the Fourteenth Amendment, mentioning that, on the eve of the Constitutional Convention, Madison favored an approach that would allow "a due supremacy of the national authority, and leave in force the local authorities so far as they can be subordinately useful." Letter to Edmund Randolph, *in* 9 PAPERS OF JAMES MADISON 368 (Robert A. Rutland & William M.E. Rachal eds., 1975). Unlike the James Madison who was author of the Virginia Resolutions protesting the Alien and Sedition Acts of 1798, James Madison in Philadelphia in 1787 fought for a congressional veto over state laws and advocated power in Congress to legislate in all cases when Congress deemed the states incompetent to act. The James Madison who proposed the Religion Clauses in the First Congress that led to the first part of the First Amendment

> conceived this to be the most valuable amendment in the whole list. If there was any reason to restrain the Government of the United States from infringing upon these essential rights, it was equally necessary that they should be secured against State Governments. He thought that if they provided against the one, it was as necessary to provide against the other.

1 ANNALS OF CONG., *supra* note 18, at 755.

[42] 1 ANNALS OF CONG., *supra* note 18, at 755. Madison's proposal and the subsequent cryptic debate and redrafting process are set out usefully in NOONAN, *supra* note 32, at 119-26. These materials, as well as state and other sources, are in McConnell, *supra* note 2.

create a negative inference."[43] It may be sensible, in fact, to discern elements of Madison's guarantee of "full" rights of conscience in the Free Exercise Clause, and to see some of his "equal rights" concern in the guarantee against the establishment of religion. Such an approach would not resolve all the tension between the two clauses, to be sure, but it would bolster a unitary, structural approach to the Religion Clauses.[44] Such an approach wisely echoes Madison's proposal, first made as early as 1776, that provided that fear of a breach of the peace would not provide adequate justification for governmental intrusion on beliefs or actions embedded within the freedom of conscience of an individual or a dissenting religious group.[45]

At the very least, Madison's initial proposal on religious freedom provides relatively clear evidence of this crucial constitutional actor's idea about what would constitute an appropriate guarantee of religious freedom. It is also consistent with the major innovation at the Constitutional Convention that

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[43] McConnell, *supra* note 2, at 1482.

[44] Justice Brennan, concurring in the decision invalidating Bible reading in the public schools, proclaimed, "the role of the Establishment Clause as co-guarantor, with the Free Exercise Clause, of religious liberty. The Framers did not entrust the liberty of religious beliefs to either clause alone." Abington Sch. Dist. v. Schempp, 374 U.S. 203, 256 (1963). For surprising overlapping support for such an integrated approach, compare PFEFFER, *supra* note 25, at 121-24, with Glendon & Yanes, *supra* note 2. Like misery and politics, law and religion seem to make strange bed-fellows. A unified approach – though it is not without internal tension, can be overly abstract, and does entail considerable unpredictability – seems to echo Madison's concerns in his 1785 Memorial and Remonstrance. Madison repeatedly warned that the majority would tend to trespass on the rights of the minority. Thus, for example, he asked rhetorically, "[w]ho does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?" NOONAN, *supra* note 32, at 108. To Madison, it was obvious that "equality . . . ought to be the basis of every law;" and he proclaimed that "[a]bove all are [all men] to be considered as retaining an '*equal* title to the free exercise of religion according to the dictates of Conscience.'" 8 THE PAPERS OF JAMES MADISON 300 (Robert A. Rutland & William M.E. Rachal eds., 1973) (quoting Article XVI of the Virginia Declaration of Rights) (emphasis in original).

[45] It is a commonplace that in the early years of the Republic, one state after another embraced Madison's position, disestablished churches, and began to accommodate the free exercise of religion by dissenters. Thus, Isaac Backus spotted a trend and could proclaim in 1805 that:

> [t]he liberty that [Roger Williams] was for, civil and religious, is now enjoyed in thirteen of the seventeen of the United States of America. No tax for any religious minister is imposed by authority in any of the said thirteen States, and their power is much weakened in the other four.

MCLOUGHLIN, ISAAC BACKUS, *supra* note 25, at 209. The remarkably kinetic quality of legal change within American history is seldom acknowledged by lawyers and judges who tend to seek abstract rules – purportedly established with simple clarity in the past – at a particular frozen moment in order to resolve complex contemporary questions.

eliminated religious qualifications for federal office holders.[46] Madison promised Baptist leaders in Virginia that, if elected to the First Congress, he would do his best for "the most satisfactory provisions for all essential rights, particularly the rights of Conscience in the fullest latitude."[47] Far from being the reluctant dragon portrayed by Justice Rehnquist, Madison became a veritable nag in that first Congress due to his efforts to amend the Constitution.[48]

As Jefferson and Madison discussed whether it was necessary or wise to amend the federal constitution, both repeatedly gave freedom of religion pride of place. These two friends, who characteristically studied past precedent carefully and who mutually delighted in their abilities as wordsmiths, again and again struggled in various venues to protect fundamental principles of religious freedom. In addition to guaranteeing free and equal treatment, both men also explicitly sought to protect *full* freedom of conscience.

III. FULL AND EQUAL IN THE RECONSTRUCTION ERA

As a matter of logic, full protection may be different from equal protection. "Full" implies substantive content – and perhaps some particularized consideration of differences – while "equal" generally is taken to require only

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[46] *See* MORTON BORDEN, JEWS, TURKS, AND INFIDELS (1984). Those who like to emphasize the presence of chaplains in Congress tend not to mention their absence in the Constitutional Convention. When Benjamin Franklin proposed that each session begin with a prayer, his motion was given the silent treatment and defeated by a motion to adjourn. *See* RECORDS OF THE FEDERAL CONVENTION OF 1787, vol. 1, 450-52 (Max Farrand ed., 1966).

[47] Letter from James Madison to the Rev. George Eve (Jan. 2, 1789), *in* 11 THE PAPERS OF JAMES MADISON 404 (Robert A. Rutland & Charles F. Hobson eds., 1977). Madison needed the support of the Baptists to defeat his friendly rival, James Monroe, for a seat in the House.

[48] In his argument from history within his dissent in *Wallace v. Jaffree*, 472 U.S. 38 (1985), then-Justice Rehnquist perceived Madison as "less . . . a dedicated advocate of the wisdom of such measures than . . . a prudent statesman seeking the enactment of measures sought by a number of his fellow citizens which could surely do no harm and might do a great deal of good." *Id.* at 93-94 (Rehnquist, J., dissenting). Rehnquist conceded that Madison was "undoubtedly the most important architect among the Members of the House of the Amendments which became the Bill of Rights," but he insisted without citations that "it was James Madison speaking as an advocate of sensible legislative compromise, not as an advocate of incorporating the Virginia Statute of Religious Liberty into the United States Constitution." *Id.* at 97-98 (Rehnquist, J., dissenting). *But see, e.g.*, DOUGLASS ADAIR, FAME AND THE FOUNDING FATHERS (1974); RAKOVE, *supra* note 15. Madison tried for nearly a month to get the House to consider his proposed amendments, and finally on July 21, 1789 he successfully "begged the House to indulge him in the further consideration of amendments to the Constitution" during what seemed "a moment of leisure." 1 ANNALS OF CONG. *supra* note 18, at 660. *See generally* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS (Neil Cogan ed., 1997).

even-handed process.[49] The equal protection doctrine now centers almost entirely on equal treatment. The "protection" element of the equal protection guarantee has virtually disappeared. Indeed, even unequal treatment is not considered constitutionally problematic unless there has been a showing of discriminatory motive.[50] It is as if the Court has decided that equality has been achieved, albeit at an unspecified magic historical moment, and that now only purposeful deviations from this happy norm need be remedied.[51]

This attitude surely was not and hardly could have been the general approach during and immediately following the Civil War and the liberation of millions of slaves. In addition to the Reconstruction amendments, often rightfully called a Second Constitution, Congress passed statute after statute seeking to provide effective federal protection for the civil rights of the newly-freed slaves and their allies. Again and again, Congress guaranteed "full and equal" benefits of the laws, rights, and access. The story of this sustained congressional effort to ensure that the war's horrific carnage was not in vain has been told in considerable detail elsewhere.[52]

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[49] *See* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990); Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982). For some of the best critical responses to Westen, see R. Kent Greenawalt, *How Empty is the Idea of Equality?*, 83 COLUM. L. REV. 1167 (1983); Kenneth Simons, *Equality as a Comparative Right*, 65 B.U. L. REV. 387 (1985); Anthony D'Amato, Comment, *Is Equality a Totally Empty Idea?*, 81 MICH. L. REV. 600 (1983). Westen responded to his critics in several articles, and then published PETER WESTEN, SPEAKING OF EQUALITY: AN ANALYSIS OF THE RHETORICAL FORCE OF EQUALITY IN MORAL AND LEGAL DISCOURSE (1990). *See also* Hamburger, *Equality and Diversity*, *supra* note 2.

[50] *See* Washington v. Davis, 426 U.S. 229 (1976); Personnel Admin. of Mass. v. Feeney, 442 U.S. 256 (1979).

[51] For a clear description and cogent critique of this approach in the realm of public policy discourse, see DEBORAH STONE, POLICY PARADOX: THE ART OF POLITICAL DECISION MAKING (1997). I tried to put the Court's sanguine doctrinal approach into a larger historical and constitutional context in the chapter, *Involuntary Groups and the Role of History in American Law*, *in* AVIAM SOIFER, LAW AND THE COMPANY WE KEEP 127-49 (1995).

[52] *See, e.g.*, ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION (1988); HAROLD M. HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875 (1982); LEON F. LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY (1979); JAMES M. MCPHERSON, ABRAHAM LINCOLN AND THE SECOND AMERICAN REVOLUTION (1990); WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE (1988). My efforts to detail these developments include Aviam Soifer, *Status, Contract, and Promises Unkept*, 96 YALE L. J. 1916 (1987) and Aviam Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History*, 54 N.Y.U. L. REV. 651 (1979) [hereinafter Soifer, *Protecting Civil Rights*]. *See also*, for example, Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L. J. 507 (1991); Earl M. Maltz, *The Concept of Equal Protection of the Laws – A Historical Inquiry*, 22 SAN DIEGO L. REV. 499 (1985).

For our purposes, it is significant enough that the 39th Congress – the very body that drafted and passed the text that was declared ratified in 1868 as the Fourteenth Amendment we know today – adopted the Civil Rights Act of 1866. Congress based this statute on its new enforcement power as provided by Section 2 of the Thirteenth Amendment. Indeed, the issue of Congress's authority was clearly joined when President Andrew Johnson vetoed the bill, and Congress overrode a presidential veto on a major piece of legislation for the first time in its history.

The 1866 Civil Rights Act directly rejected the *Dred Scott* decision even more forcefully than the Religious Freedom Restoration Act of 1993 ("RFRA") rejected the *Smith* decision. The 1866 Act began: "[t]hat all persons born in the United States and not subject to any foreign Power, excluding Indians not taxed, are hereby declared to be citizens of the United States."[53] According to Congress, "such citizens of every race and color" were to be guaranteed a list of enumerated legal rights "without regard to any previous condition of slavery or involuntary servitude."[54] Moreover, these new citizens now were promised the same right "to *full and equal* benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens."[55]

Extensive Congressional hearings had emphasized the quotidian horrors under the Black Codes, as well as numerous blatant atrocities and failures to intervene by state and local authorities in the South. The 39th Congress therefore found it necessary to act on the federal level. In their view, this was hardly a time for great deference to the wisdom of the Supreme Court – the very people who brought the nation *Dred Scott*. Nor did the 39th Congress believe the country could afford to wait for ratification of the new constitutional amendment it was drafting to make constitutionally permanent the guarantees of the 1866 Act, including the almost verbatim repeat of the Enforcement Clause first constitutionalized in the Thirteenth Amendment.

When the Court struck down RFRA in *Boerne*, it simply ignored this history of congressional power to remedy the deprivation of rights against a background of judicial failure to do so. Congress's bold rejection of *Dred Scott* in the 1866 Civil Rights Act simply cannot be reconciled with *Boerne*'s proclamation of the Court's exclusive authority.[56] Under *Boerne* and its

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[53] Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (current version at 42 U.S.C. § 1981 (1991) and 42 U.S.C § 1982 (1978)); CONG. GLOBE, 39th Cong., 1st Sess. 1857 (1866).

[54] Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (current version at 42 U.S.C. § 1981 (1991) and 42 U.S.C § 1982 (1978)).

[55] Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (current version at 42 U.S.C. § 1981 (1991) and 42 U.S.C § 1982 (1978) (emphasis supplied)).

[56] In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 998 (1992), Justice Scalia, dissenting, joined by Chief Justice Rehnquist and Justices White and

insistently formalistic view of the separation of powers, only the Court could determine that the time was ripe to overrule *Dred Scott*. In fact, as a formal matter, however, the Supreme Court has never overruled its own tragic blunder in that decision. [57]

The *Boerne* Court's crabbed view of Congress's Enforcement Clause power under the Fourteenth Amendment paid no heed whatsoever to historical context. Instead, Justice Kennedy somewhat testily declared for the majority:

> When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.[58]

Purportedly concerned about "vital principles necessary to maintain separation of powers and the federal balance,"[59] *Boerne* forbade Congress to

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Thomas, excoriated his colleagues for their refusal to overturn *Roe v. Wade*, 410 U.S. 113 (1973). He wrote:

> In my history-book, the Court was covered with dishonor and deprived of legitimacy by *Dred Scott v. Sandford*, an erroneous (and widely opposed) opinion that it did not abandon, rather than by *West Coast Hotel Co. v. Parrish*, which produced the famous "switch in time" from the Court's erroneous (and widely opposed) constitutional opposition to the social measures of the New Deal.

Casey, 505 U.S. at 998 (Scalia, J., dissenting) (internal citations omitted).

[57] In his classic work, Don Fehrenbacher quoted dictum from *Downes v. Bidwell*, 182 U.S. 244, 273-74 (1901), to the effect that the Civil War "produced such changes in judicial, as well as public sentiment, as to seriously impair the authority of [*Dred Scott*]." *Id.* Fehrenbacher then observed, however, "[t]his was perhaps as close as the Supreme Court ever came to declaring the *Dred Scott* decision totally overruled." DON E. FEHRENBACHER, THE DRED SCOTT CASE 585-86 (1978). While it generally has been assumed that the post-Civil War constitutional amendments rejected *Dred Scott*, as a formal matter no Supreme Court opinion even has purported to overrule it.

The *Boerne* logic, moreover, does not fit the context in which the 39th Congress passed the 1866 Civil Rights Act and drafted what became the Fourteenth Amendment. The early Reconstruction period was hardly a time of great respect for, or deference to, the United States Supreme Court. As the English historian W.R. Brock observed:

> If one prong of the drive for legislative supremacy was directed against the Executive, the other was necessarily directed against the Supreme Court. The prestige of the Court, with the odium of *Dred Scott* still hanging about it, did not stand high, and the whole question of its political function was brought to a head by the famous case of *ex parte Milligan*.

W.R. BROCK, AN AMERICAN CRISIS 262 (1963). Indeed, it was largely fear of the Supreme Court that led the men of the 39th Congress to try to "constitutionalize" through the Fourteenth Amendment the federal guarantee they had provided in the 1866 Civil Rights Act, based on the Thirteenth Amendment. For a detailed discussion of this point and its context, see Soifer, *Protecting Civil Rights*, *supra* note 52.

[58] City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

[59] *Id.*

alter the difficult burden of proof required in free exercise cases that the Court had newly established in *Smith*.[60] Defining and categorizing this "burden" has been a longstanding and key gatekeeping device in religion cases.[61] In the Religious Freedom Restoration Act, Congress sought to alter the burden of proof and the standard employed by judges so that free exercise rights could be protected beyond overt discrimination or indifference. Appearing quite defensive about its recent *Smith* ruling, however, the *Boerne* majority boldly swept away RFRA, and with it apparently a good deal more of Congress's power to enforce other constitutional rights – and certainly a critical element of the nation's historical commitment to the protection of minority rights.

Good arguments have been made for and against both the wisdom and the constitutionality of RFRA.[62] In the factual context underlying *Boerne*, for example, RFRA raised significant Establishment Clause problems that only Justice Stevens worried about directly. Moreover, RFRA's very breadth – and the fact that the claim made by Archbishop Flores to renovate and expand a church building had substantial implications for zoning power generally – undoubtedly contributed to the *Boerne* result.

It may have been somewhat false labeling for Congress to lay claim to the restoration of religious freedom through RFRA, though the aggressive sweep of Justice Scalia's *Smith* opinion surely made it seem that the rare victories for Free Exercise over the previous several decades were about to be obliterated entirely. Moreover, it is likely that Archbishop Flores would and should have

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[60] Indeed the Court criticized the legislative record behind the Religious Freedom Restoration Act of 1993 ("RFRA") because it "lacks examples of modern instances of generally applicable laws passed because of religious bigotry." *Id.* at 508. This might seem a careless overreading of *Smith*, which never mentioned "bigotry" as necessary to meet the constitutional standard. Yet the *Boerne* Court also criticized the legislative hearings: "It is difficult to maintain that they ["anecdotal evidence" introduced in the hearings] are examples of legislation enacted or enforced due to animus or hostility to the burdened religious practices or that they indicate some widespread pattern of religious discrimination in this country." *Id.* This second-guessing of the legislative process is revealing, particularly because the Court recognized that "[a]s a general matter, it is for Congress to determine the method by which it will reach a decision." *Id.* at 508-09. Protesting much too much in this way suggests considerable defensiveness about the *Smith* decision's departures from settled law. It also indicates how difficult actual proof of a violation of religious freedom will be after *Smith*, notwithstanding *Lukumi*, discussed *supra* note 6.

[61] Lupu, *supra* note 2. Indeed, "[s]ome shifting of burdens is inevitable wherever there is religious liberty." ROSENBLUM, *supra* note 2, at 92.

[62] *See, e.g.*, Christopher L. Eisgruber & Laurence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437 (1994); Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171 (1995); William P. Marshall, *The Religious Freedom Restoration Act: Establishment, Equal Protection and Free Speech Concerns*, 56 MONT. L. REV. 227 (1995); and other articles in this fine Montana Law Review Symposium on RFRA.

lost his case both before RFRA took effect and even under RFRA, had his property dispute gone to trial. Prior to *Smith*, the key nettlesome issue, of course, revolved around deciding when some government action imposed a substantial burden on religious activity – and then, even if a substantial burden were found, determining if some compelling state interest, narrowly drawn, might nevertheless prevail.

The degree of deference thus generally afforded government interests even within the pre-*Smith* universe might not have fit comfortably within the "full and free" guarantees of conscience propounded by Madison and Jefferson. But the *Smith/Boerne* Court's brusque unwillingness to take acts of conscience into account at all – whether or not such acts are religiously based – seems to mark a substantial departure from the bold experimental hopes of the founders' generation. Cloaked in the abstract garb of separation of powers and federalism, the New Formalism rejects much of the painful progress we have made as a nation, at least in part through a kind of constitutional common law construing free exercise. The Supreme Court now seeks to preclude that approach. The Court's new precedents are sure to constrain, at least somewhat, the countless decisions made by individuals and groups throughout the United States who pursue freedom of conscience at least to some degree aware that they operate within the shadow of our law.

It may be useful to recognize how the *Boerne* majority opinion operated simultaneously on three separate, significant jurisdictional levels. First, as already discussed briefly, the Court felt obliged in defense of the *Smith* decision to rebuff emphatically what the Justices perceived to be Congress's intrusion onto turf the Court had staked out exclusively for itself. Second, in the name of the "federal balance," the Court emphasized its enthusiasm in *Smith* for leaving matters of religious accommodation to local and state political processes. Third, *Boerne* also firmly rejected a more personal claim: that religious belief might trump some general laws of neutral application, even when those laws were not "passed because of religious bigotry."[63] A brief separate discussion of each of the three may prove illuminating.

A. "Substantive in Operation and Effect" [64]

To limit Congressional power, *Boerne* promulgated a new constitutional standard of "proportionality and congruence," to be used as the general

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[63] *City of Boerne*, 521 U.S. at 530.

[64] *Id.* at 520. Conceding that the line "is not easy to discern," the Court drew a constitutional boundary between "measures that remedy or prevent unconstitutional actions," which are within Congress's broad power under Section 5 of the Fourteenth Amendment, and "measures that make a substantive change in the governing law," which Congress may not enact. *Id.*

measure of Congress's power under the Fourteenth Amendment's Enforcement Clause.[65] As a legal standard, "proportionality and congruence" necessarily requires judges to make discretionary judgments. No benchmark is set in advance, and the inquiry required to adjudicate proportionality and congruence pushes judges into doubly subjective decision-making about policy and politics, apparently unwilling to be aided by the views of Congress. This is hardly judicial restraint. Nor does it begin to resonate with the historical context of the Fourteenth Amendment.

The *Boerne* Court never mentioned the 1866 Civil Rights Act in the course of its dip into Fourteenth Amendment history. The majority invoked "[s]cholars of successive generations" but relied on nothing published later than 1966. Taken at face value, *Boerne*'s obsession with exclusive judicial authority not only would have made *Dred Scott* the law of the land until at least 1868, but it would also apparently invalidate the 1866 Civil Rights Act's broad array of federal protections for enumerated civil rights.[66]

That this comparison with 1866 is not simply a provocative extrapolation became chillingly clear when the Court invoked the *Civil Rights Cases* as a primary source for its constitutional views. Infamously, the Court's decision to invalidate the guarantee made in the 1875 Civil Rights Act of "full and equal enjoyment" of a broad range of public accommodations did a good deal to legitimate the rise of Jim Crow.[67] In *Boerne*, the Court declared that the

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[65] It probably is hard to find reasonable people in the United States today who are opposed to proportionality and congruence, though the Court seems thus to characterize the vast congressional majorities who approved the Religious Freedom Restoration Act of 1993. *But cf.* Sen. Barry Goldwater (R-Ariz.), during his 1964 presidential campaign ("Extremism in the pursuit of liberty is no vice.").

[66] The constitutional basis for the 1866 Civil Rights Act was the Enforcement Clause of the Thirteenth Amendment, whose words were repeated almost verbatim as Enforcement Clauses in the Fourteenth and Fifteenth Amendments. The Court upheld numerous federal civil rights statutes based entirely on these post-Civil War constitutional grants of power to Congress, even in the face of federalism attacks. *See, e.g.*, Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (holding, in a unanimous opinion written by then-Justice Rehnquist, that Fourteenth Amendment enforcement power allowed Congress to abrogate state's Eleventh Amendment immunity and to permit state to be sued directly for retrospective damages); City of Rome v. U.S., 446 U.S. 156 (1980) (upholding amendments of Voting Rights Act of 1965, based on Fifteenth Amendment enforcement power that required federal preclearance of electoral changes that need not violate the Constitution). Even the decision in the *Civil Rights Cases* acknowledged more congressional power than *Boerne* appears to recognize.

[67] The Civil Rights Act of 1875 provided:

> That all persons within the jurisdiction of the United States shall be entitled to the *full and equal* enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude.

Civil Rights Act of 1875, 18 Stat. 335 (1875) (emphasis added).

reasoning of the *Civil Rights Cases* about Congress' Section 5 power "has not been questioned."[68]

This remarkable assertion poses an important further question: not questioned by whom? Does questioning by anyone other than the Justices of the Court qualify? In their defensiveness about *Smith* and their haste to establish judicial exclusivity, the Justices apparently simply missed broad societal refutation of the *Civil Rights Cases* through statutes as well as in more general ways. Many Americans have had and still do have serious questions about what the Court said and did when it failed to allow Congress to reach "unjust discrimination" in the *Civil Rights Cases*:

> If the laws themselves make any unjust discrimination, amenable to the prohibitions of the 14th Amendment, Congress has full power to afford a remedy under that amendment and in accordance with it. When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the process of his elevation when he takes the rank of mere citizen, and ceases to be a special favorite of the laws.[69]

According to the *Civil Rights Cases*, the time for formal equality had already arrived eighteen years after the end of slavery. By 1883, it was high time for former slaves to stop looking for federal protection. "It would be running the slavery argument into the ground," said the Court, to allow Congress's constitutional enforcement power to apply to the denial of access to places of public accommodation on the basis of race.[70]

To be sure, the question of what the limits ought to be when Congress invokes its enforcement power has long been nettlesome. But the *Boerne*

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[68] *City of Boerne*, 521 U.S. at 525.

[69] The Civil Rights Cases, 109 U.S. 3, 25 (1883). For the 8-1 majority, Justice Bradley went on to argue that before the abolition of slavery, "no one, at that time, thought" that the denial of "all the privileges enjoyed by white citizens" or being "subjected to discriminations in the enjoyment of accommodations in inns, public conveyances, and places of amusement" might be "any invasion of their personal status as freemen." *Id.* at 31-32. That the majority was wrong as a matter of the law is demonstrated in Joseph Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283 (1996). But a careful reading of the *Civil Rights Cases* in its entirety reveals how chilling it is that the *Boerne* Court borrowed from and invoked the "not questioned" trope in the context of the *Civil Rights Cases*. In doing so, the Court performs its own utterance – it directly echoes the *Civil Rights Cases* decision and blatantly ignores what has been widely regarded as societal progress in the realm of racial discrimination since 1883, including the guarantee against racial discrimination in access to places of public accommodations in the 1964 Civil Rights Act, 42 U.S.C.A. § 2000a. Indeed the 1964 Civil Rights Act itself – and the need to stretch to find a Commerce Clause basis because of the *Civil Rights Cases* precedent – might properly be viewed as seriously questioning the *Civil Rights Cases* reasoning and holding, if one is willing to look up briefly from the pages of the U.S. Reports.

[70] *Civil Rights Cases*, 109 U.S. at 24.

Court's egregious use of the *Civil Rights Cases* as its key precedent, and the insistent exclusivity of its proclamation about constitutional wisdom – and constitutional jurisdiction, for that matter – are striking attempts to knock most of the pieces off the board. The holding in *Boerne* seems to go far beyond the demands of the case actually before the Court and to extend well past issues of religious freedom. Instead of recognizing the Court's own complicity in aiding Jim Crow by eviscerating a broad range of protections that Congress sought to provide in the decade after the Civil War, the *Boerne* Court may have struck an even greater blow against the protection of rights by fundamentally and broadly constricting Congress' protective power, granted explicitly by the Enforcement Clauses of the three Reconstruction Amendments.[71]

B. "The States' traditional prerogatives"[72]

In the name of states' rights within the interminable federalism debate, the current Court has cut back vigorously on the power of Congress and other federal sources to limit state authority. That campaign advanced significantly in several decisions handed down the same week as *Boerne*.[73] Indeed, it is clear that a major element of the Court's objection to RFRA was the Justices' sense of too much intrusion by Congress into matters best left to state authorities. They reasoned, for example, that: "[t]he substantial costs RFRA exacts, both in practical terms of imposing a heavy litigation burden on the States and in terms of curtailing their traditional general regulatory power, far exceed any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*."[74]

This quasi-legislative judicial balancing is surprising in itself. It seems even more surprisingly subjective when one recognizes that the absence of a pattern or practice under the Free Exercise Clause, as interpreted in *Smith*, must be

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[71] The *Boerne* majority acknowledged that "the specific holdings of these early cases [several decisions between 1875 and 1903 that narrowed or invalidated civil rights guarantees] might have been superseded or modified," yet Justice Kennedy insisted that "their treatment of Congress' Sec. 5 power as corrective or preventive, not definitional, has not been questioned." *City of Boerne*, 521 U.S. at 525. It thus remains the Court's own murky business, of course, to define what is in fact an unconstitutional definitional power, as compared to constitutionally more tolerable corrective or preventive congressional efforts.

[72] *Id.* at 534.

[73] *See, e.g.*, Printz v. United States, 521 U.S. 898 (1997) (invalidating provisions of Brady Handgun Violence Prevention Act as unconstitutional commandeering of state officials by requiring them to perform background checks of prospective handgun purchasers); Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997) (distinguishing doctrine of *Ex parte* Young, 209 U.S. 1234 (1908) and holding that the Eleventh Amendment implicitly barred declaratory and injunctive action by a tribe alleging ownership of state lands).

[74] *City of Boerne*, 521 U.S. at 534.

based on a very small sample indeed, given the very brief time between *Smith*'s radical doctrinal departure and the passage of RFRA. Moreover, the Court's lack of concern for those who suffer from unconstitutional conduct that affects their religious practices, combined with the solicitude it expresses for state and local regulatory interests such as zoning, contrasts starkly with the Court's recent substantial constitutional concern for even *de minimis* intrusions on property rights through zoning and other forms of state and local regulation.[75] Finally, the *Boerne* Court was so eager to repel "a congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens" that it gave no indication whatsoever as to whether RFRA's coverage of federal governmental entities was valid or not.[76]

Contemporary federalism claims almost surely would have greatly surprised supporters of the 1866 Civil Rights Act and the Fourteenth Amendment. Deference to the states was hardly the lesson that the Radical Republicans – and the Moderates allied with them largely through President Johnson's blunders – drew from a gruesome war fought in large measure exactly to defeat states' rights claims.[77] Whether there is much precision possible in the *Boerne* concept of "traditional general regulatory power" of the states, or in the more basic idea of federalism as a constitutional standard proclaimed by the current Court are issues that are much debated today and beyond the scope of this essay.

By focusing briefly on the issue of perspective in a small sampling of recent Religion Clause cases, however, we can discern the crucial, vexing issues of judicial role and suitable detachment. Justice O'Connor led the way in recent years in directly discussing the importance of perspective within the larger problem of religious and secular coexistence in our society. "Because of this coexistence," she stated in one of her first opinions construing the Religion Clauses, "it is inevitable that the secular interests of government and the

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[75] *See, e.g.*, Phillips v. Washington Legal Found., 524 U.S. 156 (1998); Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Nolan v. California Coastal Comm'n, 483 U.S. 825 (1987).

[76] *City of Boerne*, 521 U.S. at 534. This omission may be simple sloppiness, or it may be an effort implicitly to leave the federal reach of RFRA in place. It is peculiar that the Court did not even drop a footnote to explain whether or not the majority meant to imply anything about the issue. *See* Michael McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153 (1997).

[77] "The first constitutional problem encountered by Reconstruction had been the need to give the national government as a whole powers which had been exercised by the States; the second was to assert the right of the legislative branch within the national government." BROCK, *supra* note 57, at 254.

religious interests of various sects and their adherents will frequently intersect, conflict, and combine."[78]

Through emphasizing the importance of social context, O'Connor has developed an approach that would "preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred."[79] In part, this approach incorporates an important recognition of what effects apparent state endorsement may have on those who are dissenters, skeptics, or simply losers in the many political battles interlarded with religious issues.[80]

For Justice Scalia, by contrast, there should be little – if any – judicial second-guessing of how matters affecting religion are resolved by *state or local* authorities. Scalia may believe that the opposite is true regarding the judgments of elected *federal* officials. According to Scalia, the issue is "quite simply, whether the people, through their elected representatives, or rather this Court, shall control the outcome of these concrete cases."[81] With vigor, Scalia asserts that *Smith* already has answered: "[i]t shall be the people."[82]

There is no template, of course, to fit over the multitude of complex disputes about federalism, particularly when they are commingled with sorting out basic Religion Clause tensions in the "crucible of litigation." This is the case even if one were still to agree that "the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all."[83] But the question of whether anyone will comprehend and fully protect the rights of minority religions, fringe beliefs, and doubters has become much more pressing after *Smith* and *Boerne*.

In earlier cases, it often seemed possible to map the votes of the Justices by concentrating on whose perspective in the litigation they adopted or found

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[78] Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring).

[79] *Id.* at 70 (O'Connor, J., concurring). Justice O'Connor argued that courts are obliged to examine whether "government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement." *Id.* at 69 (O'Connor, J., concurring). The bitter debate within the Court about both the purpose and the effect of Alabama's moment of silence and voluntary prayer statutes, however, suggests how difficult the role of "objective observer" may be in the context of the coexistence and conflict of secular and religious interests at the state level. *See id.* at 76 (O'Connor, J., concurring).

[80] Prayer in the schools caused heated controversy in the nineteenth century as well. *See, e.g.*, DONALD E. BOLES, THE BIBLE, RELIGION, AND THE PUBLIC SCHOOLS (1965); Charles Fairman, *The Oliver Wendell Holmes Devise: History of the Supreme Court of the United States, in* 6 RECONSTRUCTION AND REUNION 1864-1888 1310-16 (1971); CHARLES MORRIS, AMERICAN CATHOLIC (1997); *cf.* Jackson v. Benson, 578 N.W.2d 602 (Wis. 1998), *cert. denied*, 525 U.S. 997 (1998) (upholding Milwaukee tuition voucher plan).

[81] *City of Boerne*, 521 U.S. at 544 (Scalia, J., with Stevens, J., concurring in part).

[82] *Id.* (Scalia, J., with Stevens, J., concurring in part).

[83] *Wallace*, 472 U.S. at 53 (1985) (Stevens, J., for the majority).

worthy of empathy. Justice Stevens for the majority in *Wallace v. Jaffree*, for example, expressed concern for the views of nonbelievers and those who feel silently coerced, while Justice O'Connor was drawn to the role of "objective observer." On the other hand, Chief Justice Burger wholeheartedly identified with the Alabama authorities and embraced their argument that the statute under review "affirmatively furthers the values of religious freedom and tolerance that the Establishment Clause was designed to protect," while his fellow dissenter, Justice Rehnquist, argued primarily from a critical history of the "wall of separation" metaphor that he took to be obvious to "any detached observer."[84]

The significance of perspective is particularly acute in the context of legal scrutiny of religious matters. Chief Justice Burger may have been blustering a bit, but he had a point. A position of neutrality concerning religion is indeed hard to establish and hard to maintain both legally and personally.[85] We all make our own arrangements regarding religion, volitional or not.[86] Moreover, because religious issues are exceptionally sensitive, multilayered, and elusive to outside observers, the paradigmatic judicial role of objectivity and/or detachment becomes particularly difficult to identify or to maintain.[87]

Perhaps because issues of law and religion are so complicated, and so personally charged, the current Court seeks to establish some lower common denominators. *Boerne* makes it clear that a majority of the Justices believe that formal voting equality within state and local political processes affords

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[84] *Id.* at 53-54, 76, 83, 89, 92. Thus, for Justice O'Connor, "[t]he solution to the conflict between Religion Clauses lies not in 'neutrality,' but rather in identifying workable limits to the government's license to promote the free exercise of religion." *Id.* at 83 (O'Connor, J., concurring). Whereas, for Chief Justice Burger:

> [i]f the government may not accommodate religious needs when it does so in a wholly neutral and noncoercive manner, the 'benevolent neutrality' that we have long considered the correct constitutional standard will quickly translate into the 'callous indifference' that the Court has consistently held the Establishment Clause does not require.

Id. at 90 (Burger, C.J., dissenting). Justice Powell concurred separately, primarily to urge retention of the *Lemon v. Kurtzman*, 403 U.S. 602 (1971), test, and Justice White dissented separately, primarily to repeat his call for basic reconsideration of the Court's precedents dealing with the Religion Clauses.

[85] *See* Laycock, *supra* note 2.

[86] *See* Williams & Williams, *supra* note 2.

[87] Shortly before he was murdered, along with five other Jesuits and their housekeeper and her daughter in El Salvador in 1989, Father Ignacio Martín-Baró explained:

> Objectivity is not the same as impartiality with regard to the processes that necessarily affect all of us. Thus, for an objective psychosocial analysis it is more useful to become conscious of one's own involvements and interests than to deny them and try to place oneself on a fictitious higher plane "beyond good and evil."

Religion as an Instrument of Psychological Warfare, *in* Ignacio Martín-Baró, WRITINGS FOR A LIBERATION PSYCHOLOGY 149-50 (Adrianne Aron & Shawn Corne eds., 1994). *See also* SOIFER, *supra* note 51, at 150-81.

sufficient protection for free consciences. If, but only if, the popular will is so blatantly biased as to adopt a "religious gerrymander"[88] – as the City of Hialeah was held to have done in *Lukumi* – will the Court allow federal judicial intervention. Absent overt gerrymandering based on religion, state politics as usual must prevail. In the name of deference to the proper authority of the states, therefore, there ought to be no special constitutional solicitude, no particular concern to shield dissenters, and no obligation to protect the politically vulnerable from "intolerance of the disbeliever and the uncertain."[89] There seems great haste to get the job done, to have at last "paved paradise & put up a parking lot."[90]

C. *"The Essential Autonomy of Religious Life"*[91]

By contrast to the ebb and flow of the jurisdictional aspects of federalism, the autonomy of religious bodies in ecclesiastical matters has been well established as a federal matter for over a century. Faced with one of the multitude of disputes that arose in the era of the Civil War over who controlled a particular church, the United States Supreme Court held as early as 1871 that:

> whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and binding on them, in their application to the case before them.[92]

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[88] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 535 (1993) (discussed *supra* note 6).

[89] *Wallace*, 472 U.S. at 54.

[90] Joni Mitchell, *Big Yellow Taxi*, *in* RISE UP SINGING (Peter Blood & Annie Patterson eds., 1992).

[91] Marsh v. Chambers, 463 U.S. 783, 796 (1983) (Brennan, J., dissenting).

[92] Watson v. Jones, 80 U.S. 679, 726 (1871) (rejecting implied trust judicial review and instead deferring to General Assembly of Presbyterian Church that had awarded Walnut Street Church in Louisville, Kentucky to antislavery faction). The *Watson* decision was not based on constitutional law, but rather was within the Court's common law review power at the time. *Watson* was followed and transformed into a federal constitutional rule in subsequent decisions. *See, e.g.*, Jones v. Wolf, 443 U.S. 595 (1979); Serbian E. Orthodox Diocese of Am. & Canada v. Milivojevich, 426 U.S. 696 (1976); Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440 (1969); Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94 (1952). State courts had established the principle of deference to ecclesiastical jurisdiction earlier, though not without great struggles, for example, as they faced bitter disputes over church control and property between Congregationalists and Unitarians. This extended controversy helped induce the gradual disestablishment of religion under state law, a movement that had reached even Massachusetts by 1833. *See, e.g.*, *The Unitarian Controversy*, *in* LEONARD LEVY, THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW 29-42 (1957).

In *Watson v. Jones*, the Court recognized the far-reaching importance and practical impact of conceding such exclusive and final authority to church bodies. Indeed, Justice Miller, writing for the majority, somewhat wistfully noted that the dispute involved a jurisdictional issue, but he then added, "[t]here is, perhaps, no word in legal terminology so frequently used as the word jurisdiction, so capable of use in a general and vague sense, and which is used so often by men learned in the law without a due regard to precision in its application."[93] Nonetheless, the Court held that deference to religious authority was inescapable because "[i]n this country the *full and free* right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all."[94]

The *Watson* Court's statement of broad deference to the jurisdiction of religious groups was fenced round with caveats, to be sure, ranging from the limits anchored in what judges might discern as problems of morality, property, and personal rights to the Court's proclaimed ultimate judicial control over what constitutes an ecclesiastical matter, properly understood.[95] It is in the nature of jurisdictional disputes, in fact, to be partly about power, partly about relative autonomy – but nearly always about the interpretation of authority on a continuum. This problem of overlapping jurisdictions seems to frustrate the Court today, particularly as a majority seems to be committed to the discovery of settled and easily discerned either/or principles.

The current Court's discomfort with the jurisdictional tension at the heart of the Religion Clauses has led a majority to stir free exercise claims into a pabulum of unexamined general, neutral rules. Such discomfort also may help explain why the Justices appear so inclined to castigate those who litigate at the crossroads of law and religion. Paradoxically, some of the same Justices who declare themselves anxious to reduce what they take to be the excessive separation of church and state, simultaneously reject free exercise arguments by maintaining that these religious claims conflict with the special needs of the military, for example, or the strictly internal affairs of the social security bureaucracy.[96]

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[93] *Watson*, 80 U.S. at 732.

[94] *Id.* at 728 (emphasis added).

[95] All these possible limits, in fact, help explain how the "elementary dear *Watson*" principle has found an apparently secure home in American jurisprudence.

[96] *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (Rehnquist, J.) (proclaiming great deference to the military's professional judgment regarding military interest "within military community"); Bowen v. Roy, 476 U.S. 693, 712 (1986) (Burger., C.J.) (emphasizing need to leave "sufficient operating latitude" to government entities).

Nancy Rosenblum has pointed out substantial dangers looming within the potential imperialism of "sacred space."[97] On the other hand, secular authority has a strong "jurispathic" tendency, as Robert Cover explained, which continuously challenges our nation's "breathtaking acknowledgment of the privilege of insular autonomy for all sorts of groups and associations."[98] Jurisdictional tension enlivens some of the best recent scholarship about groups, particularly the developing focus on the remarkedly diverse capacity to create meaning. Such creativity often is accomplished by individuals and groups who operate largely in realms quite apart from the state.[99]

V. CONCLUSION: ALTERNATIVE HISTORIES

The core problem in the constitutional jurisprudence of law and religion may be that in the United States there is not now, nor has there ever been, a clear way to identify or to cabin the essential autonomy of religious life. It is uncommonly easy in the realm of religion, in fact, to identify exceptions and limitations. Thus there is a tendency to argue from extreme examples of one slippery slope or another.[100] Perhaps for this very reason, it would be wise to heed the nuances of historical context, rather than to seek a simple originalist key to unlock some purported Framers' intent.

It should matter, for example, that Roger Williams believed strongly that "[t]he Christian magistrate could best advance the cause of his own religion by doing it no favors."[101] But we should also be aware that for all his pathbreaking commitment to tolerance, Williams saw nothing wrong in disarming Catholics and making them wear distinctive clothes or in suppressing the "incivilities" of the Quakers, whom he detested – though he would not allow suppressing their modes of worship.[102] Moreover, it is fitting that we attend to the kinetic quality of the relationship of law and religion

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[97] ROSENBLUM, *supra* note 2, at 93 (discussing Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) as a prime example).

[98] Robert Cover, *Supreme Court, 1982 Term – Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 60-62 (1983).

[99] *See, e.g.*, ROSENBLUM, *supra* note 2; EVANS, *supra* note 2.

[100] A good example may be found in Justice Scalia's opinion for the Court in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990): "Any society adopting such a system would be courting anarchy, but the danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them." *Id.* at 888. Professor Lupu points out, however: "Behind every free exercise claim is a spectral march; grant this one, a voice whispers to each judge, and you will be confronted with an endless chain of exemption demands from religious deviants of every stripe." Lupu, *supra* note 2, at 947.

[101] MORGAN, *supra* note 22, at 140.

[102] *See id.* at 134.

across time, to say nothing of the current dramatic flux in religious identities within our nation.

Arguments from history do not compel outcomes. In fact, it often is striking how the same decision-makers can feel comfortable in gliding back and forth between levels of generality and the kinds of history they find compelling. For example, in the span of five years, the Supreme Court held both that it was unconstitutional for Tennessee to exclude ministers from holding public office and that it was constitutional for Nebraska's unicameral legislature to begin each session with a prayer in the Judeo-Christian tradition offered for sixteen straight years by a Presbyterian chaplain paid by the state. In both cases, Chief Justice Burger wrote the lead opinions, and he relied in both on America's historical experience. That experience, according to Burger, meant that Tennessee's position as the lone state to retain the once commonplace prohibition against ministers' service had to give way to a new tide and the lessons of time.[103] In the Nebraska decision, by contrast, Burger argued that it was crucial to recognize that: "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country."[104] In an important sense, the use of history in these two decisions underscores the Court's tendency to embrace "winners' history" as if it were definitive.

What this approach misses, however, is the need for judges to hear and to understand the perspective of skeptics and dissenters who invoke the courts' jurisdiction as they seek to resist the majoritarian flood. From at least the time of Roger Williams, the history we celebrate has included refuge for those unable or unwilling to go along with the majority because of beliefs and practices anchored in their religious views, or even their lack of religious beliefs altogether.

We aspire to treat like cases alike. Simultaneously, however, Americans like to emphasize that every person is different from every other person. This helps to explain why the protection of full rights of conscience so often seems to be in direct tension with the protection of equal rights. To treat everyone the same is to miss critical contextual differences. These differences tend to matter a great deal when religion and freedom of conscience are directly at issue.

Despite the current Court's considerable enthusiasm to settle these difficult matters by flattening them into general rules or by stuffing them into

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[103] *See* McDaniel v. Paty, 435 U.S. 618, 625 (1978). The Court was unanimous (Justice Blackmun did not participate), but for very different doctrinal reasons. Writing for the plurality, Burger relied on historical change over time rather than being bound by Framers' intent and the fact that a majority of the states had prohibitions parallel to Tennessee's at the time of the Constitution and throughout most of the nation's early history.

[104] Marsh v. Chambers, 463 U.S. 783, 786 (1983).

jurisdictional cubbyholes, one may take comfort from the very complexity and resilience of the matters in dispute. Chief Justice Rehnquist was correct when he paraphrased Mark DeWolfe Howe and insisted that "stare decisis may bind courts as to matters of law, but it cannot bind them as to matters of history."[105]

Fortunately – one might even say blessedly – our history seems to include enhanced general acceptance of a core belief that: "[o]ne's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."[106] Such rights still must be taken largely on faith and attended to outside the courtroom. But they remain key elements of an ongoing quest to make real a broad promise that: "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein."[107]

We have hardly begun to see the light about what might strike us as unorthodox. Though the force behind those who dare to differ may emanate from somewhere deep within our past, we have yet to guarantee the "full and equal rights of conscience."[108]

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[105] Wallace v. Jaffree, 472 U.S. 38, 99 (1985) (Rehnquist, J., dissenting).

[106] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) (invalidating mandatory stiff-arm flag salute in public schools).

[107] *Id.* at 642. Even if there are no fixed stars – and despite the fact that the starlight we see is from very long ago – there is still something worth maintaining in the pursuit of lofty goals. This should include seeking to secure constitutional protection for dissenters, even those bold enough to exercise freedom of conscience and religion "fully and freely," at least until they "manifestly endanger" clearly competing and very substantial governmental interests.

[108] James Madison's proposed amendment to the U.S. Constitution in the First Congress in 1789, quoted and discussed *supra* notes 41-48 and accompanying text.

Transcript of the University of Hawai'i Law Review Symposium: Justice Scalia and the Religion Clauses*

OPENING STATEMENT

Mr. Dean Uehara:

Good afternoon fellow students, law school faculty and staff, distinguished guests and members of the community. My name is Dean Uehara, I am one of the Co-Editors-in-Chief of the *University of Hawai'i Law Review*, along with Julia Worsham. On behalf of the *University of Hawai'i Law Review* and the William S. Richardson School of Law, I would like to welcome you to the Law Review Symposium on the Religion Clauses of the First Amendment. At this time I would like to thank our Dean, Dean Larry Foster, who helped make this event possible.

This symposium is the culminating event of the Law School's Jurist in Residence program. This year's Jurist in Residence is Supreme Court Associate Justice Antonin Scalia. Because he is one of the more outspoken, and considered by many to be the most controversial member of the Court, in terms of his opinions in absentia rights, as well as his legal philosophy, Justice Scalia's jurisprudence provides an excellent vehicle for today's discussion.

The legal issues surrounding religion and the Supreme Court's interpretation of the Constitution's Religion Clauses touch nearly every element of society. While the Law Review is, in part, dedicated to assisting and educating members of the Bar through our Law Journal, we hope this symposium will provide an opportunity for members of the general public to explore religion in a legal framework.

Moderating this symposium will be University of Hawai'i Law Professor, Jon Van Dyke. Professor Van Dyke is a senior member of the faculty at the Law School, having taught at the Law School for twenty-four years. In addition to teaching constitutional law and international law, Professor Van

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* This symposium, sponsored by the *University of Hawai'i Law Review*, took place on Friday, February 4, 2000, at the University of Hawai'i's Mae Orvis Auditorium, Honolulu, Hawai'i. Panelists included Professor Erwin Chemerinsky, University of Southern California Law School, Associate Professor William K. Kelley, University of Notre Dame Law School, and Dean Kathleen M. Sullivan, Stanford Law School. Professor Jon Van Dyke, William S. Richardson School of Law, moderated the event. This transcript contains statements by each panelist and includes the discussion that followed. Please note that detailed citations are not included. For papers expanding upon the statements offered herein by each panelist and containing detailed citations, see *supra*, this volume. Transcript recorded by Bruce Getman.

Dyke has also helped shape Hawai'i's own constitutional jurisprudence with his involvement in cases dealing with issues such as Native Hawaiian rights, international human rights, and freedom of expression. I can think of no better choice as our moderator and offer a warm welcome to Professor Van Dyke.

Professor Jon Van Dyke:

Thank you Dean, and I want to thank every member in the Law Review who has helped to make this event such a success. We are in for a great treat this afternoon. We have three very distinguished constitutional law scholars and their job is to help us understand Justice Antonin Scalia's views on religious freedom. In the process, we will probably explore some of his other ideas, but the focus is going to be on the free exercise of religion and the Establishment Clause issues. We will be hearing the three presentations first, and then we will break for a reception, and then we will come back for questions among the panelists and from the audience.

Our first speaker is Erwin Chemerinsky, who is the Sydney M. Irmas Professor of Public Interest Law, Legal Ethics and Political Science at the University of Southern California. Like our other panelists, and like Justice Scalia, he went to the Harvard Law School. He then worked at the Justice Department, worked for a small public interest law firm, joined the faculty at DePaul University for three years, and joined the USC faculty in 1984. He has written numerous articles, and has written an important treatise on constitutional law.

Speaking second is Professor William K. Kelley of the Notre Dame Law School. Professor Kelley, also a Harvard Law School graduate, clerked for Kenneth Starr in the U.S. Court of Appeals for the District of Columbia and then for Chief Justice Warren Berger and Antonin Scalia at the U.S. Supreme Court. He then worked at the Solicitor-General's Office in the Justice Department in Washington, D.C., and has been teaching at Notre Dame over the last four years. He has recently written an article entitled, *The Constitutional Dilemma of the Ethics in Government Act*, and we are delighted to have him here with us today.

And our third speaker is Kathleen Sullivan, who is now the Dean at the Stanford Law School. Kathleen Sullivan, after she graduated from Harvard, clerked for Judge Oaks with the U.S. Court of Appeals for the Second Circuit. She joined the Harvard faculty in 1984 and taught there until 1993. At that point, she joined the Stanford Law School faculty and became Dean last semester. She has been a good friend to us here in Hawai'i and I had the honor of working with her on the litigation involving T-shirt sales in Waikiki. Kathleen has argued many cases before the U.S. Supreme Court and we are looking forward to her comments this afternoon.

We will start with Professor Chemerinsky.

Professor Erwin Chemerinsky:

Thank you so much. It is really an honor and a pleasure to be with you today. I must begin by confessing that I am not a fan of Justice Scalia's work on the Supreme Court, particularly with regard to the Religion Clauses. When the Antonin Scalia fan club is formed, I am not joining. Now, this is not surprising, because I am liberal and he is conservative. But what I will suggest to you today, is that my disagreement goes beyond just the ideological.

I believe that Justice Scalia's opinions are often disingenuous and his rhetoric frequently mean. I say he is disingenuous because he professes to be value-neutral in his judging, but is consistently imposing his own conservative values. Justice Scalia purports to be following a constitutional philosophy that he calls "original meaning," but does so only if it gets the conservative results he wants. I am very critical of the rhetoric that he uses on the Court because it is frequently sarcastic, and often filled with attacks on other Justices. I would suggest to you, that that is exactly the wrong message for law students and lawyers throughout the country. So, what I would like to do this afternoon is make three major points.

First, I want to argue that Justice Scalia follows a philosophy of extreme majoritarianism when it comes to the Religion Clauses. Second, I want to argue that this philosophy is not based on a neutral method of constitutional interpretation, but instead, is just conservative value imposition. And third, I want to talk about Justice Scalia's rhetoric, the attacks and the sarcasm that are frequently a part of his opinions.

To begin then, by talking about his decisions regarding the Religion Clauses of the First Amendment, my main point is that he has essentially read these clauses out of the Constitution. His philosophy of deference to majority rule leaves little room for judicial protection of either free exercise or establishment. With regard to free exercise of religion, his primary opinion was in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990). You might remember it as the Native American peyote case, where the law prohibited consumption of peyote, a hallucinogenic substance. Native Americans argued that their religious rituals required the use of peyote and, thus, the Oregon law impermissibly burdened their free exercise of religion.

Under the principles that have been followed by the Supreme Court for over thirty years, the appropriate test would be whether the Oregon law met strict scrutiny. But Justice Scalia, writing for the majority, rather than follow this law of the Free Exercise Clause, radically changed it and said that the Free Exercise Clause cannot be used to challenge a neutral law of general

applicability. He said that the Oregon law was neutral, in the sense that it was not motivated by desire to interfere with religion. The law was generally applicable in the sense that it applied to everyone.

Justice Scalia's majority opinion says that no matter how much a neutral law of general applicability burdens free exercise of religion, this still cannot be a First Amendment challenge. To see how radical this statement is, imagine a county that prohibits the consumption of alcohol, and there are a few in the United States. Imagine that a priest wants to use wine in a communion, or a Jewish family wants to use wine at a Sabbath or Sader dinner. Before *Smith*, it was clear that the priest or the Jewish family would prevail in litigation. After *Smith*, it is clear that they would lose because the law prohibiting consumption of alcohol was not motivated by desire to interfere with religion, it is a law of general applicability.

At the end of his majority opinion, Justice Scalia professes the need for the majority to control, when it comes to accommodating religion. Let me read you Justice Scalia's exact words here. He says, "Values that are protected against government interference through enshrinement in the Bill of Rights, are not thereby banished from the political process. It may fairly be said that leaving accommodation to the political process will place it at a relative disadvantage, those religious practices that are not widely engaged in, but that unavoidable consequence for democratic government, must be preferred to a system which each conscience the law of itself which judges away the social importance of a law against a certainty of all religious beliefs." In other words, how can a religious minority get protection for its practices? Only by hoping that the religious majorities will provide them with legal protection. Just as Justice Scalia follows a majoritarian philosophy for the Free Exercise Clause, he does so with regard to the Establishment Clause.

Perhaps the fullest elaboration of Justice Scalia's Establishment Clause philosophy was in his dissenting opinion in *Lee v. Weisman*, 505 U.S. 577 (1992). In *Lee v. Weisman*, the Supreme Court held, five to four, that clergy that delivered prayers at public school graduations violated the Establishment Clause. Justice Scalia wrote an angry dissent. Justice Scalia, in dissent, said that it is essential that the Establishment Clause be interpreted to accommodate religion. Under Justice Scalia's accommodationist philosophy, what would violate the Establishment Clause? Justice Scalia indicates that the only government actions that would ever violate the First Amendment's Establishment Clause are if the government literally established a church, or if the government coerced religious participation, or if the government preferred some religions over others. And Justice Scalia makes clear in *Lee v. Weisman* that he has a narrow definition of what constitutes coercion.

Justice Scalia concludes his dissenting opinion by saying that the majority focuses on the Weismans that do not want prayer. Where is the concern, he

says, with the majority of students who do want prayer? Justice Scalia writes, and again I will read you his exact words, "The reader has been told much in this case, but the personal interest of Mr. Weisman and his daughter, and very little of the personal interest on the other side. They are not inconsequential. Church and state would not be such a difficult subject if religion were, as the Court apparently thinks it to be, some purely personal advocation that can be indulged entirely in secret, like pornography, in the privacy of one's room. For most believers, it's not that, and never has been . . . the narrow context of the present case involves a community's celebration of one of the milestones of young citizens lives, and it's a bold step for this Court to seek to banish from that occasion, and from thousands of similar celebrations throughout this land, the expression of gratitude to God that a majority of the community wishes to make." In other words, for Justice Scalia, if the majority wants prayer at a public school event, the majority should be able to have it.

Now, I disagree with Justice Scalia's majoritarianism with regard to the Religion Clauses. I think that the Free Exercise Clause should be far more robust than he does. I think it exists to protect minority religious practices. And I think that the Establishment Clause limits much more than Justice Scalia does. I think that the point of the Establishment Clause is to keep people from different religions from feeling uncomfortable when one religion is expressed by the government in a formal government setting. My point, though, is simply that Justice Scalia has a definite philosophy with regard to the Religion Clauses. But I would suggest to you, in my second point, that Justice Scalia's philosophy here is not a product of a neutral judicial methodology, but rather Justice Scalia is reading into the Constitution his own conservative political values.

Justice Scalia, in opinions and scholarly writings, repeatedly has professed the need for Justices to be value-neutral in their decision-making. In his own words, Justice Scalia objects to Justices becoming "philosopher kings." Reading his own predilections into the Constitution, Justice Scalia says that there's no such thing as a living Constitution, rather the Constitution means the same thing today as when it was written. Justice Scalia professes that the judiciary must be deferential to democratic institutions and certainly follows this deference with regard to the Religious Clauses. Justice Scalia has developed a constitutional theory that he calls "original meaning." He does not look to the intent of the Framers, but instead says there is an "original meaning" behind the words that can be learned from the text and from contemporary practices that should forever guide the courts.

What I find striking is that sometimes Justice Scalia is true to this philosophy, and sometimes he is not. Consider a couple of examples. Consider his claim of a need to defer to democratic institutions, a claim he professes with regard to the Religion Clauses. Well, what about other areas

of constitutional law? Take for instance, affirmative action. When the government adopts affirmative action programs, does Justice Scalia show the same deference to majoritarian institutions with regard to the Religion Clauses? No way.

Consider *City of Richmond v. Croson*, 488 U.S. 469 (1989). There, a city adopted an affirmative action program to set aside some of its public works monies for minority-owned businesses. One would think that Justice Scalia would give deference to the judgment of the majority, as he does in the Religion Clauses. But in that case, and in every affirmative action case, he has always voted to strike down laws adopted by popularly elected legislators.

Or to consider another example, what about sovereign immunity, an area that is receiving much attention today? When Congress adopted a law that said states could be sued for patent infringements, did Justice Scalia defer to Congress there? Did he follow the majoritarianism that he professes with regard to the Religion Clauses? Not at all. He has consistently voted in favor of state sovereign immunity, against the claims of individual rights, even when there are laws on point.

Well, what about his philosophy of "original meaning?" Does he attempt here to determine the meaning of the Constitution at the time it was adopted? Justice Scalia says that is what he is doing with regard to the Religion Clauses. Well, take affirmative action, as an example. It is clear that the primary purpose of the Equal Protection Clause, in terms of original meaning, was to help African-Americans. It was not to help white males. In fact, legal historians, such as Stephen Siegel, have extensively researched the time at which the Fourteenth Amendment was adopted. I believe they persuasively demonstrated that affirmative action, to help blacks, was widespread at the time the Fourteenth Amendment was adopted. So, does Justice Scalia look to that contemporary history and follow that original meaning with regard to equal protection? Again, no way. He always votes to strike down any affirmative action program. He never talks about the history surrounding the ratification of the Fourteenth Amendment.

The same is apparent with regard to sovereign immunity. There is no provision in the Constitution that says a state cannot be sued in its own state courts. The Eleventh Amendment only says a state cannot be sued by citizens of other states. If you look to "original meaning," the colonies, at the time the Constitution was adopted, did not have sovereign immunity. Most of the initial states in their Charters waived any immunity they had and consented to suit. Does Justice Scalia focus on this "original meaning"? Does he look to the text of the Constitution that says that the United States Constitution and the laws and treaties made pursuant to it are the supreme law of the land? Not at all. He follows a philosophy of state sovereign immunity even though it seems unsupportable under the philosophy of original meaning.

It seems to me inescapable that what Justice Scalia is doing is following original meaning when it gets to the results that he likes, such as with the Religion Clauses, and not following original meaning when it gets the conservative results that he does not like. Well, think about Justice Scalia's statement that he is not imposing his own values into the Constitution, his claim that he is just following a neutral interpretive methodology. Through this neutral interpretive methodology, as I have already said, he finds that school prayer would be permissible, but he finds that affirmative action is not permissible.

We know he finds abortion rights are not in the Constitution. He finds no rights for unmarried parents in the Constitution. He finds drug testing for students okay. It makes one think that the Republican platform and the Framers' intent are almost identical. I am not saying that Justice Scalia is unique in imposing his own values in constitutional decision-making. I think every Justice inevitably must do so. The Constitution is written in broad, open-textured language. There is not an original meaning out there waiting to be found. And inescapably, constitutional law is about Justices making value choices.

Consider Justice Scalia's philosophy of original meaning. It assumes that the practices, at the time that the Constitution was written, are the practices that the Framers meant forever to enshrine. It may well be that a constitutional provision was written to overturn those pervasive practices. It may be that there is a real difference between constituting a government and then governing under that Constitution – the choices that the Framers made when they ran the government may not be the ones they envisioned under the Constitution.

Justice Scalia's philosophy of original meaning also assumes that there was unanimous practice at the time that the Constitution was written. Rarely does this happen. For almost every issue there is great variation. Most States repudiated sovereign immunity, but not all. The danger is, as a constitutional law professor pointed out many decades ago, is that there will be law office history, where the Justice will pick and choose the historical practices that support the conclusion the Justice wants to arrive at. I think that is what Justice Scalia has done with regard to the Religion Clauses. I think you can make an equally plausible argument on either side with regard to free exercise or establishment, pointing to the practices that existed in 1791.

But most of all, I am skeptical of original meaning because it assumes that the world when the Constitution was adopted, is the world that should govern us today. We live in a vastly different world, obviously, than in 1787 or in 1791, or 1867. I do not know how Justice Scalia could defend *Brown v. Board of Education*, 347 U.S. 483 (1954), under the philosophy of original meaning, because the same Congress that ratified the Fourteenth Amendment also voted

to segregate the District of Columbia public schools. The Framers, in 1867, certainly did not see any need to stop gender discrimination, but we want the Equal Protection Clause to do that. Justice Scalia is assuming that the philosophy and beliefs two hundred years ago are the ones that should govern us today.

Well, there is a third and final point that I want to make with regard to Justice Scalia. And it is the one that I think that most liberals and conservatives should be able to agree on. And that is, that Justice Scalia's rhetoric in his opinions is simply inappropriate. What I did was go through a large number of opinions and everything I am going to read you is a direct quote of Scalia's words. When you put them together, they are disturbing.

Justice Scalia says in *Lee v. Weisman*, that the majority opinion has "ensured prudential disaster." In other dissenting opinions he describes the majorities as "nothing short of ludicrous" and "beyond absurd," "entirely irrational," and "not passing even the most gullible scrutiny." He has declared majority opinions "nothing short of preposterous" and said the majority opinion has "no foundation in American constitutional law and barely pretends to." In another dissenting opinion, he says, "One must grieve for the Constitution in light of the majority's approaches." In yet another case he calls the majority's approach "preposterous" and "ridiculous" and "so unsupported in reason and so absurd in application as unlikely to survive." In another case, he talks about majority's opinion "vandalizing our people's traditions."

Perhaps, most famously, in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), he pointedly attacked Justice O'Connor for not joining him in overruling *Roe v. Wade*, 410 U.S. 113 (1973). He said that her position "cannot be taken seriously." He said that her opinion "preserves a chaos that is evident to anyone who can read and count." He describes her approach as "irrational, as the new concept that Justice O'Connor uses the law." And he complains that her approach is "the least responsible."

In another case, he says he "must respond to a few of the more outrageous statements in today's majority opinion, which is beyond human nature to leave unanswered." In another case, he describes the majority opinion as "nothing less than Orwellian," and he talks about how he's "appalled by majority approaches."

Now I have no doubt that this makes Justice Scalia's opinions the most entertaining to read, and certainly for law students, getting to a Scalia opinion with his colorful language, may be a relief. But I ask you, is this the example we want for our law students and our lawyers about how they should speak about each other? And how they should speak in official legal documents? Are the opinions really more persuasive presented with this kind of sarcastic, pointed attacks?

I think not, especially at a time when the Bar is increasingly emphasizing civility among lawyers. It seems to me that this is exactly the wrong example that a Justice on the United States Supreme Court should be setting for students and setting for lawyers. There is no doubt that Justice Scalia is a man of great intellect. He is a man with great passion about his views. But I suggest to you today, that we should expect more of a Supreme Court Justice. Thank you.

Professor Van Dyke:

Thank you very much. Our next speaker is Professor William Kelley of Notre Dame Law School.

Professor William K. Kelley:

Good afternoon everyone. Let me first say a couple of preliminary things. A hearty and sincere thanks to the Law School and to the students on the Law Review who have been such gracious hosts. It has been a wonderful experience for me to be here.

Let me also say it is an honor to be on stage with such distinguished speakers. And I hope that Dean Sullivan and Professor Chemerinsky will cut me some slack, since I make my constitutional law students buy Dean Sullivan's case book, which I believe to be either the greatest or second greatest case book ever produced in this country. And Professor Chemerinsky ought to be grateful to me as well, since I always recommend that my Federal Courts and constitutional law students buy his treatises on those subjects. And to the law students in the audience, that is the place to go if you are looking for clarity of expression in describing the doctrines that the Court has developed over time. I think both of those books are remarkable achievements.

Since I arrived in this beautiful place, it has been a little sobering, because several people have said to me, "Oh, my word, are you ready? You clerked for Justice Scalia, but are you ready for all the attacks and all the controversy?" I began to have the sense that I was a pig who found himself invited to a nice lū'au.

But I am really not here to defend Justice Scalia. He does that quite enough for himself. Someone asked me last night whether I am pro or con and I answered, I think quite reasonably, yes. And I mean that. What I am here to do though, is to talk about the Religion Clauses and in certain respects, talk about Justice Scalia's place in the Religion Clause jurisprudence of the Court. And largely, I think that there is a great deal to applaud in what the Justice has done in those fields. And as I go along, I will just say a couple of things in

response to what Erwin said about the Religion Clause jurisprudence of Justice Scalia.

What I am particularly concerned with is the problem of accommodation of religion. The problem of accommodation has bedeviled the Court's cases. It is very difficult to see where the line between a permissible accommodation of religious practice by the government and the impermissible establishment of religion should be drawn.

It would be quite easy to say that any government action that is conscious of religion, and takes account of religious practice so as to accommodate it, is ipso facto establishment. Or alternatively, that the only accommodation that is permissible is that demanded by the Free Exercise Clause. That would be a very neat way to look at matters. But the Court has never conducted itself that way and I think most scholars have agreed that there is some gray area between permissible accommodation and mandated free exercise.

Scholars have obviously spent a lot of time analyzing this problem and I am not going to offer a general theory. What I would like to suggest is that if we take a step back and look at the respective roles of non-judicial actors and judicial actors in the problem of accommodation, we might gain some insight as to where the lines ought to be drawn. The Court has assumed, in its Religion Clause cases, that its role as the final arbiter of constitutional meaning renders it essential that it have the word in each of these cases as to what accommodations are permissible. In the context of accommodation however, the factors that lead us to be suspicious of political action are less pressing.

In the context of accommodation, it is frequently the case that it is the majority accommodating minority religious practices. It is not commonly the case in pure accommodation situations that the majority is itself acting to benefit only its own religious practices. This is surely a controversial claim, and I will just say a couple of words in defense of this claim. Historically, most accommodations have tended to be fairly specific. The example of the legislative exemption for sacramental use of wine during Prohibition was an accommodation to Roman Catholics and to Jewish observance. That was obviously very broad and reached a lot of people. But neither Roman Catholicism nor Judaism is a majority religion in this country. I think there is not, in fact, a majority religion in this country, and it seems to me that accommodations of religion, if they are specific, tend to benefit minorities and happen at the behest of majorities.

Now, it is standard constitutional theory that we ought to worry less about the constitutionality of majority action that benefits minorities. The great work by John Hart Ely and others has made this point. The political process rationale for intervening, or not, is one that is controversial, however, and needs some sophisticated development. Nonetheless, it seems that the

concerns that lead us to want judges to intervene, the concerns that lead us to rely on the independence of judges as compared to political actors, are less pressing when matters of accommodation of minority religious action are at stake.

What is more, and this is a point that is not frequently recognized, at least to the extent that I think it ought to be, it is important to understand that the non-judicial actors who are wielding government power take the same oath to respect the Constitution that judges do. And that is important, because non-judicial actors in government must, before taking any action, reach an independent constitutional judgment that the action is permissible. So, in any instance when the Court imposes its own constitutional judgment on non-judicial actors, it is a situation of stark conflict in constitutional vision between court and political branches.

Now, I am not suggesting that the institution of judicial review is therefore illegitimate, or that it ought to be curtailed, or that we ought to do away with the Court's role as the final arbiter of constitutional questions in contested cases. My point is much more modest than that. It is the point of judicial attitude. That the Court ought to be, in Religion Clause cases, and elsewhere frankly, more cognizant of the constitutional role of non-judicial actors. And this point is particularly apt in the context of accommodation, where we ought to be worried slightly less about the tyranny of the majority.

Those who are suspicious of accommodation tend to argue that the political process will protect majority, or popular religions, and denigrate the value and importance of fostering the exercise of less popular religions. That point obviously has a lot of force, and in particular contexts it can be made reality. There is no doubt about that. The opinion in *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990), recognized that that was likely to be the case.

My own view, however, is that that is not necessarily the case. Notwithstanding the point that majority religions may be in a better position than minority religions, I want to make two points to give some comfort. First, I think that the post-*Smith* history indicates that minority religions, and religious practice generally, do pretty well in the legislative majoritarian process. The passage of the Religious Freedom Restoration Act was an extraordinary event. It did not contain terms that limited its benefits only to popular religions. It was a general law protecting religious exercise. And that is also true at the state level, where many states have laws akin to the Religious Freedom Restoration Act. So, empirically, the evidence since *Smith* was decided indicates that minority religions can do okay in the context of accommodations.

The second point I want to make is more controversial. That point is to wonder what the real harm is to one religion if another religious believer's

beliefs are accommodated by government. Or to put it another way, what value ought we put on the failure to grant a benefit to one as we grant a benefit to others who demand it. Now, I want to be clear. I am not talking about any sort of accommodation that requires actions by non-believers or non-adherents, or certainly any exaction of funds from non-adherents. But what value ought we to give to the offense felt by some who do not get an accommodation when others do? I think that is a very hard question to answer.

Looking at it from the perspective of a parent, it is quite easy to understand the norm of equal treatment. I have several children, and I have learned that children really do expect to be treated equally, even when it does not make any sense to treat them equally. Recently my daughter who is in sixth grade was going to her first dance. My daughter in fourth grade felt wronged by the fact that her sixth-grade sister was going to the dance. I really did not have a response other than it is not really a question whether you, in the fourth grade, can go to the sixth grade dance. You are being treated equally.

But again, the impulse, the emotional pull that we feel, is real. I recognize that. I think that is an important thing to bear in mind. Like the situation of the fourth grader wanting to go the sixth grade dance, it strikes me as really not the case that adherents of one faith are in any significant way harmed by the accommodation of beliefs of adherents of another. Let me quickly emphasize that the government does bear an obligation under the Establishment Clause, the Free Exercise Clause, and the Equal Protection Clause to have a reason, and a very good reason, not to grant benefits to those who are similarly situated, or not to grant accommodations to religious believers who demand them, when others who are similarly situated have received them.

The Court's opinion in *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994), made much of the fact that the New York State law in that case, which created a school district with boundaries which were co-terminus with the residences of adherents of a particularly conservative form of Judaism, the Satmar Hasidim. The Court made much of the fact that there was no guarantee in the future that the New York legislature would grant a similar accommodation to other faiths or religious adherents who made similar claims. Now, I think that that was an unreasonable thing to expect and that when the time came and a failure to accommodate occurred, the Court could take one of two courses. One would be to demand that the legislature or the non-judicial actors accommodate the current demand for accommodation that could not be distinguished from the prior one. The other would be, when you have discrimination that is unjustifiable among sects, to strike down the prior accommodation.

What I have said here is obviously not completely consistent with doctrine, and my point is much more speculative than doctrinal. In the end, my basic

point is to encourage efforts to think outside the box of judges being the be-all and end-all of protecting rights.

And this brings me to just a few things I want to say, not in response to Professor Chemerinsky's points, but in reaction to them. It strikes me that there is some inconsistency in his argument. He first attacks the judges who make efforts to rely on original meaning as being hide-bound, for being old-fashioned. The fact that something was a practice in 1787 or 1791 or 1868 or whenever, does not say anything about how we ought to be governed today. We want something different. It strikes me that that is a powerful point. But then, it strikes me as problematic to say that Justice Scalia's extreme majoritarianism – Professor Chemerinsky's characterization – cannot be justified, because a judge purporting to defer to majority rule today is allowing today's current values to be implemented and not insisting that the values of the past be implemented.

And I think that there is a particular vision in Professor Chemerinsky's view of what a judge is to do, which is in the end, to impose, for want of a better word, liberal values. If that is the case, and if judges inevitably are going to impose values, and it is certainly true that judges inevitably do sometimes impose values, why ought we to prefer the values of unelected judges to our own? It is a simple point. If the role of judges is simply to impose values in constitutional cases, frankly I would rather have my own values imposed than Antonin Scalia's or David Souter's or any of the other Justices. Now, maybe we just say, okay, you five or nine people, we're going to give you this great power to choose our current values for us. And maybe the response is that simple. Our institutions are structured so that we have judges with life tenure and salary protection and no control by the political process, or directly on them at least, and their role is to pick values for us. Maybe our system is simply that. Here judges, we trust you to impose your values and if we do not like them, well, that's just the price we pay for our constitutional system. Now, I think that claim is one that would take a long time to deal with, and I'm not saying what the right answer is. But we ought to be clear about what is going on. On the one hand, we say that judges inevitably impose values, and on the other hand, we attack judges for imposing their values in the name of trying to discern meaning from the past.

I think it is quite true and quite plain that Justice Scalia is quite biased towards majority rule. He might say, yes, majoritarianism is a value judgment, but that value judgment is put in place by the Constitution of the United States and by the political theory underlying it, which is self-government. Government from the people, by their consent and the people get to vote.

Now, just a brief word about *Smith* and the Free Exercise Clause. I think it is important to recognize that *Smith* is a majoritarian decision. I do not believe that it is as radical as Professor Chemerinsky or the academic literature has

described it. And it actually makes the Free Exercise Clause generally of a piece with other constitutional doctrines. It is a very rare constitutional claim that is based upon impact alone. Not even under the most cherished freedom, freedom of speech, can you win a constitutional claim based only on impact. You need more than that. And so, the history of free exercise, which I grant was neglected and ought not to have been, in the *Smith* decision itself, is fairly read consistently with that sort of approach to free exercise claims. Nor is *Smith* hostile to claims for permissive accommodation. I imagine that Justice Scalia, as a man of faith, is perfectly sympathetic to claims of free exercise. And indeed, the opinion in *Smith* explicitly noted the fact that legislative accommodation of peyote use had been accomplished in some states, and at least implied that such accommodations are desirable.

Several years later, in *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court struck down the Religious Freedom Restoration Act, which was passed in response to *Smith*, and Justice Scalia was in the majority in that case, in favor of striking it down. The question then is, well, what about this guy who is in favor of legislatures making these calls, and yet here Congress has acted. Is there not an inconsistency? In all fairness, there is no inconsistency. *City of Boerne* is a case about the scope of federal legislative power. If Justice Scalia, and or the Court, were to strike down state law religious freedom acts that impose accommodations, that would be extraordinary, and quite surprising to me. I predict that will not happen, except insofar as the majority of the Court, which I do not think would include Justice Scalia, would find such laws to be an impermissible establishment of religion.

In the end, I think it is important to step back and think about what the role of judicial power is under the Constitution. As law students, as lawyers, frequently we take for granted that judges are best situated to make these judgments and quite frequently that is true. But it is not always true and it is a factor that ought to be borne in mind as one goes about the job of judging, goes about the task of analyzing cases in law. Why is it that judges ought to do this? And why are judges better situated than political actors to protect minorities, especially in the context of accommodation, where the political process has, by definition, already accounted for the needs of the minority? Thank you.

Professor Van Dyke:

Our final speaker for this part of our program is Kathleen Sullivan, Dean of the Stanford Law School.

Dean Kathleen M. Sullivan:

Well, I'd like to join my fellow panelists in thanking the University of Hawai'i, Dean Foster, and the Law Review for your splendid hospitality. It is a really great pleasure to be back in Honolulu, where I have had some of the most exciting legal experiences of my career, including fighting T-shirts on Waikiki and upholding the Hawai'i Land Reform Act in *Hawai'i Housing Authority v. Midkiff*, 467 U.S. 229 (1984). It is a joy to be back here and I thank you very much.

I think there is a great deal to what's already been said by my fellow panelists. But I think the best way for me to try to talk about how I see Justice Scalia's jurisprudence in relation to the Religion Clauses, is to try to put him in the context of all the different approaches that are now floating around the Court in relation to the Religion Clauses. And I would like to do this by suggesting that there are four possible models.

We have two Religion Clauses: the Free Exercise Clause and the Establishment Clause, which bars government symbolic or coercive union with religion. And we have two positions the Court can take on claimed violations of either clause: the Court can either be strong on intervening to protect free exercise or to prevent establishment, or it can be weak in intervening on free exercise violations or Establishment Clause violations. It can either be interventionist or it can be deferential. I am going to suggest that there are four possible positions and then get to Justice Scalia last and then talk about why he might take the position that he does.

Now, this is covering a lot of ground in a short space, so please bear with me if I am a bit abbreviated. At the outset, let us be clear about the current controversies over free exercise and establishment. We are not in an era where Catholics are still tarred and feathered by angry mobs or Mormons are driven, with violence, over the mountains to Utah. We are not in an age in which religious bigotry is generally expressed in this nation through violence, as it is still in other parts of the world. So, free exercise tends to be mostly about, as Bill Kelley just described, exemptions. Claims of needs to exempt yourself from generally applicable laws that were not intended to hurt your religion, but happened to do so – for example, bans on peyote ingestion by Native Americans.

Let us be clear that the Establishment Clause violations we face today are usually not about placing a Latin cross on the roof of the State Capitol. We do not tend to do that in this country, even though there might be parts of the world where there still is that kind of fight over official theocratic symbolism. Rather, the big debates in our Establishment Clause litigation world are about how much government subsidies can go to religion, either in-kind subsidies of

grants of public space to religious symbols, or cash subsidies – most controversially, vouchers that might be used in parochial schools.

So, let us look at the four positions you might have on free exercise exemptions or Establishment Clause subsidies by way of general programs. Scholarships to students who go to chaplaincy school, aid to deaf students who attend Roman Catholic parochial schools, and so forth. Let us take the positions in turn, on these two debates.

The first one would be a strong interventionist position on both free exercise and establishment. On this view, the Court would strike down lots of establishments. It would strike down, as the Court said in the *Everson v. Board of Education*, 330 U.S. 1 (1947), dictum, any tax, no matter how small, that is used for transfer to the aid of religious proselytization. It would strike down lots of establishments, lots of subsidies, even if they were small or part of a general program. And this approach would also give very robust protection to religious minorities who claim that they need a free exercise exemption. It would give judicially mandated or constitutionally compelled exemptions from general laws.

Well, let us call that first position – strong intervention on both clauses – separationism, and let us locate where it existed on the Court. It existed on the Court from the 1940's to the 70's. That is basically the universe that was created by *Everson*, on the one hand, and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and *Sherbert v. Verner*, 374 U.S. 398 (1963), on the other. On this view, the Amish can pull their kids out of high school if it tends to conflict with their religious faith. You are allowed to have that exemption. Seventh Day Adventists cannot be denied benefits if they do not work on their Sabbath. On this view, free exercise exemptions are administered by judges, who also enforce strong Establishment Clause invalidation.

Now, is this approach still alive on the Court? Yes, it's alive and well, at least with one Justice, Justice David Souter, who is the closest, in his very extensive set of Religion Clause opinions, to taking the view that you ought to have strong free exercise exemptions. In his opinion, *Employment Division v. Smith*, 494 U.S. 872 (1990), was wrong, and you also want to have strong Establishment Clause interventions. Justice Souter would have struck down lots of programs that the Court has upheld, including the aid to remedial education that's conducted in parochial schools in New York that the Court upheld in *Aguilar v. Felton*, 521 U.S. 203 (1997).

Now, I want to say just a word about what you might think about religion if you're a strong separationist. And this is also the continuing position of the ACLU, which comes in to try to fight lots of establishments, but also comes in very much on the side of religionists, to gain free exercise exemptions, to the extent you can possibly do any work around *Smith*. What might you think religion is in our polity, if you take this view? What you think, if you take this

view, is that religion is an extremely strong force in life. It has strong commands. It draws strong obedience and allegiance. It operates as a more powerful force in people's lives than just membership in a political party, a Kiwanis Club, a fraternity, or a cheerleading organization. It is not like other affiliations. It is something distinctively powerful, because it is about allegiance to the transcendental, because it is about allegiance to something like an alternative sovereign. When God and Caesar conflict, you choose God.

Now, if that's your view of religion, you certainly want to have free exercise exemptions. You want to allow people who do not think they can conscientiously comply with the civil order to have a kind of enclave, a normative enclave, to retreat to of their own. You think religion might even be a threat to state sovereignty if you do not provide that release valve. But on the other hand, you are very vigilant to police any allegiance, even if it is symbolic, between religion and the State. So, to use Albert Hirschman's famous trilogy of exit, voice and loyalty – a great description of the different ways we can respond to threats in our political culture – the separationist view would give religion exit, but not voice. You can go and have your own Amish sub-culture. A strict separationist might even allow Mormons an exemption to practice polygamy, overruling *Reynolds v. United States*, 98 U.S. 145 (1878), but would not allow religion to prevail in passing general laws. Of course, religionists can argue in politics, but on the separationist view, no legislation can be expressly premised on a religious position.

Now, let me contrast that with a second position, which we might call secularism. Let us contrast separationism with secularism. Sometimes separationists are accused of being secularists, but I do not think that is so. I think that the secularist's position is one that would be weak on free exercise protection, but also quite strong on establishment.

Let me give you an example of who might take this view. It is really Justice Stevens and Justice Ginsburg on the current Court. Justice Stevens is not going to allow a lot of religious exemptions. He wrote an opinion for the Court saying that Lieutenant Goldman couldn't wear his yarmulke in the Air Force because of headgear regulations and was not entitled to an exemption on that. He talked about the danger of the slippery slope to Sikh turbans and Rastafarian dreadlocks. Justice Stevens is also strong on Establishment Clause enforcement. He is the Justice most likely to strike down things as an establishment. He was even willing to strike down the Religious Freedom Restoration Act as an establishment. So, that was his reason for joining the Court's opinion in *City of Boerne v. Flores*, 521 U.S. 507 (1997).

So, the secularist's position is not going to come in on the side of free exercise exemptions. It is going to come in on the side of Establishment Clause violations. Weak on free exercise, strong on establishment. What might you think of religion in our culture if you take that view? Well, if you

take that view, you might think religion is really something that is almost vestigial in modern life. It is something that is more like being a member of a fraternal order or it is maybe something that is like the family. It is something that should be practiced in private, but it certainly should not be a matter of alliance between the Government and the State. And the Courts should not come to the rescue of religious minorities the way they might come to the rescue of other minorities. In fact, this position would say, no exit for religion and no voice. No religious prevalence in political disputes.

So, there is separationism, there is secularism. Now, let us go to a third position. Again, we are not yet to Justice Scalia's position. A third position we might call accommodationism. This position is the one that many religious organizations today most favor, because it gives religion the best victories in court. The accommodationist position would be very strong on free exercise enforcement, and thus say *Smith* was wrong. There should be both permission for legislative accommodations of religion, but also judicially mandated accommodations of religion, when religionists really conscientiously cannot comply with general laws.

The Religious Freedom Restoration Act under this view was right and constitutional, but at the same time the accommodationists would say we should have very weak Establishment Clause enforcement. If religionists get a piece of the public pie, let them have it. If we are giving out money to encourage teenagers to abstain from sex and not get pregnant, then let that go to religious family life counselors, as well as to Planned Parenthood. If we are giving out money to soup kitchens and somebody wants to get money for a soup kitchen in which they say prayers with dinner, and it's held in the bottom of a church, give them the money, along with Oxfam. In other words, on this view, religion should just participate in all the spoils of the modern welfare state, including, of course, vouchers. And in fact, we should enshrine that into a religious equality amendment which would say that no distribution of a benefit of religion should automatically count as an establishment, so long as it is part of a general program.

Now, this is a view that is held on the current Court most consistently by Justice O'Connor. She is the closest to this position, and this is a position that has been very eloquently articulated by many of the leading religion scholars in this country, especially Michael McConnell and Douglas Laycock. This view says that we need both a Religious Freedom Restoration Act and a Religious Equality Amendment. You should be strong on free exercise exemptions, but also very weak on Establishment Clause enforcement. This position would give religion both exit and voice. A way out of politics when religion loses out in the making of general law, and a way of staying in the political process when religion prevails in getting a piece of general distribution of benefits.

Now, what is your view of religion if you take this approach? I think your view of religion is not that it is a quasi-sovereign counterweight to the state, an empistemic normative enclave apart from the rest of life, as in the view of the separationist. And it is not that it is just something that people do in private, the view of the secularist, that religion should be more like family – a thing you do on your own, but the State does not get involved in. The view that this approach takes is a view that religion is a kind of endangered species. That religionists are a discrete and insular minority, vis-a-vis a mountingly secular majority. That religionists are in need of judicial protection against majorities who are insensitive to religious practices and desires. But also, when the still small voice of religion actually ekes out a little bit of a legislative victory, we ought to allow that to go forward. In other words, this is both a discrete and insular minority in need of protection when the majority hurts it, but also a discrete and insular minority that ought to be allowed what little affirmative action it gets out of the central state. Give it exit and voice.

Now, we come to Justice Scalia, the topic of your fascinating week, in which you've had so many chances to interact with him personally. What is his position? It is none of the three set forth above. His position is the fourth logical possibility. It is not separationist. It is not secularist. It is not accommodationist. Rather, he would be weak on free exercise enforcement and also weak on Establishment Clause enforcement. Or as Professor Chemerinsky said, he would read both clauses out of the Constitution. So, what does this position hold, and what name am I going to give it? I have got to give it a name. I have given everybody else a name. I'm going to call this position assimilationism. And I'm going to say a little bit about why I think that it actually embodies a kind of political theory of religion.

Justice Scalia's obviously weak on free exercise enforcement, at least when it is judicially mandated. We know that because he wrote *Smith*. He said that if it is a generally applicable law, there's not a facial discrimination against religion the way there was against the Santeria practioners, when the City of Hialeah said you cannot have animal sacrifice within its walls. He is still going to strike you down if you discriminate selectively against religion. But he's not going to strike you down if you have a generally applicable law that merely happens to sideswipe religious practice, like the drug laws that hurt peyote ingestors who were religiously compelled.

We know that Justice Scalia is not crazy about judicial free exercise enforcement. I think Professor Kelley made an extremely interesting claim, which we should discuss later, about whether he would, in fact, tolerate lots of state by state mini-RFRA's that would allow local enforcement. But he certainly does not want a federal law that's overturning his own opinion. And you know, he wrote *Smith*, and he thought *Boerne* was perfectly appropriate striking down the attempts to overturn *Smith* through RFRA.

And we know Justice Scalia is also weak on Establishment Clause enforcement, because he joins all the opinions in which the court upholds the distribution of benefits to religious practioners. Sign language interpreters to parochial school students, subsidies to chaplaincy students and the like. He joins the Court when it upholds such things and he dissents in the rare cases when the Supreme Court strikes down anything as an establishment. For example, he dissented vigorously in the school prayer case, *Lee v. Weisman*, 505 U.S. 577 (1992). He dissented vigorously in *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994), the case about the gerrymander of a Satmar Hasidim district to provide education for handicapped children there. He dissented there saying, "I do not know who would be more surprised that New York's creation of a district that happens to coincide with Satmar Hasidim would be held an establishment – the Framers or the Grand Rabbi, who did not realize that he just turned into a theocrat in New York State." He dissented in *Texas Monthly v. Bullock*, 489 U.S. 1 (1989), which holds it to be an establishment to give sales tax exemptions to people who sell Bibles and so forth.

And we know he is weak on Establishment Clause enforcement, finally, because he is quite willing to hold that when free speech rights of religionists have been violated, it is not an Establishment Clause violation to include them in a free speech program. It is not a violation of the Establishment Clause to let the University of Virginia sponsor a religious proselytizing magazine, any more than it is to fund the 4-H magazine. So, he's weak on free exercise enforcement and weak on Establishment Clause enforcement.

Why might that be so? Well, you might think that it has some explanation having nothing to do with religion. I'll give you three possibilities. First, you might think it is about his attitude towards judicial review. He does not believe in judicial activism, he believes in deference to legislative majorities. That's why he might be willing to uphold legislative exemptions of religion from general law, but not to have to judicial compulsion of such exemption. He seems to defer to lots of religious accommodations. He deferred to school prayer, religious subsidies, and so forth. And maybe it is just about deference to majorities. Well, that cannot be entirely right, because after all, he is quite willing to join in the invalidation of the Religious Freedom Restoration Act, an act of Congress that was passed with one of the largest majorities in the history of Congress and signed in one of the fastest times by the President. This was your political process in action and nine Justices, including Justice Scalia, were willing to strike it down. So, his cannot be purely a deferential position. Of course, Justice Scalia could claim personal privilege on that one since Congress was trying to overrule his own opinion in *Smith*, but still, at the least, it's not entirely consistent with a mere posture of legislative deference.

Second, you might think this approach is just in keeping with Justice Scalia's preference for rules rather than balancing tests. He's written extensively on how bright line rules and categorical tests are much better than flexible balancing tests. He ridicules the majority for example, in *Lee v. Weisman*, for having too loose a conception of coercion; a kind of psychological version of coercion, rather than good old Blackstonian coercion at the end of a stick. He makes fun of people who balance and he advocates rules, and yet, his opinions in this area do not seem entirely rule-like. After all, in *Smith*, he said, generally applicable laws cannot be challenged for having a disproportionate impact on religionists in violation of the Free Exercise Clause, unless there's a hybrid claim – two rights are better than one. If you have both a free speech claim or a privacy claim and a religious claim, maybe you'll still win. And then he said also, employment discrimination claims, there's an exception there. So, he builds these exceptions in. That does not seem very rule-like. It cannot just seem to be explained by his rules preference.

And then you might think, well, maybe he's just trying to be consistent with his constitutional views in other areas. That seems promising when you start thinking about it. He takes the same view about generally applicable laws in both the equal protection context and in the free speech context. In the equal protection context, he is quite willing to defer to any federal law that has a disproportionate impact on racial minorities, women, or other minorities claiming to be disadvantaged in the political process. He is all for *Washington v. Davis*, 426 U.S. 229 (1976), and similarly in the First Amendment free speech area, he is quite willing to uphold general laws that merely happen to have a bad impact on speakers. After all, think of the previous nude dancing cases. There's another nude dancing case up this term about Candy Land. The last one was about the Kitty Kat Lounge. And in these cases, what's at issue is whether erotic dancing in the nude is protected by the Free Speech Clause. In *Barnes v. Glen Theatre*, 501 U.S. 560 (1991), the Court narrowly said it was not, but Justice Scalia was the only one who said, look, this law does not even implicate the Free Speech Clause. It's a public nudity statute. It applies whether you're dancing in the Kitty Cat Lounge, dancing in the Balanchine Ballet, or everybody having a nudist convention in the Hoosier Dome. It applies to you whether you're nude wherever you are and it shouldn't even implicate free speech. So, you might think *Smith* is just a part of his general jurisprudence. He always wants to defer to generally applicable laws.

But that cannot be quite right, because he is for affirmative action for religion. And we know he is not for affirmative action in racial contexts. We know that he is quite willing to allow explicit legislative accommodations of religion. He said so in a number of his Establishment Clause dissents. And that seems inconsistent with his quite consistent position that there can be no

racial affirmative action at all, even though you might say in both cases, well, the majority should be able to give rights away to the minority.

So, what is it really? I think it really does come down as Professor Kelley suggested, to a vision about politics and its relation to courts. It is a vision of politics that's majoritarian, but I want to say it is something a little bit more than that, and I want to say why I think, in the end, his view of religion is not one that the Framers would have recognized. It is not originalist in that sense. And it may not be a view of religion that religionists ought to endorse.

I think it is not just majoritarianism, but a particular kind of majoritarianism. A kind of majoritarianism in which Justice Scalia sees religion as a garden variety interest group, playing in the political process, just like any other interest group, getting in there on K Street to lobby for vouchers just the way farmers lobby for agricultural subsidies. Getting in there to lobby for exemptions from general laws or a piece of the federal pie for charitable purposes, or income tax exemptions, or property tax exemptions. It is just another player in politics. That is why we should give it voice in politics, but not exit. That is why we should be weak on free exercise enforcement in court, but also weak on Establishment Clause enforcement. We should give it voice and not exit. It is just another interest group and it is going to have a relatively benign role in politics. If there's a little bit of accommodation and there is a little bit of school prayer, what skin is that off of anybody else's nose? Let everybody live.

Let me conclude by saying that this vision of religion might be a vision of religion that is a good policy. You might say, you'd rather have a view of religion as a kind of benign, garden-variety interest group. You might be a Catholic. You might be a Kiwanis. You might be a Jew. You might be a Republican, etc., etc. It might just be another form of interest group relationship. You might think that is a good policy and we are better off with that kind of policy than living in Beirut or Belfast, or places where religion determines people's life prospects all the way down in ancient tribal animosities. But I do not think it is the view of religion that the Framers had in mind. They came across, there's the old New Yorker cartoon of the people on a Mayflower-like vessel saying, "Well, we came to escape religious persecution, but we did not know about the upward trend in real estate values."

But at least one of the principle reasons for the founding was the escape from religious persecution in regimes where religious differences were taken very seriously. And I think that is why the separationist's position is more loyal to the original intent of the Framers, in that it is the one that recognizes that religion is different from other kinds of interests. It does command a different kind of loyalty. And to have everybody get together and lobby, and find the least common denominator, the overlapping consensus of religious views is going to dilute religion and dilute the role it plays in individual lives.

So, you might decide that it is a good idea to be an assimilationist and see religion as just another interest group. Let it win in politics when it can, but not come whining to the Court if it loses. Let it get whatever victories it can in politics and not have other people come whining to the Court to deprive religionists of their victories. Let it just win or lose in politics. Let it take its lumps. Those who have voice ex ante shouldn't have sour grapes ex post. It might be a good way to view religion, but I do not think it is the one that is true to our history. And maybe that comes back to a theme that Professor Chemerinsky raised: Is there any way to be a true originalist when things have changed. Thank you.

Panel Discussion

Mr. Uehara:

In the public debate and discussion section, the panel will first ask questions of each other. Then anyone in the audience can come up to the two microphones in front and ask questions of the panelists. Professor Van Dyke will continue to moderate the discussion.

Professor Van Dyke:

I want to thank our wonderful panelists for their excellent presentations that give us such a strong anchoring on this complicated subject. What we want to do is engage in an interchange among ourselves for a few minutes about the issues that each speaker has raised, and then open it up for general questions from the floor.

I would like to start off the discussion by focusing on two cases that present a lot of mysteries for us law professors about what the Court is really trying to do, and where their decisions may lead us. The first case is the *Smith* case, the peyote case, where Justice Scalia and the Court ruled that a generally applicable law must govern even if it interferes with a person's exercise of religious practices. I asked Justice Scalia what he would do on the bench if he were faced with a situation where you had an act of Congress that prohibited sex-based discrimination but had no exemption for religious groups, and thus would require the Roman Catholic Church to have female priests. His answer was that (as a judge) he would be obliged to uphold the statute, based on his decision in *Smith*, but that (as a citizen) he would then lead a revolution to persuade Congress to amend the statute to add an exemption for religious organizations.

Then we went on to discuss the other case that you have heard so much about this afternoon, the *Boerne* case, involving Congress' enactment of the

Religious Freedom Restoration Act, which overturned the *Smith* decision and required greater accommodations of minority religious views. The Court, with Justice Scalia's concurrence, overturned that statute. The Court said the statute was unconstitutional and that creates a mystery for us, because it seems like the Court is rejecting the democratic process, which is something that Justice Scalia frequently tells us he is constantly adhering to. He claims to prefer the democratic solution to the judicial solution for these decisions.

So, where does all this leave us? One question that is apparently unresolved is whether the Religious Freedom Restoration Act is still in the books and applicable to federal governmental bodies and federal statutes. I would like to begin and ask our distinguished panelists whether they view RFRA as still law applicable to the federal government. What would Justice Scalia and the rest of the Court do if we had a series of mini-RFRAs passed by the fifty states?

Professor Chemerinsky:

In *City of Boerne v. Flores*, the Supreme Court declared the Religious Freedom Restoration Act unconstitutional, and held that it exceeded the scope of Congress' power under Section Five of the Fourteenth Amendment. Justice Kennedy wrote the opinion for the Court. He said Congress' power under Section Five of the Fourteenth Amendment is "to enforce by appropriate legislation." Justice Kennedy said that when Congress is expanding the scope of rights or creating new rights, Congress is not enforcing the Fourteenth Amendment.

Now, as an aside here, I do not know how you can justify that position by the original meaning of the Fourteenth Amendment. Every indication we have with regard to what Section Five is about broadly empowers Congress to be able to legislate to protect the rights that are safeguarded by the Fourteenth Amendment.

But, in answer to your question, the majority opinion in *City of Boerne v. Flores*, is just that Congress, under Section Five of the Fourteenth Amendment, could not adopt the Religious Freedom Restoration Act. Section Five power gives Congress authority with regard to state and local government action. The authority for the Religious Freedom Restoration Act, as to the federal government, would have to be someplace else. It would have to be Congress' supervisory authority over the federal government, together with the Necessary and Proper Clause. But there is nothing in *City of Boerne v. Flores*, as to Section Five, that would indicate why it would be unconstitutional for Congress to have the same law with regard to the federal government. Some federal courts of appeals have held that it is constitutional still as applied to the

federal government. The Eighth Circuit, in the *Crystal Evangelical Church*, 82 F.3d 1407 (8th Cir. 1996), case for example, has come to that conclusion.

Now, as to state RFRAs, I believe that since they do not implicate Section Five, they would be constitutional. The only issue would be whether or not state RFRAs, or even the federal RFRA applied to the federal government, might be seen as an Establishment Clause violation. As Professor Sullivan indicated, that was Justice Stevens' concurring opinion in *City of Boerne v. Flores*. I do not think that Justice Scalia would find a violation of the Establishment Clause. I agree with Professor Kelley here. But it is an open question obviously, since the majority did not need to reach the issue in *Boerne*.

Dean Sullivan:

I think there is a plausible argument, or an argument that could be made, that RFRA violates some constitutional provision other than the Establishment Clause, even as applied to the federal government. And that would be that it violates the structural principle of the horizontal separation of powers because Congress tried to overrule the Supreme Court decision by majority vote, rather than leaving that to the process of constitutional amendment.

One very strong reading of *Marbury v. Madison*, 5 U.S. 137 (1803), is that Congress cannot overrule the Supreme Court. The Supreme Court is the final arbiter of the meaning of the Constitution. Here Congress was arguably trying to circumvent Article Five in a sense, by passing a statute, rather than proposing an amendment that would have to go to ratification by the states to overrule a Supreme Court decision. The problem with that argument is we really cannot think of any other example where the Court has ever held as much. Certainly, that's not *Marbury* itself. And you might think that this is an area where the horizontal separation of powers does not rise to the level that anybody should be concerned about. We would only be concerned about Congress overruling a Supreme Court decision if its statute violated somebody else's rights.

For example, if Congress were to declare human life begins at conception that might be thought to override women's rights under the Fifth Amendment against Congress taking away what the Court has called a liberty right under the Due Process Clause. So, there is an open question. It is a good exam question. It is not the kind of thing that has actually been adjudicated – about whether there is a structural horizontal separation of powers problem with Congress overruling the Supreme Court decision without an amendment. It is not one in which there has been any precedent.

Erwin, do you have any thoughts on that?

Professor Chemerinsky:

The only thought that I have is that what the Supreme Court in *Smith* said, is there is no constitutional right to be free from the neutral law of general applicability that burdens religion. The fact that there is not a constitutional right does not mean that there cannot be a statutory right.

Dean Sullivan:

So, it is not an overrule?

Proffesor Chermerinsky:

It is not an overruling. The Religious Freedom Restoration Act is Congress, by statute, saying you have a right to be free from neutral laws of general applicability that burden religion, unless strict scrutiny is met. And the Supreme Court in *Boerne* says, Congress, you cannot create this right under Section Five of the Fourteenth Amendment. That does not mean that Congress might not be able to create it under other powers, or states cannot create it. It simply means that the Court says there is nothing in the Constitution that gives the right in Congress and state legislature saying, but yes, there is a statutory right here.

Professor Van Dyke:

Professor Kelley?

Professor Kelley:

About *Boerne*, I agree with Erwin that it is entirely about the scope of the Section Five power. And as I said in my first remarks, I would be very surprised if the Court were to hold a state-level RFRA unconstitutional.

Now, as to the horizontal separation of powers question, it does strike me that it would be okay for Congress to pass RFRA as a matter of federal statutory policy. It is analytically the same as Congress providing for welfare rights after the Court decides that they are not required by the Constitution. Congress has the power to do lots of things that are not strictly required as a matter of right, under the Constitution. The protection of disparate impacts on religious interests is of similar weight. It is a similar analytical problem.

The Establishment Clause argument about RFRA is not trivial and will certainly get some votes on the Court. As a matter of law prediction, I would be surprised if the Court were to find RFRA an establishment of religion, but

I think there will be people who think that. There are plenty of scholars – and excellent scholars – who do think that, and certainly, at least one Justice.

Professor Van Dyke:

I now invite each panelist to pose questions to other panelists.

Professor Chemerinsky:

First I would like to answer the questions that Bill posed to me during his presentation, very briefly. Let me focus on two questions that I thought were asked. One is whether or not I was in a contradiction if I opposed the dead hand of the past, then why do not I favor a majoritarianism with regard to the Religion Clauses. And my initial answer is, there are not just two choices out there – the dead hand of the past or pure majoritarianism. I think there are many meanings we might give to the Free Exercise Clause and the Establishment Clause. Kathleen's elegant presentation showed us four different models. And I think I could show you, based on an "original meaning" theory, evidence to support any of those four models. Ultimately it is really a choice about which model we think best achieves what we think the Establishment Clause and Free Exercise Clause are all about.

But maybe the best way to answer that question is to go to the second question you posed to me. If value choices are being made, why not have them done by elected legislatures, rather than unelected judges? To me, that is the central question that constitutional law is all about. And let me just give a few very tentative thoughts. First, I want to suggest that all Justices are making value choices – Justice Scalia, as much as any liberal on the Court. When Justice Scalia is choosing to strike down popularly elected legislatures' affirmative action programs, he is not deferring to the democratic process, and he is not following original meaning. He is reading value choices into the Constitution.

Now, as I said, I think all Justices have to make value choices. I think it is the nature of the document that is written, and the open textured language of the Constitution, written so very long ago, but still governing our modern society. Now, this does not mean that it is just personal predilection. It does not mean that it is as simple as, I like Coke better than Pepsi, or 7-Up better than Sprite. What they are doing is deciding, as best as they humanly can, what they believe the Constitution should mean, and applying it to specific situations.

Now, my concern when a Justice pretends that there are not value choices being made is that they do not defend their value choices. I am very critical of the recent sovereign immunity decisions of the Supreme Court, because

they do not acknowledge that there is a value choice being made. State immunity is preferred over state accountability. They try to say, well, they can find it in the structure or the words of the Constitution, even though it is not there at all. And I would be much happier if they said, look, here is why we favor state immunity over state accountability. And there can be a dialogue in the Court, with scholars, with legislators.

But I still really have not answered your question. Why Justices rather than legislators? All I have said is that all Justices do this.

And my answer, and I will sketch it only very briefly is, that I think society is better off with an institution largely immune from direct electoral pressures, deciding the meaning to give to the Constitution, and then protecting those values from majoritarian rule. In the steps in the argument, though I cannot develop them given the time here, would be: First, that it is desirable to have a Constitution to safeguard our most precious values – values such as separation of powers, freedom of speech, or free exercise of religion, or the Establishment Clause, or privacy. That to serve these purposes the Constitution must evolve. It cannot be a static document. The Constitution, for so many reasons – technological changes, value changes, social needs – has to be an evolving document. We cannot be governed in the year 2000 by the values and choices of 1787 or 1791. That evolution should be by interpretation, not just by amendment. It is not conceivable that the document to serve the purpose we want it to can only be changed by amendment.

In a simple example, Article Two of the Constitution refers to the President and the Vice President with the pronoun "he." There is no doubt that the original meaning was that only men would be president or vice president. Does that mean it is unconstitutional to elect a woman as president or vice president until the Constitution is amended? Now I give this is a simple example, but I could give hundreds of them. And my argument is that it is good to have an institution, like the federal judiciary, largely immune from direct majoritarian politics, saying this is what our most precious values mean, and safeguarding them. And ultimately, it means that in order to have cases like *Brown v. Board of Education*, or *Roe v. Wade*, I know that there is the risk of cases like *Alden v. Maine*, 527 U.S. 706 (1999), or *Lockner v. New York*, 198 U.S. 45 (1905), that I do not like. But it is based on my belief that overall we, as a society, are better off having that institution, with Justices with that kind of authority.

Professor Kelley:

I think it is true that these are among the most fundamental questions in American Constitutional Law. On the matter of the Religion Clauses particularly, and what you said, Professor Chemerinsky, about the fact that

original meaning is indeterminate and you could find support for lots of different interpretations, including all the ones that Dean Sullivan outlined for us so clearly . . . that might well be so. And I do not think anyone should pretend that it is a simple task to interpret the Constitution. And I return to the question, if we are not trying to discern the meaning of the document, then what are we doing? For my part, I worry about the "then, what?" being judges to protect our most fundamental values for us.

The Constitution is law. It is a legal document. It has legal force. And if the meaning of the Constitution is that judges have the power to do as they please, or to state it more elegantly, judges have the power to stand against the majority to protect our most fundamental values – if that is its meaning, then so be it. That is what we the people have ordained and established. But, I believe any theory of judicial review, any theory of judicial power, needs to draw legitimacy from law. It cannot be deemed legitimate simply by practice. At least, it ought not to be deemed legitimate, simply by practice. Let me quickly add, though, that the doctrine of *stare decisis* is an essential element of our system of constitutional adjudication.

So, it strikes me that the difficult question is, from where do judges get the legitimate authority to stand in the way of self-government, by people – actually republican self-government – people elected to represent us? And the legitimacy of that has to be traced to the Constitution itself. And the Constitution itself was understood at the time to mean that in the course of deciding contested cases and controversies, judges must prefer the fundamental law ordained and established by the people to the laws established through ordinary law-making processes by the people's representatives. That is the basic theory of judicial review. It might be trite to restate it, but I think it is important to bear that in mind, especially before an audience of law students. And if what we are going to task judges with doing is simply choosing our most fundamental values, I return again to the question, whose values?

Now, it is of course, a very difficult task to trace any sort of judicial doctrine to some legitimate foundation in the original meaning of the document. And there are some questions, with developments over time, that you need to infer from general principles. You need to go to a higher level of generality, that is obviously so. I agree with that. But if we abandon the task of trying to ground the judicial function in law, then we are not really governed by law at all. We are governed by the majority of nine Justices who, frankly, I am not confident have any better sense of values than I do, or Kathleen Sullivan, or Erwin Chemerinsky do.

Professor Van Dyke:

Dean Sullivan?

Dean Sullivan:

Well, we might take a predictive look at what we think is going to happen to vouchers. If you are a court watcher you see this trend. Case after case after case involving a public subsidy to a religious user that is challenged as an Establishment Clause violation. The Establishment Clause claim gets rejected and the subsidy gets upheld as long as the subsidy is part of a general program in which there are non-religious beneficiaries.

If the Church gets a property tax exemption, but so does the private university, and the private hospital, that's fine. If the chaplaincy student gets his vocational rehabilitation subsidy, but so does the student who takes his vocational rehabilitation subsidy to the public university, or to a private secular school, that's fine. If the kid who goes to parochial school gets a sign language interpreter, but so do other handicapped children get aid at their public schools, that's fine. Well, you would think that that trend would inexorably mean that if folks get a rebate of a certain amount of public tax money that has been centrally collected and then redistributed, and the parents happen to send their kids to parochial school, that would be fine. It is a general program. People are getting their tax money back to go to private secular schools, as well. And it is an exercise of choice, not coercion. It is not a classic Establishment Clause violation, like swear allegiance to my God or I won't let you live, or be part of my polity, or give a tithe to the Church. It does not seem coercive in that way.

So, let me be the last person in the world who thinks that there might still be an argument that vouchers are unconstitutional, despite this trend. And then I would like to know what the other panelists think. I think the one argument that is still left is that vouchers are different from these other programs that it is a global support of what is necessarily the function of proselytizing about religion. Vouchers will necessarily go to government speech. It is government speech because religious schools, like other schools, are teaching a state-prescribed curriculum. It is government speech on behalf of religion. There is no way that a voucher can endure the legal fiction that you are just paying for the bus driver and not the prayer, or that you are just paying for the secular film loops and for the math books, not the catechism books. You cannot maintain that fiction with vouchers, because vouchers are going insegregably into all of the teaching at the school. And the teaching in the school necessarily involves proselytizing. That is what religious schools are

about. It is good that they are about proselytizing, in my view. That is part of religious freedom.

So, if you think that the fact that the money is inevitably going to go to proselytizing, that is a bridge that the Court has not yet finally crossed. There has always been something about these other programs that make them fall short of the government itself proselytizing. So, that would be the argument that vouchers are different. And you can read some faint indications that maybe Justice O'Connor hasn't quite decided the voucher question yet. In *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), the religious magazine case from the University of Virginia, she made a big deal about how this was not a case about taxation. Taxation might be different. That was a case about mandatory student fees. Maybe the kids who were conscientious objectors to the religious speech could get a rebate. But we do not get rebates on our taxes. So, maybe there is some argument left that vouchers are different. That this would be public support of proselytizing, and maybe that is a line that is left from the *Everson* rule that the Court still wants to uphold.

Now, there are two kinds of people in the world. People who think that every policy is perfectly ridiculous, but that they are all constitutional. And then there are people who think that lots of policies are perfectly wise, or helpful, but that they are all unconstitutional. John Ely is the first. I am the second. I really do not have a problem with the policy behind vouchers. I think that there are a lot of heroic parochial schools in the inner cities of the nation, including the ones that my grandparents went to, that are doing a heroic job of educating inner city kids. And there is an argument from a standpoint of social equity, that voucher programs would help, under an existing educational distribution system, the poorest and least advantaged kids in the country to get a shot at the best education available to them in their localities.

So, I think that it might be a good policy, but I am seriously concerned that there is a last Establishment Clause line that we have not crossed yet. It is the line that the government is going to coerce me to give up money to the tax system, take money away from me and spend it on a religion that I do not believe in. And that is an area in which we do not always get tax rebates, but the Establishment Clause is one area where we should not have to give up money in form. So, I am interested to know if you think there is any hope, or am I just dreaming?

Professor Chemerensky:

Can I ask you to clarify one aspect of the hypothetical, since you asked us to be predictive? When do you think the Court will decide this, and who do

you think will be on the Court when they decide it? You can treat that as a rhetorical question, if you want. There is a reason why I asked that.

Dean Sullivan:

So you think it is a five-four issue?

Professor Chemerinsky:

Right.

Dean Sullivan:

Let us suppose that the Ohio case were up before the current Court, so that there is no change of personnel.

Professor Chemerinsky:

There is obviously a reason why I asked that question. For each of us, it would be a relevant question in trying to answer Kathleen's predictive inquiry. The outcome depends on who the Justices are at the time, because it all depends on the values of the Justices in deciding a question like this. Inescapably, whether they are conservative or liberal, it is going to depend on who they are and what they believe on the issue. It is a value choice. Now, let me answer predictively and then my own views normatively.

Predictively, I think the current Court would uphold such a voucher system by a five to four margin: Rehnquist, O'Connor, Scalia, Kennedy and Thomas in the majority; Stevens, Souter, Ginsburg, and Breyer dissenting. That has been the majority with regard to the recent Supreme Court cases on aid to parochial schools, such as *Agostini v. Felton*, 521 U.S. 203 (1997). In fact, at the end of her majority opinion in *Agostini*, Justice O'Connor said that to summarize the current law, government aid to parochial schools violates the Establishment Clause in three circumstances. And I do not think she was summarizing at all. She said that one circumstance is if the government favors some religions over others. A second she says is if the government is involved in religious indoctrination. And the third is if the government is involved in the administration of religious programs.

Now, if this is her test for the Establishment Clause and aid to parochial schools, it is very different from any test the majority has ever articulated – which is what I find puzzling at the end of her opinion, and she presents it as if it is just a summary of the law. I do think that is her test for the Establishment Clause. And by that test, a voucher system would be

constitutional, so long as the vouchers could be equally used for any religion, and for religious or non-religious education. So long as it is simply a voucher that goes to parents that they could use for any school so the government is not involved in indoctrination or administration.

You allude to the Ohio case. And as we know, a federal district court judge had issued a preliminary injunction as to a voucher program, but the Supreme Court in a five to four decision without written opinions, stayed the preliminary injunction, to allow the voucher system to continue. The decision was a five-four split as I just said. Which to me, is some indication of what the current Court likely believes about vouchers. Now, this is predictive and it is predictive based on who the current Justices are. Normatively I agree with you, for exactly the reasons you say, and I would go further.

To me, if anything is a violation of the Establishment Clause, it is the government giving, in essence, a total subsidy to a religious institution. Vouchers can be, and likely will be, total subsidies to parochial schools. And here you can go back to words of the Framers in original meaning. Thomas Jefferson said that there is nothing more offensive than to tax people to support the religions of others. And to me, there has got to be some line that is drawn between permissible and impermissible aid, with total subsidy. And vouchers are there, being on the impermissible side.

Professor Van Dyke:

Professor Kelley?

Professor Kelley:

As a predictive matter, I suppose I agree that the Court would uphold such a program on the vote that you hypothesize. It is a very hard problem and I think the particulars of the program matter a lot to the Court. This is one field in which formalism has been very important to the Court rather than economic reality. I am thinking of cases like *Muehler v. Allen*, 463 U.S. 388 (1983), and others, where the identity of the decision-maker makes a big difference. If the decision to use money for a religious purpose is the product of private action, and not government action, the Court has been much more willing to countenance that.

I think it is certain that the Court would not tolerate public judgments that money ought to be spent on religion. And I think the difference for the Court will be dispositive in the voucher situation. The Court will simply disagree that the use of vouchers, which are the product of private decision-making, for schools that can be non-religious, as well as religious, amounts to government proselytization of religion. I think that the Court will reject the argument that

allowing people to use money, tax money, or a tax refund, or not to be taxed, for education of their choice, whether it be private or public, parochial or non, is proselytization of religion. I should say religious or non-religious, because parochial has the connotation of just Catholic schools and there are plenty of religious non-Catholic schools in this country. I think that the difference between public and private choices will be dispositive. The Court will say that if the government permits people to use money, either a tax refund or a failure to tax, on things that they choose, that the Court will tolerate that. But then again, maybe it won't.

Dean Sullivan:

Okay.

Professor Van Dyke:

I do not have too much to add. My prediction is, as the others have stated, that the Court would uphold a voucher system, because we have a combination of an eagerness to accommodate religion with a desire to support a "market system" approach to education, which would make it irresistible for the Court. There are a lot of people, not only religious people, who favor vouchers as a market mechanism, and that perspective will carry the day if there is any lingering doubt for the Justices.

Let us open the discussion up for questions now.

Audience Question:

I do not know if what I have is a question or if it is more of a departure point. I am fairly accustomed to working with military chaplains and I am curious, whether you see that as a violation or is it just something that we have come to accept as military culture? Do we just accept it and turn a blind eye?

Professor Van Dyke:

That is a good question and it is also timely because there has been an incredible recent political controversy over the new House chaplain – a Prostestant who was picked over a Catholic. This conflict does confirm one's deepest fears about the entanglement of government into religion when the government hires chaplains. Could we hear from our panelists on their views on what, in a perfect world, we ought to do with chaplains serving in governmental organizations?

Professor Chemerinsky:

I think that military chaplains are constitutional. And I think they are very distinguishable from legislative chaplains which, contrary to what the Supreme Court said in *Marsh v. Chambers*, 463 U.S. 783 (1983), I think are unconstitutional. I think the reason that military chaplains are different is because to not provide military chaplains would be to raise a serious free exercise problem. Those who are in the military, and in past times often not by choice, are often in places where they cannot see chaplains outside of the context of the military. In other words, unless the military provides them a chaplain, then they are not going to be able to practice their religion. I think the same is true of those in prison. Since the government is not going to release those in prison to go to their own houses of worship, unless the government provides for them a chaplain, then we are going to be infringing their free exercise.

And so, protecting free exercise of religion becomes a compelling interest to allow us to do something that would otherwise violate the Establishment Clause – the government paying for a chaplain. That justification does not carry forward when we are talking about a House chaplain because people in a legislature can go anytime they want to see the chaplain of their choice and to get the spiritual advice that they want. I think that for the government to pay for a particular religion's chaplain, like in *Marsh v. Chambers*, is a violation of the Establishment Clause. I would draw a distinction between the military chaplain and the House chaplain along those lines.

Professor Van Dyke:

Other thoughts?

Dean Sullivan:

I agree completely with Erwin.

Professor Kelley:

So do I.

Professor Chemerinsky:

Can I write this down?

Professor Kelley:

But on different grounds. It strikes me that in principle, Kathleen, you are right. Your prior writings, and the positions which you have described today, Erwin, would lead to the invalidation, I think, of a military chaplain. This is because it is quite easy to make contextual accommodations for those situations where people have been conscripted or, where people in the military are unable to get to the chaplain of their choice. What's more, it would be very easy for the military simply to give access to its members for privately paid, privately provided clergy. Nothing in the law of nature that precludes that.

So, if we are going to be strict about the principle that the government ought not to spend a dime on religious exercise, then we ought to be strict about it and require the government to take action to facilitate personnel's military access to clergy without crossing the line of spending money to do it. And I think that the vast majority of time, that could be easily accomplished. It might be administratively difficult, but not overwhelmingly so.

What I would offer is, just a small word in favor of tradition, because it strikes me that if we draw a hard line that no money shall ever be spent, or to do anything to support religion no matter what, or a hard line that the government ought not officially ever to acknowledge religion, it follows that military chaplains must go. I think it follows that the pledge of allegiance must go. I think in principle, it follows that the currency of the country must go, even though some people have said it is a de minimus violation, and ought not to be a concern. I think Justice Brennan said that in a case, *Lynch v. Donnelly*, 465 U.S. 668 (1984).

It strikes me as a bit contrived to draw a very strong line and then say, but we are going to accommodate these traditions. Why do we accommodate these traditions? Well, the reason why we do is not simply because we have a compelling interest in having military officers, or military service people have access to clergy. It is because we, as a society, have always tolerated that. And because it is not something that ought really to offend people. It is not a tradition that we, as a culture, generally have found offensive. Now, that is a controversial claim, but I think that the contrary view, that state-paid, state-provided military chaplains are okay only because of a potential free exercise violation, is playing a little fast and loose with the ordinary demands that we place on the government in trying to avoid Establishment Clause problems.

Now briefly as to the legislative chaplains, I do not really have a view. I can see good arguments on both sides of that issue. The Court has specifically upheld it at the state level, but that does not count for much, and I think it is a hard question.

Professor Chemerinsky:

One thought as to the statement about money, if anybody really objects in principle, that your money says "In God We Trust," I'd be glad to help you by taking it off your hands.

Professor Kelley:

Be very careful what you ask for, because pennies really do add up.

Professor Chemerinsky:

I'll take them.

Professor Kelley:

In weight, not so much in dollars.

Professor Van Dyke:

Yes, sir?

Audience Question:

My name is Ancondo Malm. We had a situation here at the state legislature about a year ago regarding leaving cultural and/or religious symbols on legislative office doors. Now, does Congress tolerate either cultural and/or religious symbols on the doors of representatives or senators in Washington, D.C.?

Professor Van Dyke:

As background, we had some of our legislators putting religious symbols on the doors of their offices at our State Capitol. Others objected that this action violated the Establishment Clause. What are your views on whether it is constitutional to allow religious symbols on government doors? Are there examples from Washington or other state legislatures that any of you are aware of?

Dean Sullivan:

I guess that I would take the strong view that that would not be constitutional if it is on government property. I certainly think that the legislator can have a bumper sticker on his car or a rosary hanging from his rear view mirror. It is his private property and in his clearly private capacity, the legislator should be very free to speak as a religious person and to be associated with religious views – he has a private life. But when it comes to government property and the seat of government, I would make that a zero-tolerance space for that kind of religious symbolism.

But I have to confess that my view is not necessarily the Court's view. The Court is now governed by Justice O'Connor's statement of the test, and she says that the test for this kind of religious symbolism is: Would a reasonable observer attribute the speech on government property, or near government property, to the government? Or would a reasonable observer understand that the government is simply providing a platform in which lots of people say different things, and some people have "Save the Whales" posters on their doors and some people, even in the Capitol, have religious posters on their doors, and if there is a kind of general scene in which there is lots of speech, and religion is just part of it, no one will say, oh, well the government is endorsing the religion of these folks.

That is the governing test, even though Justice Scalia, has railed against that test as much too loose and subjective and dependent on things that Courts are not good at discerning. What would a reasonable objective observer think? That is the governing test. That is the test that five, and in one case, six Justices have endorsed about endorsement.

Now, I have to say that that fits reality a little bit. I'll never forget one of the occasions on which I met Professor Kelley's former boss, Kenneth Starr. I was going into the Justice Department, the seat of government, to work on the transition to the Clinton Administration. I was representing those people who had been delegated by the Clinton Administration to work with the outgoing administration on the transfer of the administration. So, in the Solicitor General's office, the issue was what cases were pending in the Supreme Court and what would the new Administration do, if anything, differently from the previous administration.

It was winter when this happened of course, because it was between the November election and January with the inauguration. And it was Christmas time. I remember walking into the Department of Justice – this great, gray majestic building, the seat of justice in the United States, the exemplar of defending our rights and liberties – there was the picture of the outgoing President, President Bush, and outgoing Attorney General Starr on the wall. And I went upstairs to visit General Starr, who was, as he always is, was

extraordinarily courteous and courtly. But on my way into his office, I brushed past the Christmas tree adorned with all kinds of quasi-religious symbols, in addition to the candy canes and the dancing reindeer. It is associated, after all, with Christmas. It was winter and so static electricity caused some tinsel from the tree to adhere to my wool coat. When I walked into General Starr's office, he said, before he said anything about the Supreme Court dockets, "Please allow me to remove some tinsel from your coat." And he reached over and removed the tinsel. It was partly a courtly gesture, and partly designed to throw me off a little bit, as I walked into the office asking, "May I have the documents, please?" with a white flag.

In any event, it led me to think very hard about the Christmas tree in the Department of Justice. I know it is well-accepted, and I know there is a carol ceremony that Chief Justice Rehnquist leads in the Court, with the various clerks there in attendance. Obviously you want to let people who work in government have their private life and private religious beliefs. I would just favor erring really on the side of extreme caution about having those symbols in the seat of government. So, I would say, take down the Christmas tree, have it in a different location than the Department of Justice and take those posters off the door, while still believing very firmly that people should be able to express their views in their private spaces and private property.

Professor Kelley:

As a doctrinal matter, I think that the Court would say that if a person in his or her private capacity, is expressing religious views, that is quite different from the government doing it. I quite agree, however, that as a matter of prudence it is something that ought to be done with great care and sensitivity, particularly for someone who is a legislator who represents a lot of people.

Professor Chemerinsky:

As a predictive matter, I think it would be unconstitutional to put the symbol of one religion on the door of a legislator's office. And I here point to a case that I think Kathleen was alluding to, *Allegheny County v. ACLU*, 492 U.S. 573 (1989), where the Court had before it two different religious displays. One was a nativity scene by itself, in a display case of a county courthouse. The other was in front of a city building, a menorah, a Christmas tree and a proclamation about tolerance in the holiday season. What the Court ultimately came down as saying is the nativity scene by itself was unconstitutional, because a nativity scene, by itself, is symbolic of government endorsement for Christianity. But when you have symbols from more than one religion and

when you have secular symbols as well, then it is not symbolic endorsement for religion or for a particular religion.

So, to me, having a cross or a Star of David, assuming that to be a religious symbol, on somebody's door does, when it is a government office, involve the same kind of symbolic endorsement as a nativity scene by itself. And maybe that explains what Justice O'Connor said about the Establishment Clause, that it is meant to keep people from feeling unwelcome with regard to their own government and their own community. If a legislator has a cross on his or her office door, then those who are not Christian are going to feel that that legislator is not their legislator.

When there is a government ceremony that begins with a very religious invocation, and it is in a particular religion, those of a different religion just feel that they do not belong here. They think, this is not my ceremony. That is why I think prayers at public school graduations are inappropriate. Because those of different religions are just left to feel, I'm in the wrong place. And that's what O'Connor says the Establishment Clause is about. And I think she is right there and I think it explains why a symbol of a particular religion on a government door is inappropriate.

Professor Van Dyke:

Professor Chang?

Audience Question:

Thank you. My name is Professor Chang, a professor here at the Law School. I was very impressed by each of your performances. Native Hawaiians and I would like to draw your attention to a case in which Native Hawaiians raised an issue to protest the geothermal drilling on the Big Island, where geothermal energy was being produced by drilling into volcanic areas. The Goddess Pele, who is a very real entity to Native Hawaiians, is alive and that is her domain – her *kuleana*, as we say. And to drill into the ground is like drilling into your Uncle Saul, because in the Hawaiian view of the world, the "'*aina*" or the land, is a part of your family. The Hawaiians tried to stop this by bringing suit. The Hawai'i court denied the cause of action.

Let us focus on what [former Hawai'i Supreme Court] Chief [Justice] Richardson says: One, you haven't proven harm to the Goddess Pele. Two, he says that you have not proven that this particular hole has any religious significance. Now, let me ask you, if I went over to Temple E'manuel and painted swastikas all over the walls, it would be perfectly appropriate to jail me. Now, do I have to prove that Jehovah was harmed? Do I have to put him on the stand? How does the court expect Hawaiians to respond – how do you

prove religious harm? What are you going to do? People who are Hawaiian are getting sick. And for showing that a particular site is of special religious foundation – that is not the Hawaiian way of looking at the world. Let me suggest that in a central view of the world, by act of man, certain sites become sacred, like Calvary or Gettysburg, or Pearl Harbor, where blood is spilled. The Hawaiian view is the diametric opposite. That the world is itself sacred, and all of us are just passing through. So, that to say, prove that this piece of land is, in your frame of mind, sacred, is to misunderstand the context.

My point is really this. And it goes to *Smith* because the neglect in *Smith*, to note for the case law of all Native Americans, is the neglect of fact. Some people in the United States are here because they chose to be here or their ancestors emigrated, or made the voluntary choice. Other people are here because they protested or were conquered and are compelled to be part of the political social compact. So, according to Professor Chemerinsky's political view of the world, the idea of social compact allows the United States Constitution to be imposed and us to assume an assimilationist view, in the words of Dean Sullivan, and that our framework should be one that they accept. Can we expect the Supreme Court to understand the psychological place and the psychic component of the religious aspects of being a Hawaiian as the Hawaiians do?

Professor Van Dyke:

Thank you. Let us see if we can get some answers to that. This is a case like *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988), which involved the building of a road in the National Forest, which burdened native religious beliefs. Who wants to take it on?

Professor Kelley:

I'm not familiar with the case, and I hesitate to talk about it for that reason. I will just offer one observation. It does strike me that the decision-makers, in such a circumstance, ought to be sensitive to the beliefs that are going to be spiritually harmed by whatever conduct we are talking about. That is my own policy view.

And it strikes me that the non-trivial question for some people who are suspicious of accommodation would be: If this decision were made to develop some sacred site, whether it be in Hawai'i or elsewhere, and later, in response to religious objections, the government changed its mind, would that be an establishment? Because it is very clear that on the one hand the decision-maker's view of the common good without religion as a factor was that it was desirable to engage in this conduct. And the view of the common good after

religion was taken into account, the views, the beliefs of the religious people, was that the common good is better served by tolerance and sensitivity. But make no mistake, there presumably would be harm to other interests from making that decision. It strikes me as a non-trivial establishment question if one takes, at all, an anti-accommodationist view.

Professor Van Dyke:

After the *Lyng* decision, which involved the question of whether the Forest Service could put a road through sacred Indian land, Congress did reverse the Court's decision and prohibited the road.

Professor Kelley:

Well, was that an establishment? That is the issue that I am raising from the perspective of those who are suspicious of accommodation.

Professor Van Dyke:

What about the statute passed by Oregon that allows the peyote users to get their unemployment compensation?

Professor Chemerinsky:

I thought the question was excellent. I do not know enough to have a thought-out opinion on it. Let me suggest what I think the test in question should be. I think the question should be, those that were asked prior to *Smith*, because I think the test should be that which was followed before *Smith*, that is first, is there a significant burdening of religion, is there an infringement? And second, if so, has the government justified its action as meeting strict scrutiny?

Now, as to the first question, is there an infringement of religion here? I would put to the side your example of painting a swastika on a synagogue because I do not even need to get to free exercise question to say that painting a swastika on a synagogue is defacing the property of another, and the law does not allow that. I do not see it as necessary to talk about the free exercise terms. I am very much convinced by your eloquent question that there was a significant burdening of religion, with regard to geothermal drilling. The drilling is just like putting the road through the sacred Indian burial grounds, which in *Lyng* was a significant burdening of religion. And I think the point that you make for all of us to think about is, when we are dealing with religions different from our own, it is enormously important to be empathetic

to understand that religion. The more different the religion is from our own, the more central it is and the harder it is.

To take a simple example, when I teach the Establishment Clause and Free Exercise Clause and I talk about singing carols in public schools, or doing nativity pageants, inevitably a number of the Jewish students say, oh, I find this to be a violation of the Establishment Clause. It made me very uncomfortable when I was in elementary school to have to sing religious carols, or to have to take part in nativity pageants. And many of the Christians say, I do not get it. What's the big deal here? You know this is all just a secular celebration. It's all about being empathetic to somebody's religion that is different from ours and the more different, the harder it is, and the more empathy is necessary.

Well, the second question is, assuming that there is a significant burden on persuasive ears, is strict scrutiny. Is it necessary to achieve some compelling government interest? I obviously do not know enough about the facts of this to be able to answer that question, but I do want to point to something that goes to our central discussion today. In order to decide what is a compelling interest, there is no formula or litmus test. Justices have to decide within themselves what is sufficiently significant to be compelling. That is a value choice, there is no way to escape it.

Professor Van Dyke:

Kathleen, do you want to make any closing comments?

Dean Sullivan:

Well, I think both the previous responses were really excellent. I would just add one thing that has not been said yet. For a judge to inquire at all into the bona fides of a religious belief – for example, to ask say whether Pele is really mad – arguably does violate free exercise rights under *United States v. Ballard*, 329 U.S. 187 (1946), which suggested that the government may inquire into the sincerity of religious beliefs, but not their veracity. You can find out if somebody really worships Pele or if they just invented their interest in Pele yesterday, in which case maybe you do not pay so much attention to them. But you shouldn't be able to ask what Pele is thinking. In a court of law, that seems to me that there might be a kind of subsidiary free exercise problem with that kind of an inquiry.

The more extensive the religious reverence for all of the ecosystem, the more difficult externalities religious fidelity is going to create for other uses. And it may be that the only solution in this case is the political solution that tries to work the trade-offs to try to find the least sensitive spot. Erwin is right

that under strict scrutiny that you would ask whether refusal of this exemption is compelled by an essential government interest. And the answer to that might be no, the refusal of this exemption is not that you can dig somewhere else, and I'm not clear from the facts of your hypo, whether there is an alternative site that might be less religiously offensive. If there is no alternative site that is less religiously offensive, than we get into a kind of impasse between religion and the State.

But I think you raise deep questions about all of these matters and this does connect back to one of the themes of our discussion. We asked does the political process adequately take care of minoritarian religions? And Justice Scalia is very optimistic about that. He says, look at RFRA. All the religions got together and they created this law. I participated in striking it down. But they all got together and they passed it. And it proves my point. They are not powerless in politics, right? They are not powerless to protect themselves. And he might point to the override in *Goldman v. Weinberger*, 475 U.S. 503 (1986). Everything that we have talked about today has had some legislative response. Oregon overruled the peyote ban as applied to Native Americans. Congress overruled the denial of the opportunity to wear yarmulke in the military. And so you could point to these isolated examples and say, see, religion is powerful in politics, and even religious minorities can have alliances with the powerful religions and the Catholics and the Episcopalians will help the Native Americans.

But there are limits to that principle. And I think you really illustrate the point that maybe sometimes there may be a religious group that is a true discrete and insular minority – discrete and insular in the sense that no one will necessarily ally with its religious interests or comprehend its faith. And that is precisely the best argument I think there is for judicial intervention in free exercise cases, where it does not raise intolerable trade-offs with other interests.

Professor Van Dyke:

I am sorry that we have reached the end of this wonderful program, but I want to thank our very distinguished panel, and I hope you will join me in thanking them for coming and giving us their thoughts this afternoon.

Litigating NAGPRA in Hawai'i: Dignity or Debacle?

I. INTRODUCTION

> It is not possible to study human skeletal material in . . . Polynesia, without becoming aware that one is dealing with things of the deepest import to traditional belief . . . .[1]

According to traditional Hawaiian belief, bones are the essential physical material of a person.[2] Furthermore, bones have an inherent spiritual power called *mana*,[3] and they represent the lasting and immortal elements of an individual.[4] Death does not dissipate the *mana*.[5] Rather, the bones of ancestors retain their *mana*, are highly respected by their families and loved ones, and are meant to be guarded and treasured.[6] The bones of ancestors symbolize an important link to the past for living Native Hawaiians.[7]

Protection of one's ancestor's bones, and particularly preventing them from falling into the possession of one's foes, is of great importance in traditional Hawaiian culture.[8] For like most sources of power, the *mana* contained in bones is susceptible to abuse.[9] The *mana* of bones can be manipulated and exploited, for example, by re-shaping the bone or using it as a tool.[10] Improper exploitation of this *mana* has serious cultural implications.[11] Because desecration of graves is an ancient element of Hawaiian culture,[12] Hawaiians adapted coping mechanisms, such as concealing graves, to thwart grave

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[1] PATRICK VINTON KIRCH, FEATHERED GODS AND FISHHOOKS 244 (1985) (citation omitted).

[2] *See* NATIVE HAWAIIAN RIGHTS HANDBOOK 247 (Melody Kapilialoha MacKenzie ed., 1991) [hereinafter HANDBOOK].

[3] *See* MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 217 (1st ed. 1979). *Mana* is a Hawaiian word describing the spiritual power that is contained in living things and inanimate objects. *See also* HANDBOOK, *supra* note 2, at 307 (defining *mana* as supernatural or divine power, miraculous power, authority, miraculous, divinely powerful, spiritual). Anglo-American culture has no similar concept.

[4] *See* HANDBOOK, *supra* note 2, at 247.

[5] *See id.*

[6] *See id. See also* KIRCH, *supra* note 1, at 237 (noting the sensitivity with which Native Hawaiian burials must be treated in order to respect the dignity of both the living descendants and the deceased ancestor).

[7] *See* HANDBOOK, *supra* note 2, at 247.

[8] *See id.*

[9] *See id.*

[10] *See id.* (citing examples of shaping bones into fishhooks or using skulls as spittoons).

[11] *See id.*

[12] *See id.*

desecration by other Hawaiians.[13] Hawaiians were not prepared, however, for the desecration of their graves by people who did not share their beliefs and who were not subject to their cultural mores.[14]

Europeans first sighted Hawai'i more than two hundred years ago.[15] Since then, Native Hawaiians have suffered the devastating indignity of having the bones of their ancestors and sacred cultural items disinterred on a massive scale.[16] While many cultural items and sets of remains have stayed in Hawai'i, collectors and scientists have taken much away from Hawai'i to be studied and preserved in public and private collections around the world.[17] The dispersal of ancestral remains and cultural items has had serious repercussions on Hawaiian culture.[18]

Until the passage of the Native American Graves Protection and Repatriation Act ("NAGPRA")[19] on November 16, 1990, Native Hawaiians had limited access to effective legal remedies to either regain possession of their ancestor's bones, or to prevent future desecration of undisturbed burial sites.[20] Hawai'i's state law pertaining to the treatment of Hawaiian burials

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[13] *See id.* at 247-49. *See also* JUNE GUTMANIS, NA PULE KAHIKO: ANCIENT HAWAIIAN PRAYERS 40-41 (1983) (discussing how traditional Hawaiian culture dealt with death).

[14] *See generally* Edward Halealoha Ayau, *Restoring the Ancestral Foundation of Native Hawaiians: Implementation of the Native American Graves Protection and Repatriation Act*, 24 ARIZ. ST. L.J. 193 (1992) (commenting that Native Hawaiians have had to endure the onslaught of foreign intervention, displacement, and cultural destruction). *See also* Edward Halealoha Ayau, Memorandum from Hui Mālama I Na Kupuna O Hawai'i Nei to the Native Hawaiian Legal Corporation regarding Proposed Portions of Report to Excise (Feb. 21, 1995), at 1-2 [hereinafter *Memorandum Regarding Portions to Excise*] (indicating that the handling and scientific investigation of Hawaiian bones is an affront amounting to desecration).

[15] *See* ATLAS OF HAWAI'I 169 (Sonia P. Juvik & James O. Juvik eds., 3d ed., 1998) [hereinafter ATLAS] (relating that Captain James Cook "discovered" the Hawaiian Islands quite by accident in January 1778 on his way from Tahiti to the Pacific Coast of North America in search of the fabled Northwest Passage).

[16] *See* Ayau, *supra* note 14, at 193-94. *See also* Memorandum from Hui Mālama I Na Kupuna 'O Hawai'i Nei to Dr. Tom Cye, Dr. Sara Collins, Toni Han, Elaine H.R. Jourdane, Vince Sava, and Dr. James Anthony expressing concern for the handling of the Mōkapu inventory report that contains osteological related information (Aug. 4, 1997) (noting that prior to the repatriation request for the remains from Mōkapu, Hui Mālama has repatriated Native Hawaiian remains from all over the world) (on file with author).

[17] *See id.* (listing the 26 museums and institutions around the United States and the world from which Hui Mālama has repatriated Native Hawaiian remains).

[18] *See* Ayau, *supra* note 14, at 216 (indicating that in Hawaiian tradition, the removal of ancestral remains leads to the depletion of *mana*, which leads to spiritual and social decay).

[19] Native American Graves Protection and Repatriation Act, 25 U.S.C.A. §§ 3001-13 (West 1999).

[20] *See* Ayau, *supra* note 14, at 194-95 (noting that Native Hawaiian remains had been successfully repatriated pursuant to the provisions of the American Indian Graves Protection and Repatriation Act).

provides only a partial remedy.[21] Hawai'i Revised Statutes Chapter 6E-1 only vests jurisdiction over disputes in state courts when historic and cultural resources are discovered on state-owned or privately owned land.[22]

In Hawai'i, however, the federal government owns a considerable amount of land.[23] The federal courts have exclusive jurisdiction over federal lands and are not bound by Hawai'i law. Therefore, when graves are disinterred on federal land, Native Hawaiians have not been able invoke Hawai'i's historic preservation law. Rather, they have had to rely on the willingness of federally funded museums and federal agencies to act reasonably and to negotiate in good faith for the return of ancient Hawaiian remains and cultural items.[24]

Against this backdrop, this comment examines the effectiveness of NAGPRA's well-intentioned, but inadequate, repatriation mandate in Hawai'i. The events surrounding a nine-year effort to repatriate the remains of more than 1500 Native Hawaiians,[25] which were removed from the Mōkapu Peninsula[26] on the island of O'ahu, demonstrate that, in Hawai'i, repatriation under NAGPRA can be anything but expeditious.[27] The lawsuit that resulted from stalled negotiations, *Na Iwi O Na Kupuna O Mōkapu v. Dalton*,[28] is the only case in Hawai'i to date that has resulted in litigation under NAGPRA. Unfortunately, the dearth of NAGPRA litigation in Hawai'i makes discussion of trends or patterns impossible. However, the events that spawned the lawsuit

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[21] *See* HAW. REV. STAT. § 6E-1-51 (1999).

[22] *See id.* § 6E-13(b) (stating that "any person may maintain an action in the trial court having jurisdiction where the alleged violation occurred"). Since state courts do not exercise jurisdiction over activities on federal property, Hawai'i Revised Statutes ("HRS") section 6E does not apply to burials discovered on federal land.

[23] *See* ATLAS, *supra* note 15, at 255. The bases and facilities owned by the military in Hawai'i include more than 200,000 acres, approximately five percent, of the state's land area. *See id.* While to some, the percentage of total land area owned by the military might seem low, the significance becomes clear when the example of the island of O'ahu is taken into consideration. The military controls about 80,000 acres on the island of O'ahu, a staggering 21% of this small island's limited area. *See id.*

[24] *See generally* Ayau, *supra* note 14 (discussing one Native Hawaiian group's experiences with repatriation efforts).

[25] *See* HANDBOOK, *supra* note 2, at 245. There is some discrepancy as to exactly how many individuals the collection represents. In any case, the number is substantial and the estimates of the number range from approximately 1300 to 1700. *See* Ayau, *supra* note 14, at 193. *See also* J. STEPHEN ATHENS, ARCHAEOLOGICAL RECONNAISSANCE AT THE MŌKAPU BURIAL AREA: MARINE CORPS AIR STATION, KANEOHE BAY, HAWAII 3 (1985).

[26] *See* ATLAS, *supra* note 15, at 9.

[27] *See* 25 U.S.C.A. § 3005(a)(1)(West 1999) (requiring expeditious repatriation of human remains and cultural objects). *But see id.* § 3005(e) (allowing the federal agency currently in possession of the remains or cultural objects to retain custody until issues of competing claims are resolved).

[28] 894 F. Supp. 1397 (D. Haw. 1995).

do illustrate NAGPRA's inherent conflict and call into question NAGPRA's effectiveness as a tool for repatriation.

Section II of this comment presents a brief explanation of the important and sacred role of burials in Hawaiian culture. Section III discusses the intent behind the enactment of NAGPRA and illuminates NAGPRA's basic goals of protecting human rights and restoring cultural dignity. Section IV retells, in part, the events surrounding the struggle to repatriate numerous sets of human remains disinterred at Mōkapu and the resulting lawsuit. Section V explores some of the difficulties presented when Western legal paradigms collide with Native Hawaiian beliefs and questions whether, as written, NAGPRA can achieve its stated goals.

This comment is based on the assumption that Anglo-American and Native Hawaiian societies comprise completely separate spheres of thought, with fundamentally different bases of perception.[29] In addition to expressing uncertainty regarding the effectiveness of NAGPRA in the context of Hawai'i, this comment addresses the larger question of whether a Western legal system is capable of creating a mechanism that is sensitive to Native Hawaiian cultural values. Absent a blending of Western legal paradigms and Native Hawaiian beliefs, the answer is no. In Hawai'i, NAGPRA fails in its essential purpose of restoring cultural dignity.[30]

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[29] *See* Rennard Strickland, *Implementing the National Policy of Understanding, Preserving, and Safeguarding the Heritage of Indian Peoples and Native Hawaiians: Human Rights, Sacred Objects, and Cultural Patrimony*, 24 ARIZ. ST. L.J. 175, 181 (1992). A clear illustration of the inherent differences between Anglo-American society and Native American society makes clever use of the apple/orange distinction:

> Neill H. Alford, Jr., the distinguished American authority on trusts, describes many of the differences in cultural attitudes as those of "apple societies" and "orange societies." In apple societies: law, religion, art, economics, and all other aspects of society are part of a single whole, an integrated oneness. In orange societies: law, religion, are and economics are each a segment; life is fragmented into separate sections or compartments. An apple society does not make the same kinds of rigid distinctions between art and religion that orange societies believe to be absolutes. It is often difficult for these two societies to understand each other because their fundamental approaches to life are at opposite ends of the scale of perception. In terms of judicial systems, the Anglo-American common law represents, in Alford's analysis the classic case of law in an orange culture; Native Americans and their legal systems are apple societies in an almost pure form.

Id.

[30] Telephone Interview with Edward Halealoha Ayau, Administrator, Burials Program, Historic Preservation Division, State of Hawai'i; Member, Hui Mālama I Na Kupuna O Hawai'i Nei (Feb. 1999).

II. NATIVE HAWAIIAN VALUES

> Native people recognize that there is a connection between their well-being and the places and items which define their culture . . . .[31]

A. Death and Burial in Traditional Hawai'i

The predicament that Native Hawaiians face when considering NAGPRA litigation cannot be understood without first understanding the role of death and burial in traditional Hawaiian culture. A fundamental disparity between Western logic and Hawaiian values, and a history of Western insensitivity to Hawaiian culture, has set the scene for a fundamental misunderstanding regarding the proper handling of unearthed Native Hawaiian remains.

Native Hawaiians experience the death of a loved one as a powerful emotional and spiritual event.[32] Death does not end the relationship between the deceased and the living; rather it transforms the relationship into an essential link between Hawai'i's ancestors and modern, living Native Hawaiians.[33] This link is symbolized by the bones of the deceased and contributes to the immortality of Hawaiian culture.[34]

Traditional Hawaiian belief is that, after death, the spirit of the deceased person embarks on one of three paths.[35] In some cases, the spirit remains near the bones before beginning its journey into eternity to join the personal, ancestral gods.[36] In other cases, the spirit might stay near the burial site for awhile, and then depart for the underworld.[37] Alternatively, the spirit might be induced, through ritual, to remain in the bones and to serve their keeper.[38]

B. Bone Desecration

According to Native Hawaiian tradition, improper touching, handling, or destruction of bones is considered desecration.[39] Destruction is the ultimate act of desecration as it prevents the spirit from ever joining the ancestral spirits

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[31] Hon. Sherry Hutt, *Native American Cultural Property Law*, 34-JAN ARIZ. ATTY. 19 (1998).

[32] *See* HANDBOOK, *supra* note 2, at 246.

[33] *See id.* at 246-49. *See also* Ayau, *supra* note 14, at 195.

[34] *See* HANDBOOK, *supra* note 2, at 247.

[35] *See id.* at 246-47.

[36] *See id.* at 246.

[37] *See id.* at 246-47.

[38] *See id.* at 247. *See also* GUTMANIS, *supra* note 13, at 40 (implying that a loved one would be the keeper of the bones).

[39] *See* HANDBOOK, *supra* note 2, at 247.

and gods in eternity.[40] Native Hawaiians are understandably affronted by the handling and scientific investigation of their ancestors' bones by people who do not respect their beliefs.[41] For Native Hawaiians, protection of their ancestor's bones is a cultural imperative.[42]

III. THE WESTERN LEGAL PARADIGM

> In the larger scope of history, [NAGPRA] is a small thing. In the smaller scope of conscience, it may be the biggest thing [Congress has] ever done.[43]

In 1990, Congress enacted NAGPRA, bringing to a close decades of struggle and legislative advocacy by Native American tribal governments and individual people.[44] The passage of NAGPRA represents an important formal acknowledgment by the federal government of the sacredness and vitality of Native American culture, and official recognition that the treatment of ancestral remains, as well as the treatment of sacred cultural items, is a very important obligation to many Native American cultures.[45] NAGPRA creates long-overdue rights in Native Americans with respect to excavations of their burials and cultural items.[46] This combination of recognition and rights

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[40] *See generally Memorandum Regarding Portions to Excise*, *supra* note 14 (protesting the affront of the unacceptable and unnecessary scientific investigations being performed on the remains from Mōkapu, in derogation of NAGPRA).

[41] *See id.*

[42] *See* HANDBOOK *supra* note 2, at 249.

[43] Strickland, *supra* note 29, at 178.

[44] *See* Allison M. Dussias, *Science, Sovereignty, and the Sacred Text: Paleontological Resources and Native American Rights*, 55 MD. L. REV. 84, 152 (1996). *See also* Strickland, *supra* note 29, at 176; Dean B. Suagee, *Tribal Voices in Historic Preservation: Sacred Landscapes, Cross-Cultural Bridges, and Common Ground*, 21 VT. L. REV. 145, 202 (1996); Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 36 (1992).

[45] *See* Suagee, *supra* note 44, at 202. *See also* Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559, 627 (1995); Robert W. Lannan, *Anthropology and Restless Spirits: The Native American Graves Protection and Repatriation Act, and The Unresolved Issues of Prehistoric Human Remains*, 22 HARV. ENVTL. L. REV. 369, 390 (1998); Rennard Strickland & Kathy Supernaw, *Back to the Future: A Proposed Model Tribal Act to Protect Native Cultural Heritage*, 46 ARK. L. REV. 161, 162 (1993); Strickland, *supra* note 29, at 179-81.

[46] *See* Strickland, *supra* note 29, at 179 ("The human rights of Alaska Natives, Indian peoples, and Native Hawaiians are now, under the terms of NAGPRA, back in their own hands."). *See also* Douglas W. Ackerman, *Kennewick Man: The Meaning of "Cultural Affiliation" and "Major Scientific Benefit" in the Native American Graves Protection and Repatriation Act*, 33 TULSA L.J. 359, 366 (1997) (noting that Non-Native Americans are given no ownership rights to objects discovered after the enactment of NAGPRA unless no individual or tribe claims the objects (citing 25 U.S.C.A. § 3002(a)-(b) (West 1999))).

empowers Native Americans with the ability to re-bury ancestral remains and to properly handle sacred objects in accordance with traditional cultural and religious beliefs.[47]

Interestingly, Native Americans have generally invoked NAGPRA to repatriate remains, not arguing the cultural significance of the remains, but rather on the premise that Native American remains deserve the same treatment and respect accorded to the ancestral remains of non-Native Americans.[48] Commensurate treatment of human remains is pivotal to Native American cultural integrity, pride, and identity.[49]

A. The Native American Graves Protection and Repatriation Act

NAGPRA has proven to be a controversial statute and the subject of much scholarly writing.[50] This comment, therefore, presents only a basic summary of the statute. Simply put, NAGPRA is a statutory mechanism whereby Native Americans, including Native Alaskans and Native Hawaiians, can gain access to and demand repatriation of collections of bones and "cultural patrimony"[51]

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[47] *See* Lannan, *supra* note 45, at 369.

[48] *See* Sarah Harding, *Justifying Repatriation of Native American Cultural Property*, 72 IND. L.J. 723, 765 (Summer, 1997). *See also* Gerstenblith, *supra* note 45, at 578 (proposing that the desecration of Native American burial sites stemmed from the societal bias in favor of preserving the integrity of Anglo-American grave sites while allowing the exploitation of Native American burials for scientific study and economic gain); Hutt, *supra* note 31, at 19 (noting that Native American burials are assumed to be government property, in contrast with general American property law that reserves the rights to the disposition of a corpse with the deceased's descendants).

[49] *See* HANDBOOK, *supra* note 2, at 246; Harding, *supra* note 48, at 765 (commenting that the passage of federal legislation finally affords Native peoples, and the remains of their ancestors, the same protections that other American citizens enjoy).

[50] Numerous articles extant address the complex issues involved in understanding NAGPRA. *See, e.g.*, Harding, *supra* note 48, at 726 n.8 (citing the following references, in addition to others cited in this comment, that provide a background understanding of the provisions of NAGPRA: Walter R. Echo-Hawk, *Museum Rights vs. Indian Rights: Guidelines for Assessing Competing Legal Interests in Native Cultural Resources*, 14 N.Y.U. REV. L. & SOC. CHANGE 437 (1986); Steven Platzman, *Objects of Controversy: The Native American Right to Repatriation*, 41 AM. U. L. REV. 517 (1992); Symposium, *The Native American Graves Protection and Repatriation Act of 1990 and State Repatriation Related Legislation*, 24 ARIZ. ST. L.J. 1 (1992)).

[51] 25 U.S.C.A. § 3001(3)(D)(West 1999) (defining "cultural patrimony" as "object[s] having ongoing historical, traditional, or cultural importance central to the Native American group or culture itself"). While it is difficult to identify exactly what types of items fall within the category of "cultural patrimony," there is a notable legislative acceptance of Native American attitudes toward the significance of certain objects. *See* Trope & Echo-Hawk, *supra* note 44, at 66. *See also* Dussias, *supra* note 44, at 151; Harding, *supra* note 48, at 726-27; Strickland, *supra* note 29, at 180-81, 189.

that are held by federal agencies,[52] federally funded museums,[53] and other federal institutions.[54] NAGPRA mandates that museums create a detailed inventory[55] of their collections, and where possible, a determination of "cultural affiliation"[56] of the objects. Upon request by the appropriate individual or group,[57] the items must be "expeditiously repatriated."[58] A museum or federal agency can defeat a repatriation claim, however, if it is able

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[52] 25 U.S.C.A. § 3001(4), (8) (West 1999). "Federal agencies" are defined as "any department, agency, or instrumentality of the United States," excluding the Smithsonian Institution. *Id.*

[53] *See* 25 U.S.C.A. § 3001(8) (West 1999). This section defines the term "museum" as "any institution or State or local government agency . . . that receives Federal funds and has possession of, or control over, Native American cultural items." *Id.* Interestingly, the Smithsonian Institution is not covered by this definition. Congress passed the National Museum of the American Indian Act in November 1989 specifically to address the issue of the extensive collection housed at the Smithsonian Institution. *See* 20 U.S.C.A. § 80q (West 1999). *See also* Trope & Echo-Hawk, *supra* note 44, at 56.

[54] *See* 25 U.S.C.A. §§ 3004-05 (West 1999).

[55] *See id.* § 3003(a).

[56] *Id.* §§ 3001(2), 3003-04 (defining "cultural affiliation" loosely as "a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Indian tribe or Native Hawaiian organization and an identifiable earlier group," and noting that Congress intended that museums and federal agencies make a good faith effort in establishing cultural affiliation); *see also* Gerstenblith, *supra* note 45, at 629 n.298.

The standard of proof for establishing "cultural affiliation" can be as low as a "preponderance of the evidence" standard. *See* 25 U.S.C.A. § 3005(a)(4). *See also* Gerstenblith, *supra* note 45, at 628-29 n.297. A claimant can establish "cultural affiliation" based upon "geographical kinship, biological, archaeological, anthropological, linguistic, folkloric, oral traditional, historical, or other relevant information or expert opinion." *Id.* The Act's legislative history also indicates that Congress intended that proof of "cultural affiliation" need not be established with "scientific certainty," and that claims would not necessarily be rejected solely because of gaps that exists in records. *Id.*

[57] *See* 25 U.S.C.A. § 3002(a). NAGPRA prioritizes proper claimants as a lineal descendant, or if no descendants can be ascertained, the Tribe that bears the closest cultural affiliation, or the Tribe that aboriginally occupied the area in which the remains or objects were found. *See id.*

[58] 25 U.S.C.A. § 3005(a)(1); *see also* Dussias, *supra* note 44, at 150 n.435 (giving a "helpful summary" of the repatriation provisions of NAGPRA regarding human remains and associated funerary objects). *But see* Isaac Moriwake, Note, *Critical Excavations: Law, Narrative, and the Debate on Native American and Hawaiian "Cultural Property" Repatriation*, 20 U. HAW. L. REV. 261, 276 n.95 (1998) (noting that the federal agency or museum may delay repatriation in two circumstances, one of which is when any item is found to be "indispensable for completion of a specific scientific study, the outcome of which would be of major benefit to the United States") (quoting 25 U.S.C. § 3005(b)). The other circumstance in which federal agencies and museums may delay repatriation is when they are faced with competing claims and are, therefore, unable to determine which of the claimants is "most appropriate." 25 U.S.C.A. § 3005(e).

to establish a "right of possession"[59] by showing that its means of obtaining and possessing the item in question conform to legal standards.[60]

NAGPRA represents a national consensus that the sacred cultural items of Native Americans must be respected.[61] Importantly, NAGPRA allows for the substitution of some Native American concepts for Anglo-American legal understandings.[62] For example, NAGPRA recognizes that in some cases, Tribal courts are the better decision-makers to interpret factual and legal issues under NAGPRA.[63] Thus, Native American concepts and values can become the controlling standards.[64] Unfortunately, there are currently no Tribal courts in Hawai'i, nor is there an organized Native Hawaiian government that represents all Native Hawaiians.[65] Native Hawaiians do not fit NAGPRA's mold.

B. Legislative Intent

NAGPRA is, fundamentally, human rights legislation.[66] It reflects recognition of a disgraceful history of indignity, double standards,

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[59] 25 U.S.C. § 3001(13). A "right of possession" is defined as "possession obtained with the voluntary consent of an individual or group that had authority of alienation." *Id.* The "right of possession" defense does not apply to requests for human remains and "associated funerary objects." *See* Harding, *supra* note 48, at 729. Importantly, items of "cultural patrimony" generally are not, by definition, alienable, and are therefore generally immune from a "right of possession" defense. *See id.*

In most cases, the lack of written records kept by Native Hawaiians will make it impossible to establish that a museum does not have a "right of possession." Native Hawaiians will, instead, often have to rely on oral tradition and historical evidence to prove that important cultural objects were not actually "owned" by individuals, and could not, therefore, have been properly given away, sold, or transferred to the current possessor. *See* Harding, *supra* note 48, at 736.

[60] *See* 25 U.S.C.A. § 3005(c).

[61] *See* Strickland & Supernaw, *supra* note 45, at 162. *See also* Dussias, *supra* note 44, at 152.

[62] *See* Strickland & Supernaw, *supra* note 45, at 162-63. *See also* Harding, *supra* note 48, at 726.

[63] *See* Strickland & Supernaw, *supra* note 45, at 162-63.

[64] *See* 25 U.S.C.A. §§ 3001(3)(C), (D), (13). *See also* Strickland, *supra* note 29, at 179-82.

[65] *See* Rice v. Cayetano, 146 F.3d 1075, 1081 (9th Cir. 1998), *rev'd*, 528 U.S. 495 (2000). The last of the sovereign Hawaiian Monarchs, Queen Liliu'okalani, was overthrown in 1893. *See* ATLAS, *supra* note 15, at 177. Since then, with the exception of the Department of Hawaiian Homelands and the Office of Hawaiian Affairs, both controversial state agencies, the Native Hawaiians have enjoyed little officially sanctioned self-determination. *See generally* Rice v. Cayetano, 528 U.S. 495 (2000).

[66] *See* Trope & Echo-Hawk, *supra* note 44, at 59. *See also* Roger Mastalir, *A Proposal for Protecting the "Cultural" and "Property" Aspects of Cultural Property Under International Law*, 16 FORDHAM INT'L L.J. 1003, 1063 (1993) (noting the existence of human rights consciousness in Congressional intent).

disenfranchisement, and blatant disregard for the survival of America's indigenous cultures.[67] Congress enacted NAGPRA for two primary reasons.[68] First, Congress recognized the significance of certain cultural and religious items and human remains, and a federal obligation, as an element of its trust responsibility toward Native Americans, to protect these items.[69] Second, the history in the United States of the plundering and desecration of Native American graves and archeological sites, often with an official stamp of approval,[70] established a need to better protect these sites and objects.[71] Congress believed that NAGPRA would encourage a meaningful and ongoing dialogue between museums and Native Americans and Native Hawaiians, and the dialog would promote a greater understanding between the groups.[72] Importantly, NAGPRA's authors intended to give Native Americans greater ability to negotiate with recalcitrant museums and institutions for the return of their excavated ancestors and cultural items.[73]

IV. THE PATH TO LITIGATION

> Since [the Hawaiian skeletal remains] were taken from their ancestral resting places . . . [they] were extensively examined by scientists, put on public display, and were subjected to other indignities which violated their privacy and robbed

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[67] *See* Lannan, *supra* note 45, at 393. *See also* Strickland, *supra* note 29, at 176.

[68] *See* Gerstenblith, *supra* note 45, at 627. *See also* Dussias, *supra* note 44, at 152.

[69] *See* Dussias, *supra* note 44, at 152 n.443 (referring to the discussion of the trust obligations of the federal government) (citing FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 220-28). *See also* Gerstenblith, *supra* note 45, at 627; Trope & Echo-Hawk, *supra* note 44, at 60.

[70] *See* Dorothy Nelkin & Lori Andrews, *Do The Dead Have Interests? Policy Issues for Research After Life*, 24 AM. J.L. & MED. 261, 269-70 (1998). Historically, scientists have focused on Native American corpses as a valuable source of scientific research into the origins of Native Americans. *See id.* Anthropologists and archaeologists of the 18th century viewed Native Americans as "noble savages," and treated their corpses as material that provided invaluable information about past cultures. *See id.* Official sanction of the mass excavation of Native American graves began with an endorsement, in 1793, by Thomas Jefferson, the reputed father of American archaeology, in the name of "a higher order called science." *Id.* In 1868 the U.S. Surgeon General ordered that all troops of the U.S. Army "fulfill their patriotic duty" and collect specimens from Native American burials for research purposes. *See id.*

[71] *See* Dussias, *supra* note 44, at 152-53 nn.444-47.

[72] *See* Trope & Echo-Hawk, *supra* note 44, at 60-61. *See also* Thomas H. Boyd & Jonathan Haas, *The Native American Graves Protection and Repatriation Act: Prospects For New Partnerships Between Museums and Native American Groups*, 24 ARIZ. ST. L.J. 253, 263 (1992); Harding, *supra* note 48, at 739 (noting that while the negotiations will not necessarily lead to the return of the objects in question, at least there would be room for some sort of settlement agreement or compensation).

[73] *See* 136 CONG. REC. S17173-02, S17174-17175 (daily ed. Oct. 26, 1990) (comment by Sen. Daniel Inouye).

them of their *mana*. [They] seek to be returned . . . in order that the shame and pain that they suffer while away from their resting places may finally cease.[74]

A. The Remains From Mōkapu

Mōkapu Peninsula is ideally suited as a Hawaiian burial ground.[75] Most of the more than 1500 sets of human remains and 281 cultural items from Mōkapu Peninsula were excavated by representatives of the United States Marine Corps and the Bishop Museum[76] between 1915 and 1975.[77] The excavations were primarily necessitated by the expansion of Kane'ohe Marine Corps Air Station.[78] The ignorance of, and indifference to, Native Hawaiian cultural values regarding burials and ancestral remains resulted in the Marines and the museum making poor decisions regarding the treatment of the unearthed bones.[79] Scientists subjected the skeletal remains to various forms of scientific investigation, and eventually boxed and stored them on the shelves of the Bishop Museum.[80] To make matters worse, the Bishop Museum

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[74] Complaint for Declaratory and Injunctive Relief at 3, Na Iwi O Na Kupuna O Mōkapu v. Dalton [hereinafter *Na Iwi*], ex. C, 894 F. Supp. 1397 (D. Haw. 1995) (Civ. No. 94-00445 DAE) (on file with author).

[75] *See* Defendant's Memorandum in Support of Motion for Summary Judgment, *Na Iwi*, ex. C (Civ. No. 94-00445 DAE) (indicating that Mōkapu, O'ahu is widely recognized at a large, communal graveyard typical of traditional Hawaiian custom) (on file with author). *See also* HANDBOOK, *supra* note 2, at 248; KIRCH, *supra* note 1, at 237-42.

[76] The Bishop Museum is located in Honolulu, Hawai'i and is widely recognized as having the most comprehensive Polynesian collection.

[77] *See generally* Memorandum from Edward Halealoha Ayau, representing Hui Mālama I Na Kupuna O Hawai'i Nei, to P.F. Nahoa Lucas, representing the Native Hawaiian Legal Corporation regarding "Bishop Museum and University of Hawai'i responsibility under NAGPRA and Territorial Law to Inventory and Rebury Certain Ancestral Native Hawaiian Skeletal Remains Recovered from Mōkapu, O'ahu between 1938 and 1948." (Feb. 21, 1995) (reciting a time line of excavations of remains from Mōkapu) (on file with author). *See also* ATHENS, *supra* note 25, at 3; Fact Sheet: Mōkapu Repatriation Project (June 28, 1994) [hereinafter *Fact Sheet*] (on file with author). Many of the excavations occurred during construction of the Kane'ohe Marine Corps Air Station on Mōkapu Peninsula. *See id.*

[78] *See Fact Sheet*, *supra* note 77, at 2.

[79] *See* GUTMANIS, *supra* note 13, at 41 (indicating elements of proper treatment of burials). *See also* Defendant's Memorandum In Support Of Motion for Summary Judgment at 5, ex. C, *Na Iwi* (Civ. No. 94-00445 DAE).

[80] *See* Ayau, *supra* note 14, at 194-95 n.2. *See also* Order Granting Federal Defendant's Motions For Summary Judgment and Denying Plaintiff Hui Mālama's Cross-Motion for Summary Judgment at 2-3, *Na Iwi* (D. Haw. 1995) (Civ. No. 94-00445 DAE) (on file with author).

allowed improper handling of the bones, resulting in a number of missing bones and extensive commingling of the bones of different individuals.[81]

B. The Formal Request For Repatriation

Negotiations to repatriate the remains from Mōkapu began before the enactment of NAGPRA.[82] These efforts, however, proved unsuccessful, and on November 26, 1990, under the recently enacted NAGPRA, Hui Mālama I Na Kupuna O Hawai'i Nei ("Hui Mālama")[83] made a formal request for the inventory, repatriation, and reinterrment of the Mōkapu remains.[84] This initial formal request marked the beginning of repeated meetings and correspondence between Hui Mālama, the Bishop Museum, and the Navy.[85]

In response to these negotiations, the Navy transferred the collection of human remains to the Bishop Museum for three purposes authorized by NAGPRA: (1) to study, preserve and inventory the remains; (2) to provide an accurate list of the human remains and cultural items from Mōkapu; and (3) to facilitate the repatriation process.[86] Three years of intense effort by all parties yielded only a "conceptual plan" for inventory and repatriation, but no substantive agreement.[87] By early 1994, Hui Mālama had made repeated repatriation requests, but these were either ignored or rejected for being technically improper or incomplete.[88] Finally, on January 30, 1994, the Navy

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[81] *See* Federal Defendant's Memorandum in Response to Plaintiff's Cross-Motion for Summary Judgment and Reply to Plaintiff's Opposition to Federal Defendant's Motions for Summary Judgment at 9-11, *Na Iwi* (Civ. No. 94-00445 DAE). *See also* Affidavit of Sara L. Collins at 3-5, *Na Iwi* (Civ. No. 94-00445 DAE).

[82] Telephone Interview with Edward Halealoha Ayau, *supra* note 30.

[83] Hui Mālama is a non-profit group of Native Hawaiians that organized to care for the well being of Hawai'i's ancestors. Hui Mālama was one of two Native Hawaiian organizations specifically mentioned in NAGPRA, the other being the Office of Hawaiian Affairs. Hui Mālama is recognized as having expertise in the repatriation and reinterrment of Native Hawaiian remains. For an account of Hui Mālama's successes in repatriation, see Complaint, at 4-5, *Na Iwi* (Civ. No. 94-00445 DAE).

[84] *See* Telephone interview with Edward Halealoha Ayau, *supra* note 30. *See also* Time Line of Events and Log of Correspondence between Hui Mālama, the Navy, and the Bishop Museum (Aug. 13, 1990 – Apr. 15, 1995) [hereinafter *Time Line*], at 9 (on file with author).

[85] Telephone Interview with Edward Halealoha Ayau, *supra* note 30.

[86] *See also* Order Granting Summary Judgment at 2, *Na Iwi* (Civ. No. 94-00445 DAE) (noting that this was the first Department of Defense project falling under NAGPRA); Defendant's Memorandum in Support of Summary Judgment at 5, *Na Iwi* (Civ. No. 94-00445 DAE).

[87] *See Time Line*, *supra* note 84, at 10-11 (recording several correspondences that refer to the conceptual plan that was to be developed).

[88] *See id.* (noting several repatriation requests made to the Navy).

and the Bishop Museum published the required inventory and identification report.[89]

Hui Mālama interpreted the delays and excuses by the Navy and the Bishop Museum as harassment.[90] Hui Mālama was outraged at the continued scientific investigations being performed on the remains because the remains disinterred at Mōkapu have always been regarded by the museum community as quintessentially Hawaiian.[91] This means that the remains from Mōkapu set the standard to which subsequent burial finds are compared to determine if the remains are "Hawaiian."[92] Therefore, the continued handling and study of the remains, in the guise of making a determination as to their ethnicity, was viewed as unnecessary, and unbearably offensive.[93] Eventually, a Senator from Hawai'i, Daniel K. Inouye, agreed that unnecessarily invasive scientific investigations were being performed in violation of NAGPRA.[94]

C. The Lawsuit: Na Iwi v. Dalton

On June 14, 1994, Hui Mālama filed suit for declaratory and injunctive relief,[95] alleging that the Navy failed to expeditiously repatriate the remains

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[89] *See Memorandum Regarding Portions to Excise*, *supra* note 14, at 14. *See also Fact Sheet*, *supra* note 77.

[90] Telephone Interview with Edward Halealoha Ayau, *supra* note 30. *See* Complaint, *Na Iwi* (Civ. No. 94-00445 DAE). *See also Time Line*, *supra* note 84, at 15, 17, 22 (Mar. 2, 1994 newspaper interview and Mar. 7, 1994 letter from Hui Mālama to the Navy, Lawsuit filed June 14, 1994).

[91] Telephone Interview with Edward Halealoha Ayau, *supra* note 30. *See Memorandum Regarding Portions to Excise*, *supra* note 14, at 12 (explaining that earlier studies of the collection had determined that the remains were "clearly" Hawaiian). *See also* Press Release: Native Hawaiian Organization Files Law Suit Against the U.S. Navy and Bishop Museum for Violating Federal Repatriation law in the Inventory of Over 1,500 Ancestral Hawaiian Remains From Mōkapu, June 14, 1994 (noting that "[i]t was agreed by all parties at the outset that the ethnicity of the remains were Hawaiian") (on file with author).

[92] Telephone Interview with Edward Halealoha Ayau, *supra* note 30.

[93] *See Memorandum Regarding Portions to Excise*, *supra* note 14, at 2 (stating that the existence of the unnecessary information would be regarded as "an affront to Native Hawaiian cultural traditions and beliefs amounting to desecration"). *But see* 25 U.S.C.A. § 3003(a) (West 1999) (authorizing museums to make reasonable scientific investigation of remains in order to determine "cultural affiliation"). The question asked by many people was why, if the collection of bones from Mōkapu is, by definition, "Hawaiian," did the Bishop Museum need to conduct further investigation. Telephone Interview with Edward Halealoha Ayau, *supra* note 30.

[94] *See* Letter from Senator Daniel K. Inouye, Chairman of the Committee on Appropriations, Subcommittee on Defense, to The Honorable William J. Perry, Secretary of the United States Department of Defense (June 29, 1994) (equating the Marines questionable use of appropriated funds and "overly-broad" scope of scientific investigation to a violation of Native Hawaiian dignity and to an almost willful violation of NAGPRA).

[95] *See* Order Granting Summary Judgment at 5, *Na Iwi* (Civ. No. 94-00445 DAE).

and that the Bishop Museum conducted additional and unnecessary scientific research on the Mōkapu remains in violation of NAGPRA.[96] On July 25, 1995, Federal District Court Judge David A. Ezra granted summary judgment in favor of the United States.[97]

This lawsuit was only the second case in the country brought under NAGPRA,[98] and the first in Hawai'i, providing the court little guidance to inform its decision. Despite clear congressional intent regarding the treatment of Native Hawaiian beliefs and values,[99] Judge Ezra missed a unique opportunity to take a significant stand on a very important political and cultural issue.[100] Recognition of traditional Hawaiian beliefs would have significantly furthered resolution of the on-going struggle for Native Hawaiian self-determination.

V. ANALYSIS

> While scientists view the study of human remains as an essential means of acquiring information valuable in anthropology and in other fields, many Native Americans view this practice as a desecration.[101]

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[96] *See id.* at 5-6. *See generally Memorandum Regarding Portions to Excise*, *supra* note 14 (listing types of scientific investigation performed on the remains, such as determination of ethnicity, sex and age of the individuals, that are beyond the scope of NAGPRA, which only allows for determination of cultural affiliation).

[97] *See generally* Na Iwi O Na Kupuna O Mōkapu v. Dalton, 894 F. Supp. 1397, 1406 (D. Haw. 1995). Judge Ezra held specifically that: (1) Human remains do not have standing to sue under NAGPRA; (2) Human remains are not recognized as legal persons and do not have interests that can be legally protected; (3) Despite being specifically named in NAGPRA, Hui Mālama is not the sole guardian of all Native Hawaiian remains; (4) Hui Mālama has standing to sue under NAGPRA; (5) NAGPRA does not establish a fiduciary obligation by the Federal Government; (6) The inventory report created under NAGPRA is an agency record for purposes of Freedom of Information Act ("FOIA"); and (7) The inventory report produced pursuant to NAGPRA must be released under FOIA. *See id.* at 1406-17.

[98] The other case, *Abenaki Nation of Mississquoi v. Hughes*, 805 F. Supp. 234 (D. Vt. 1992), *aff'd*, 990 F.2d 729 (2d Cir. 1993), involved a dispute regarding the issuance of a permit by the Army Corps of Engineers for the purpose of raising the spillway of a hydroelectric dam. *See id.* at 236. The Abenaki feared that construction would likely uncover buried cultural items. *See id.* at 252. The court held that NAGPRA's definitions were broad enough to include the Abenaki as an "Indian Tribe." *See id.* at 251-52.

[99] *See generally* 25 U.S.C.A § 3001-13 (West 1999). *See also* Ackerman, *supra* note 46; Boyd & Haas, *supra* note 72; Trope & Echo-Hawk, *supra* note 44; Robert H. McLaughlin, Comment, *The Native American Graves Protection and Repatriation Act: Unresolved Issues Between Material Culture and Legal Definitions*, 3 U. CHI. L. SCH. ROUNDTABLE 767 (1996).

[100] The court adopted a rigid stance in its analysis of the issues.

[101] Lannan, *supra* note 45, at 388.

The concept of human dignity holds a place of prominence in United States jurisprudence and is fundamental in the American notion of justice.[102] Dignity, however, is an elusive concept. It has been described as a "sense . . . of one's status as a person."[103] Dignity "relates to how one deserves to be treated by other people. Dignity is a matter of respect worthiness, or of intrinsic worth that calls for respect."[104] Cultural dignity, therefore, requires not only autonomy and self-determination, but also respect for cultural values.[105]

The problem with creating a legal mechanism to restore Native Hawaiian cultural dignity is that Western legal paradigms resist being melded with Native concepts. However, harmonizing Western legal concepts with traditional cultural values, spiritual needs, and cultural experiences is the only means of achieving NAGPRA's goal of restoring cultural dignity to Native Hawaiians.[106] In Hawai'i, NAGPRA does not provide an easy solution, as some scholars claim.[107] Rather, the statute contains assumptions that raise serious questions as to its utility in Hawai'i.[108] Many significant difficulties are encountered when attempting to implement NAGPRA in Hawai'i.

A. Hawai'i's Fractured Politics

The first of these misguided assumptions is that all indigenous cultures of the United States have a similar socio-political organization.[109] However, Native Hawaiian organizations are not similar to Indian tribes.[110] Unlike many Native American societies, which are organized as tribes with tribal leaders,

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[102] *See* R. George Wright, *Consenting Adults: The Problem of Enhancing Human Dignity Non-Coercively*, 75 B.U. L. REV. 1397, 1422 (1995) (using the example of procedural due process rights to illustrate the notion that the legal system in the United States ascribes special value to human dignity).

[103] *Id.* at 1398.

[104] *Id.*

[105] *See id.* at 1431.

[106] *See* Moriwake, *supra* note 58, at 307-08.

[107] *See* Strickland, *supra* note 29, at 179 (claiming that NAGPRA "brought an end to a long, bitter debate and was a great victory"). *See also* Strickland & Supernaw, *supra* note 45, at 162. *But see* McLaughlin, *supra* note 99, at 768 (proposing that, despite NAGPRA's successes, many difficult questions and issues remain unresolved).

[108] *See* Boyd & Haas, *supra* note 72, at 264 (noting that NAGPRA contains three basic parts: inventory, notice, and repatriation, and that each of these parts contains ambiguities and uncertainties as to the proper process of resolving issues).

[109] *See* 25 U.S.C.A. § 3001(7), (11)(West 1999) (defining "Indian tribe" and "Native Hawaiian organization").

[110] *See* Rice v. Cayetano, 146 F.3d 1075, 1081 (9th Cir. 1998) (recognizing that unlike other Native American groups, Native Hawaiians are not organized into federally recognized "tribes").

Native Hawaiians do not constitute a "tribe" with one political voice.[111] In Hawai'i, no one Native Hawaiian organization even represents a majority of Native Hawaiians.[112] Therefore, determination of the proper claimant is not necessarily the relatively simple matter that NAGPRA assumes.[113]

The fractured political situation in Hawai'i thus makes repatriation requests particularly susceptible to extended delay. In the case of competing claims, where the federal agency cannot clearly determine which of the claimants is the "most appropriate" claimant, NAGPRA authorizes continued possession of the disputed objects and remains by the federal agency until either, the claimants agree upon their disposition, or the issue is somehow resolved.[114] For the remains from Mōkapu, the Navy was faced with fourteen individual claimants, all with arguably legitimate claims but different agendas, who demanded repatriation and custody of the Mōkapu remains.[115] Ten of the fourteen claimants relinquished their individual claims and consolidated their claims into one claim under the name Ka Ohana Nui O Na Iwi Kupuna O Mōkapu ("The Great Family of the Ancestral Bones of Mōkapu"), leaving

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[111] *See* Letter from Francis P. McManamon, Ph.D., Departmental Consulting Archaeologist, Chief, Archaeological Assistance Division, National Park Service, United States Department of the Interior, to Major R.E. Kaainoni, Deputy Staff Judge Advocate, United States Marine Corps [hereinafter *Letter*] (Dec. 21, 1994) (indicating the existence of at least 15 claimants, and noting the NAGPRA Review Committee's recommendation that the Navy retain possession of the remains until disputes between the claimants could be resolved) (on file with author).

[112] This is evidenced by the fact that 14 claimants had standing to sue under NAGPRA, which authorizes suit by "Native Hawaiian organizations." *See* 25 U.S.C.A. §§ 3002, 3005 (West 1999). Hui Mālama and the Office of Hawaiian Affairs are explicitly named in the statute, however, the language of NAGPRA is inclusive, rather than exclusive, and does not foreclose the possibility of other valid Native Hawaiian organizations. *See id.* § 3001(11).

[113] *See* 25 U.S.C.A. § 3002. The statute envisions claimants as either individual persons or organizations that represent a discrete group of people. In the situation that a claim originates from a Native American/Alaskan/Hawaiian group, the statute assumes a unified voice, and single claim. The statute has no provisions for resolving claims made by disparate factions of a single group, such as is the case with Native Hawaiians.

[114] *See* 25 U.S.C.A. § 3005(e). The continuing lack of a unified claim by Native Hawaiians eventually required the issue to be turned over to the NAGPRA Review Committee for resolution. *See Fact Sheet*, *supra* note 77. *See also Letter*, *supra* note 111 (indicating the willingness of the NAGPRA Review Committee to accept the dispute for resolution). The purpose of the NAGPRA Review Committee is to review and monitor implementation of the inventory, identification, and repatriation processes. *See* 25 U.S.C.A. § 3006(a). The Review Committee is also authorized to facilitate the resolution of any disputes between claimants and federal agencies and museums. *See id.* § 3006(c)(4).

[115] *See* Letter from Native Hawaiian Claimants to Dr. Francis McManamon, Departmental Consulting Archaeologist, U.S. Department of the Interior, National Park Service (Oct. 19, 1994) (on file with author). There was no disagreement as to the need to repatriate the remains and reinter them at Mōkapu. Rather, it seems that much of the disagreement between claimants was about the specifics of reburial. *See id.*

only four remaining claimants.[116] However, as evidenced by the protracted negotiations for repatriation of the remains from Mōkapu, the continuing lack of consensus for eventual treatment of the remains can bring the process of repatriation to a virtual standstill.[117]

The situation in Hawai'i is tragically ironic: expeditious repatriation of the Mōkapu remains to any one of the claimants, without an official determination of the most appropriate guardian, would likely have spawned further litigation and created even more delays.[118] NAGPRA does not anticipate or adequately address this reality in Hawai'i and does not achieve its stated goal of bringing parties together.[119] Despite its noble intentions, NAGPRA embodies a conflict that renders the statute a less-than-ideal solution to issues that deserve a more respectful resolution.[120]

B. An Attempt to Reconcile Irreconcilable Perspectives

Repatriation involves reconciling irreconcilable interests and ideas.[121] These include disparate cultural values, human rights concerns, race relations, different notions of spirituality, and opposite views on the value of scientific investigation.[122] The clash in perspectives created by NAGPRA is necessitated by the statute's very nature as a Western legal construct. NAGPRA was

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[116] *See* Memorandum from Edward Halealoha Ayau to Honorable Senator Daniel K. Inouye, Update of Mōkapu/Heleloa Repatriation Effort (Apr. 8, 1996), at 3 (referring to action taken on Jan. 23, 1996) (on file with author).

[117] *See Letter*, supra note 111 (noting that the NAGPRA Review Committee, established pursuant to 25 U.S.C.A § 3006 (West 1999), recommended that the Navy retain possession of the human remains until the proper claimants could be identified).

[118] *See* Burl Burlingame, *Bishop Museum Artifacts Debated*, HONOLULU STAR-BULL., Mar. 25, 2000, at A1, A10. The issues surrounding proper treatment of human remains and sacred cultural items in Hawai'i continue to be contentious. Even NAGPRA repatriation actions where the multiple claimants are acting in unison cause controversy in the community. *See id.* In a situation where the claimants are not acting in unison, repatriation to any one group would likely result in any of the other claimants, with an equally legitimate claim, to sue the repatriating entity.

[119] *See id.* (implying that disputes between claimants are to be resolved outside the NAGPRA repatriation process).

[120] *See* Trope & Echo-Hawk, *supra* note 44, at 60 (discussing the human rights and trust doctrine bases of NAGPRA). However, despite its significance in the struggle for cultural self-determination, NAGPRA suffers from a fundamental flaw. NAGPRA creates a precarious balance between the needs of museums and the rights of Indian people. These two cultures and realities are inherently irreconcilable. *See id.*

[121] *See* Strickland, *supra* note 29, at 178 (commenting that such a compromise will require "much cross-cultural understanding" and a willingness by all parties to recognize both the differences between Native Americans and Anglo-Americans, and the differences within the Native American community). *See also* Gerstenblith, *supra* note 45, at 627.

[122] *See* Gerstenblith, *supra* note 45, at 627; Strickland, *supra* note 29, at 179.

drafted using Western paradigms to address non-Western cultural concerns. The idea that NAGPRA is "unique legislation"[123] because it requires consideration of the "Indian perspective"[124] begs the question of whether legislation born of a Western legal system can ever genuinely value a culturally disparate perspective.

Litigating under NAGPRA for the return of the remains from Mōkapu meant accepting such an untenable compromise.[125] Hui Mālama eventually reached a point where it faced a difficult choice. Either they could forgo their legal rights by ignoring blatant NAGPRA violations by the Navy and the Bishop Museum and re-inter their ancestor's remains, or they could vindicate their rights guaranteed by NAGPRA by pursuing further litigation, but risk delaying the re-interring their ancestors indefinitely.[126] Hui Mālama chose the former.[127] This coercive situation cannot be what the drafters of NAGPRA had in mind.[128]

NAGPRA also brings into direct conflict disparate perspectives on appropriate treatment of human remains.[129] For scientists and museums, the study of human remains is an essential means of obtaining invaluable information unavailable from other sources.[130] Scientists argue that the study of ancient human remains can provide society with many practical advantages, such as increased knowledge about human health and disease, and demography.[131] This attitude may lead to insensitivity toward non-Western human remains and a profound lack of empathy toward their descendants.[132]

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[123] Trope & Echo-Hawk, *supra* note 44, at 76.

[124] *Id.*

[125] Telephone Interview with Edward Halealoha Ayau, *supra* note 30.

[126] *See id.*

[127] *See id.*

[128] *See* Ackerman, *supra* note 46, at 383 (supporting the proposition that NAGPRA is "an example of what happens when a good idea is incorporated in poorly drafted legislation").

[129] *See Time Line*, *supra* note 84, at 23. Different perspectives come from inside the Native Hawaiian community as well as from outside. In the case of the remains from Mōkapu, there were 14 claimants representing individual claimants, religious organizations, community clubs, cultural societies, governmental agencies, and Native Hawaiian organizations. While the claimants generally agreed that the remains must be repatriated, disagreement over the proper handling and burial of the remains persisted. *See id.*

[130] *See* Lannan, *supra* note 45, at 391.

[131] *See id.* at 391-92.

[132] An example of the lack of empathy intrinsic to this perspective was articulated when Dr. D. Gentry Steele, a plaintiff in *Bonnichsen v. United States*, 969 F. Supp. 614 (D. Or. 1997), was asked whether the 9000 year-old remains of an individual known as the "Kennewick Man" should be studied or re-buried. He commented that if remains are reburied without having been studied "it would be the same as if one or two or three people read a Shakespearean play and then someone burned the book, and those three people tried to tell the rest of us what it was like." *See* Lannan, *supra* note 45, at 392 (citation omitted). The analogy indicates an alarming lack of understanding of the important role that ancestors play in many Native American

From the perspective of some Native Hawaiians, any scientific study of ancestral remains is offensive.[133] Native Hawaiians view this type of treatment of their ancestor's bones as desecration.[134] By failing to address the perspective of Native Hawaiians, NAGPRA exacerbates the fundamental conflict between the cultural obligations of Native Hawaiians and the perceived needs of the scientific community.[135]

C. Legal Language vs. Cultural Understandings

In addition to incorporating some questionable assumptions about Native Hawaiian politics, and causing an unnecessary clash between polar opposite cultural perspectives, NAGPRA's complex language undermines its effectiveness.[136] For example, NAGPRA employs semantics in an attempt to separate the "property" and "cultural" aspect of cultural items.[137] Hawaiian cultural items, however, are imbued with both and do not readily lend themselves to simple classification.[138] Because these two distinct and conflicting aspects are inseparable, neither aspect can be ignored when discussing repatriation.[139]

NAGPRA attempts to accomplish this schism by creating five artificial classifications of "cultural items."[140] The first category is "human remains,"[141]

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cultures, and completely misses the issue of dignity, the central tenet of NAGPRA.

[133] *See Memorandum Regarding Portions to Excise*, *supra* note 14, at 2 (indicating that the handling and scientific investigation of Hawaiian bones is an affront amounting to desecration).

[134] *See id.*

[135] *See* Ackerman, *supra* note 46, at 373 (claiming that the underlying interest in NAGPRA is a relationship between Anglo-Americans and Native Americans, and that the cultural differences between the two groups may, in fact, be irreconcilable).

[136] *See* McLaughlin, *supra* note 99, at 779.

[137] *See* 25 U.S.C.A. § 3001(3)(D) (West 1999) (defining "cultural patrimony" as property that cannot be owned, implying that some cultural items can be owned). *See also* Mastalir, *supra* note 66, at 1062-63 (discussing the two aspects of cultural property as inseparable).

[138] *See generally* Moriwake, *supra* note 58 (discussing the merging in Hawaiian cultural items of the "property" aspect – the physical aspect that can be "owned" – and the "cultural" aspect – with sacred meaning only in the context of Native Hawaiian culture). *See also* Brain Bengs, *Dead On Arrival? A Comparison of the Unidroit Convention on Stolen or Illegally Exported Cultural Objects and U.S. Property Law*, 6 TRANSNAT'L L. & CONTEMP. PROBS. 503, at 505 (1996); Mastalir, *supra* note 66, at 1037.

[139] *See* Bengs, *supra* note 138, at 505. *See also* Ackerman, *supra* note 46, at 380-81. Unfortunately, Anglo-American law, and thus NAGPRA, assumes the "overriding and exclusive importance of logic," and the necessary compromise is not possible where Native Hawaiian belief collides with Anglo-American logic. *Id.*; *see also* Mastalir, *supra* note 66, at 1035 (arguing that any attempt at separating the "cultural" aspect from the "property" aspect necessarily destroys the other, essential aspect of the object).

[140] 25 U.S.C.A. § 3001(3).

[141] *Id.*

which are simply skeletal remains. The second classification of cultural items is "associated funerary objects," which are objects reasonably believed to have been placed with individual remains at the time of death and both the objects and the human remains with which they were buried are still together.[142] The third classification "unassociated funerary objects" is similar to "associated funerary objects" except the objects and human remains have become separated from each other.[143] The fourth classification is "sacred objects," which are ceremonial objects that are essential for the present-day practice of Native American religions.[144] The fifth category is "cultural patrimony," which includes all objects having ongoing importance to the culture itself, and which, by definition, cannot be alienated by any one individual.[145]

These categories and distinctions are not malleable, lack utility, and fail to accommodate the sacredness and cultural meanings Native Hawaiians ascribe to human remains and cultural items.[146] This presents a major problem for both museums and Native Hawaiians in trying to sort out the issues. Worst of all, NAGPRA frames repatriation claims in purely Western legal terms, thereby reaffirming the hierarchy of the dominant Western legal, social, and cultural order.[147] Despite this obstacle, common ground between the two seemingly polar viewpoints can be found: both sides are concerned about preservation of the human remains and cultural items.[148]

D. Litigation vs. Dispute Resolution

Another obstacle in the implementation of NAGPRA in Hawai'i is the assumption that Western law can play a significant role in the resolution of issues of cultural respect and dignity.[149] Although NAGPRA contains clear statements vesting ownership[150] of identifiably Hawaiian remains and cultural items in Native Hawaiians,[151] NAGPRA contemplates the inevitability of

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[142] *Id.* § 3001(3)(A).

[143] *Id.* § 3001(3)(B).

[144] *Id.* § 3001(3)(C).

[145] *Id.* § 3001(3)(D).

[146] *See* McLaughlin, *supra* note 99, at 768, 790 (discussing the lack of utility of the current legal definitions and the need for a new approach).

[147] *See id.*

[148] *See* Mastalir, *supra* note 66, at 1037.

[149] *See* MARCUS PRICE, III, DISPUTING THE DEAD: U.S. LAW ON ABORIGINAL REMAINS AND GRAVE GOODS 21 (1991). *See also* ERIC K. YAMAMOTO, INTERRACIAL JUSTICE, CONFLICT & RECONCILIATION IN POST-CIVIL RIGHTS AMERICA 154-59 (1999) ("Law does not address healing directly. The actual healing of injured bodies, minds, and spirits and the repairing of broken relationships generally lie beyond the law's reach.").

[150] *See* 25 U.S.C.A. § 3002(a)(2)(A)-(B).

[151] *See id.* § 3005(a)(1)-(3).

litigation to resolve the issues.[152] While the process of litigation may serve to vindicate Anglo-American sensibilities,[153] it has little in common with traditional Hawaiian methods of dispute resolution.[154] The fact that issues such as those envisioned by NAGPRA require a resolution process that "makes sense" to the culture whose dignity is at stake cannot be overstated.[155]

For some injustices, such as improper possession of ancestral remains and sacred cultural items, the proper forum may not be a courtroom.[156] Rather, a less adversarial situation, in which healing can begin,[157] is probably more appropriate.[158] In this regard, extrapolation from non-Western to Western methods of dispute resolution is a necessary step toward providing a meaningful resolution in repatriation disputes.[159]

One possible source of enlightenment is a traditional Hawaiian method of dispute resolution, *ho'oponopono*, translated literally as "to set right" or "to disentangle."[160] Originally, *ho'oponopono* was intended to resolve disputes between family members, however, in recent years its application has been adapted to other types of disputes.[161] In general, however, *ho'oponopono* consists of twelve steps,[162] the main goal of which is to bring the family, or

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[152] *See id.* § 3005(a)(4) (requiring, in the case where the cultural affiliation of the remains are unknown, a showing of a preponderance of the evidence of cultural affiliation).

[153] *See* YAMAMOTO, *supra* note 149, at 156.

[154] *See* James A. Wall, Jr. & Ronda Roberts Callister, *Ho'oponopono: Some Lessons from Hawaiian Mediation*, 11 NEGOTIATION J. 52 (1995) (contrasting the goals and methodology of traditional Hawaiian method of dispute resolution, *ho'oponopono*, discussed *infra*, and Western litigation).

[155] This is the basic premise of this comment. See Wall & Callister, *supra* note 154, for the contrast to the healing qualities of mediation versus the rending qualities of litigation. *See* YAMAMOTO, *supra* note 149, at 156-57 (noting that legal doctrine and procedure overlook the psychological (cultural) healing of harmed individuals and groups, and that a process that does not address this essential element of healing can seem empty).

[156] *See* YAMAMOTO, *supra* note 149, at 154-56 (explaining that for some injustices, the healing of injured minds, spirits and relationships cannot be addressed effectively by legal remedies).

[157] *See id.* at 155, 158-59 (stating that the formal legal process has a tendency to inhibit the restoration of damaged relationships, and that non-legal justice can be an effective tool for reaching breaches that the law cannot).

[158] *See* Robert Benham & Ansley Boyd Barton, *Alternative Dispute Resolution: Ancient Models Provide Modern Inspiration*, 12 GA. ST. U. L. REV. 623, 634 (1996).

[159] *See* Wall & Callister, *supra* note 154, at 51.

[160] *Id.* at 47.

[161] *See id. See also* Manu Meyer, *To Set Right – Ho'oponopono / A Native Hawaiian Way of Peacemaking*, 12 THE COMPLEAT LAWYER 30 (1995).

[162] *See* Wall & Callister, *supra* note 154, at 48. The usual 12 steps of traditional *ho'oponopono* are: (1) Gathering of the disputants by a "high status" family or community member who knows the parties; (2) Opening *pule*, or prayer, to the gods; (3) A statement of the problem to be solved or prevented from growing worse; (4) Questioning of involved participants by the leader; (5) Replies to the leader and a discussion channeled through the leader; (6)

society, back into harmony.[163] Each step plays an important role in the process, and is imbued with deep, cultural significance.[164] Through this mechanism, Native Hawaiians were able to successfully keep their society cohesive and avoided deterioration of inter-personal relationships.[165]

Part of this success is because, unlike in litigation, there are no "winners" or "losers" in *ho'oponopono*.[166] Rather, the parties strive to reach a mutually beneficial understanding.[167] Implicit in the success of *ho'oponopono* is a commitment by both parties to their interdependence and to the shared desire to repair strained relationships.[168]

Unfortunately, the values of *ho'oponopono* may not extend themselves to cover the typical relationships in NAGPRA negotiations. Generally, the requisite mutual sense of interdependence will be lacking, as will the desire to

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Periods of silence; (7) Honest confession to the gods and to each of the disputants; (8) Immediate restitution or arrangements to make restitution as soon as possible; (9) The "setting to right" of each successive problem that becomes apparent as *ho'oponopono* proceeds; (10) Mutual forgiveness of the other and releasing him or her from guilt, grudges, and tensions from the wrongdoing; (11) Closing prayer; and (12) A final meal. *See id.* *See also* Benham & Barton, *supra* note 158, at 630.

[163] *See* Meyer, *supra* note 161, at 30.

[164] *See* Wall & Callister, *supra* note 154, at 47-51 for an in-depth discussion of each step of the *ho'oponopono* process.

[165] *See id.* at 47. *Ho'oponopono* does incorporate a procedure, called *mōka piko*, translated as "to sever the umbilical cord," that is used when a person refuses to participate in the process. If restitution is not made, the individual may be cut off from society. *See* Meyer, *supra* note 161, at 34.

[166] *See* Meyer, *supra* note 161, at 30. While traditional western negotiation methods, and indeed litigation, serve a valuable purpose in Anglo-American society (e.g. the vindication of Anglo-American sensibilities) these forms of dispute resolution have little in common with traditional Hawaiian methods of dispute resolution and are often inadequate for solving many human problems. *See* Wall & Callister, *supra* note 154, at 45-46. Litigation and adjudication produce win-lose results. They also run the risk of producing a "split the difference" result that may not satisfy the underlying needs of the parties. *See* Cynthia A. Savage, *Culture and Mediation: A Red Herring*, 5 AM. U. J. GENDER & L. 269, 280 (1996). The cultural differences among the participants in repatriation negotiations raises serious questions about the effectiveness of employing purely Western mediation practices in situations involving cultural diversity. *See id.* Culture necessarily affects values and perceptions, and these values and perceptions necessarily affect the negotiations. *See id.*

[167] *See* Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How The American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235, 278 (1997). Unlike the traditional Hawaiian form of dispute resolution the Anglo-American dispute resolution system does not necessarily seek mutually beneficial resolutions. *See* Savage, *supra* note 166, at 279. In fact, Western dispute resolution methods have been called "a process of structured aggression in which the parties, assisted by lawyers, engage is a self-interested pursuit of justice." *Id.* at 251-52.

[168] *See* Savage, *supra* note 166, at 283.

maintain a close, continuing relationship.[169] In addressing cross-cultural disputes, *ho'oponopono* faces the same difficulties as does litigation. A tool that is steeped in the values and understandings of one culture cannot adequately address the needs of the other culture.[170] Even well intentioned people on either side of the dispute may not be able to divorce themselves from the realities of their cultures.[171] The Westerner fears that litigation might result from improper repatriation and the loss of an object of potentially great scientific and monetary value. In contrast, the Native Hawaiian has a cultural duty to end the shame and suffering of their ancestors.[172] The cultural differences between Native and non-Native negotiators make the process of attempting to blend systems a Herculean task.[173]

Incorporating some essential elements of *ho'oponopono*, however, may provide a measure of balance, help to foster mutual understanding between disputing parties, and provide a more workable solution to NAGPRA negotiations.[174] Without a willingness to seriously consider the Native perspective, NAGPRA repatriation negotiations will necessarily fail, leaving litigation as the only alternative.[175] In the words of one scholar, "it is more often than not an easy excuse to put our own Western educational, scientific, and artistic demands over and above the interests and integrity of another culture."[176] NAGPRA does not go far enough in correcting this tendency.

VI. CONCLUSION

Congress hailed NAGPRA as "hugely important legislation."[177] NAGPRA undoubtedly represents an important advance in the law in its recognition of the importance of Native American cultural beliefs. Certainly, NAGPRA brings the treatment of deceased Native Americans more in line with the treatment of deceased Anglo-Americans. Yet, the processes directed by

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[169] *See generally* Wall & Callister, *supra* note 154.

[170] *See id.*

[171] *See* Wall & Callister, *supra* note 154, at 51-52 ("Typically, Westerners view mediation from a logical perspective, one which stems in part from our written tradition.").

[172] *See* Complaint at 3, Na Iwi O Na Kupuna O Mōkapu v. Dalton, 894 F. Supp. 1397 (D. Haw. 1995) (Civ. No. 94-00445 DAE) (on file with author).

[173] *See* Carol E. Goldberg, *Symposium, Indian Law Into the Twenty-First Century: Overextended Borrowing: Tribal Peacemaking Applied in Non-Indian Disputes*, 72 WASH. L. REV. 1003, 1005 (1997).

[174] *See generally* Wall & Callister, *supra* note 154.

[175] This clearly happened in the Mōkapu case. See *Time Line*, *supra* note 84, for a recounting of the relevant events of only four of the years during which Native Hawaiians were actively trying to repatriate the remains unearthed from Mōkapu.

[176] Harding, *supra* note 48, at 769.

[177] 136 CONG. REC. S17173-02, S17175 (daily ed. Oct. 26, 1990) (statement of Sen. Moynihan).

NAGPRA tend to dehumanize the ultimately human story of the struggle for respect and dignity.[178]

The story of the bones from Mōkapu illuminates the problematic reality of litigating under NAGPRA. Further, it reveals a disquieting disharmony between the express intent of Congress and the laborious, some would say humiliating, process of repatriation.[179] For, despite the fact that NAGPRA requires "expeditious" repatriation,[180] efforts to repatriate the remains from Mōkapu lasted more than nine years.[181] Obviously, the process is not working as intended.

If the legal tool for repatriation afforded to the Native Hawaiian claimants had been more respectful of traditional values and perspectives, perhaps litigation could have been rendered unnecessary. The premise of NAGPRA relies heavily on the presumption that all of the parties involved in the repatriation process will act reasonably. However, when negotiations fail, and litigation ensues, NAGPRA falters. The creators of NAGPRA could not have envisioned the adversarial repatriation process experienced by Hui Mālama. Nine years after its enactment, the underlying assumptions of NAGPRA must be critically analyzed. NAGPRA is a good idea that does not work in Hawai'i, at least not in the Act's current form.

Matthew J. Petrich[182]

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[178] *See* Ayau, *supra* note 14, at 194-95.

[179] Telephone Interview with Edward Halealoha Ayau, *supra* note 30.

[180] 25 U.S.C.A. § 3005(a)(1)(West 1999).

[181] *See id.*

[182] Class of 2000, William S. Richardson School of Law.

Insufficiency of Trade Dress Protection: Lack of Guidance for Trade Dress Infringement Litigation in the Fashion Design Industry

"Imitation is the sincerest form of flattery, but equally true, . . . is that flattery will often get you nowhere."[1]

I. INTRODUCTION

"[F]ashion comes from a dream . . . ."[2] Fashion designers dream up a vision for the upcoming season. They take this vision and transform it into beautiful clothing.[3] Designers are, undeniably, artists.[4] They create.[5] They interpret. They dream. They express their emotions, their fantasies, and their reality with clothing.[6] Their fashion creations are, therefore, a part of the fashion designer.[7]

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[1] Bausch & Lomb Incorp. v. Nevitt Sales Corp., 810 F. Supp. 466, 468 (W.D.N.Y. 1993) (citing BARTLETT'S FAMILIAR QUOTATIONS 393:5 (Justin Kaplan ed., 16th ed. 1992) (quoting Charles C. Cotton)) (internal quotations omitted).

[2] RICHARD MARTIN & HAROLD KODA, CHRISTIAN DIOR 10 (1996) (quoting Christian Dior).

[3] The best designers believe in beauty in the world and offer that beauty into garments. Their clothing breathes with "a hopeful aestheticism" and "comprise a mighty force of convictions about beauty and civilization. To say . . . that they endow life with beauty, poetry, or hope is a prodigious claim for pieces of cloth." MARTIN & KODA, *supra* note 2, at 10-11.

[4] The classic haute couture designer, Paul Poiret poses, "Am I a fool when I dream of putting art in my dresses, a fool when I say dressmaking is an art?" LAURA JACOBS, THE ART OF HAUTE COUTURE 17 (1995). Also, Christian Dior once commented, "I think of my work as ephemeral architecture, glorifying the proportions of the female body." *Id.*

[5] Mark Azria, the head designer, creator, and owner of BCBG, commented that he designs his clothing so that women are addicted to BCBG - like perfume. Azria believes he has the "right formula of brilliant color and comfortable fabric" to make women feel good about themselves. *The Look of bcbg*, INSTYLE, Oct. 1999, at 106.

[6] Christian Lacroix, master of interpretative design, states that:

> [i]n these times, so intent on naming, labeling and analysing [sic], when the 'look' of a particular fashion designer is no longer simply a question of proportions or of the relationship of length to volume but has to express some social phenomenon; in these times when fashion design is seen as a matter of symptoms and interpretation.

CHRISTIAN LACROIX, PIECES OF A PATTERN 17 (1997) (single quotation marks in original).

[7] Christian Lacroix stated that:

> Looking back, it seems that rather than wanting to create for creation's sake, I have usually tried to *modify existing shapes, dimensions and choices and revitalize them according to my own vision; to give them a fresh verve and élan*, and to remove from them an element of conformity without rejecting them out of hand. In this way I hope to be able to shed a new light on them while still using a familiar source, rather as you might

In the fashion world, a designer's phenomenal creations are magnificently displayed in seasonal fashion shows in Paris and New York.[8] Interested fashion gurus, from the industry and the public, attend these shows to admire, comment, and critique a designer's idea for the next season. These ideas are the beginning of the new fashion trend.[9] Unfortunately, these creative ideas can be stolen from the originating designer.[10] These stolen designs become the basis of unfair competition[11] in the fashion industry.

The thin line between free competition[12] and unfair competition[13] is crucial

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turn a complex garment inside out in order to understand the idea behind it and the way it has been put together, but without actually resorting to take it apart.

Id. at 53 (emphasis added).

[8] Christian Lacroix is known for his elaborate fashion showcase, and explains his inspiration for his fashion shows as:

> It is not enough simply to product a good design; you also need to be able to develop it and set it in context, to hammer out your recurring themes and work out your entrances, and to repeat and *make variations on a stroke of inspiration so that it enters into people's minds and imaginations* . . . In my view there are two possible approaches to staging a show: the 'working session' approach, aimed at commercial interests and articulating an uncomplicated idea as simply as possible; and the 'performance' approach, *a showcase in which the clothes serve as a springboard for the imagination*, in which the theatrical aspect of the occasion is exploited to the full, and which is aimed essentially (and usually with success) at the media.

Id. at 56 (emphases added) (ellipses and single quotation marks in original).

[9] Designer Christian Lacroix views his ideas for a new fashion line as very important and "tremendously exciting" components of his "creative process." *Id.* at 150. He states, "I love the feeling of having to make something out of nothing, as though approaching virgin territory or a deserted spot in high summer. It is like a breath of fresh air; it gives you new life and fresh blood." *Id.*

[10] "The dilemma confronting many originators of creative ideas is how to protect the idea and prevent someone from 'stealing' it . . . ." CARYN R. LELAND, LICENSING ART & DESIGN 25 (1990).

[11] Unfair competition is generally defined as any "dishonest or fraudulent rivalry in trade and commerce." BLACK'S LAW DICTIONARY 1528 (6th ed. 1990); *see also infra* notes 15 and 16. In this article, unfair competition refers to trade dress infringement of designers in the fashion designing industry.

[12] The objective of the American free market society is to encourage competition. This competition is "socially and economically desirable" and the social welfare is best advanced with this free competition. J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 1:1 (4th ed. 1997). Evolving from the concept of free competition is the principle of free copying. Free copying is the copying of "anyone's business ideas, inventions, writings and symbols, once disclosed to the public," or are in the public domain. *Id.* § 1:2. But "public domain is the rule: intellectual property is the exception." *Id.* Exceptions to the principle of free copying are patents, trademarks, and copyrights.

[13] BLACK'S LAW DICTIONARY explicitly defines unfair competition as:

> [T]he practice of endeavoring to substitute one's own goods or products in the markets for those of another, having an established reputation and extensive sale, by means of imitating or counterfeiting the name, title, size, shape, or distinctive peculiarities of the

to the fashion designer and the consumer.[14] The courts have not yet set forth a definitive guideline to determine unfair competition,[15] however, many activities have been characterized as such.[16] In this comment, unfair competition refers to the infringement of a high-fashion designer's trade dress through imitation of the designer's fashion creations. The trade dress of a product is the overall image or appearance of the product.[17] The fashion designer's trademark[18] and trade dress are important factors in defining and distinguishing her style from her competitors.[19] This comment focuses only on high-fashion to illustrate the complexity in application of trade dress laws to such a small, yet influential, sector of the fashion world. High-fashion, for

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article, or the shape, color, label, wrapper, or general appearance of the package, or other such simulations, the imitation being carried far enough to mislead the general public or deceive an unwary purchaser . . . .

BLACK'S LAW DICTIONARY, *supra* note 11, at 1528. McCarthy, quoting Judge Becker, states that "[i]t is not ipso facto 'unfair competition,' we believe, for one boldly to copy a competitor's product; it is only 'unfair competition' to trade off another's good will and in the process dupe consumers into mistaking one's product for another's." MCCARTHY, *supra* note 12, § 1:28 (quoting Duraco Prods. v. Joy Plastic Enters., 40 F.3d 1431, 1448 (3d Cir. 1994)). Due to the creative nature and curiosity of humans, it is almost impossible to not extract ideas from others' creative works. A beautiful piece of artwork may inspire a designer with her season fashion line, but there is a distinction between copying and inspiration.

[14] For the designer, the distinction between unfair and free competition means imitation or inspiration of her designs to competitors. For the consumer, that distinction means low quality designer imitations or a variety of high quality designer originals.

[15] *See, e.g.*, Johnson & Johnson v. Quality Pure Mfg., Inc., 484 F. Supp. 975, 979 (D.C.N.J. 1979) (stating that "[w]hen competition is engaged in beyond the boundaries of fair play, there is unfair competition"); Ray v. Proxmire, 581 F.2d 998, 1002 (D.C. 1978) (explaining that "[i]n a society encouraging aggressive economic competition, this court has recognized that the tort of unfair competition is a somewhat anomalous creature." Such behaviors include: "passing off one's goods as those of another, engaging in activities designed solely to destroy a rival, and using methods themselves independently illegal"); Reinforced Earth Co. v. Neumann, 201 U.S.P.Q. (BNA) 205, 216 (D.C. Md. 1978) (stating that "[t]he test of unfair competition is whether defendants have damaged plaintiff's legitimate business interest through acts which equity would consider unfair").

[16] J. Thomas McCarthy illustrates unfair competition by providing a list of examples, such as: "infringement of trademarks and service marks," "dilution of good will in trademarks," use of "confusingly similar titles" of commercial goods, copying of "trade dress and packaging," and "theft of trade secrets." MCCARTHY, *supra* note 12, § 1:10.

[17] *See* Lanham Act § 43(a), 15 U.S.C. § 1125(a)(1) (1988). *See infra* text accompanying note 64.

[18] Trademark is essentially any kind of distinguishing mark, logo, or symbol on a product to identify the source of that product. *See* ENCARTA WORLD ENGLISH DICTIONARY 1887 (1999). *See also infra* text accompanying note 40.

[19] *See* Hermenegildo A. Isidro, *The Abercrombie Classifications and Determining the Inherent Distinctiveness of Product Configuration Trade Dress*, 62 BROOK. L. REV. 811, 812 (1996). Distinguishing marks and designs identify the producer of the particular good and allow consumers to recognize the quality of the perceived source. *See id.*

purposes of this article, encompasses any design creation of a quality above common, mass-marketed clothing; this includes designer ready-to-wear, *avant garde*, and *haute couture*.[20]

Whereas understanding and acknowledging the importance of trade dress protection is simple, enforcing such protection is not. Even more difficult is attempting to define and distinguish a particular high-end fashion designer's trade dress and protecting it from infringement by lower-end fashion designers. Understandably, in a nation where competition is encouraged, courts are hesitant to restrict any competitor's right to compete in her field of trade.

The United States Supreme Court's 1992 decision in *Two Pesos, Inc. v. Taco Cabana, Inc.*[21] demonstrated that trade dress is an important category of intellectual property and deserves protection.[22] Since then, however, the nation's courts have neither uniformly enforced nor acknowledged the important distinction between free competition and unfair competition regarding trade dress.[23] Designers are, therefore, not afforded protection for their product designs. Clearly, the implications of such a decision for the fashion industry are unsettling. Why should lower-end, private label fashion designers profit from clothing designs stolen from higher-end fashion designers? What can all fashion designers do to protect their original creations and receive the deserved financial and emotional rewards?

Intellectual property is, indeed, a very fascinating field of law, however the rules in application are subjective, and therefore, imprecise. The nation's courts, practitioners, and fashion designers need guidance to realize the significance of trade dress in the fashion industry, and actualize the protection thereof. This comment examines trade dress protection and demonstrates that current laws are ineffective for application to the fashion industry. It is impractical for a court to apply trade dress law, which is usually applied to ordinary products, to the unfamiliar and sophisticated world of high-fashion. Comprehension and appreciation of high-fashion requires awareness of designer styles, understanding of sewing and designing quality, and perception of trend discrepancies between the runways and the magazines. Essentially, this comment attempts to raise awareness of the perpetual occurrence of

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[20] *See* discussion *infra* section IV.C.1.

[21] 505 U.S. 763 (1992).

[22] *See* Nancy Dwyer Chapman, ADVANCED SEMINAR ON TRADEMARK LAW 9 (1993) (stating that trade dress is important to protect).

[23] *See* Stephen F. Mohr, *Recent Trends in Trade Dress Law: Is Trade Dress Protection in Decline?*, 438 P.L.I. PAT. 7, 9 (1996). Cases of the 1990s reveal a restrictive view of protection in the fashion industry. The courts seem to imply that the protection is extended to only "blatant copying of distinctive, wholly non-functional designs . . . [t]he net result . . . is a body of case law which is far different in tone from the case law of five to ten years ago and which represents a significant whittling away at the protection accorded to owners of trade dress." *Id.*

fashion design infringement, and urges courts and practitioners to preserve the unique intellectual property of trade dress in the fashion design industry.

Part II of this comment provides a brief background on trademark law and explains the development of trade dress law. Because the ever-changing law of trade dress is built upon the law of trademark, a preliminary discussion on the background of trademark law is beneficial.[24] This section explains the three requirements necessary in order to obtain trade dress protection.

Part III explores the 1992 Supreme Court case that revolutionized trade dress law. *Two Pesos, Inc. v. Taco Cabana, Inc.*[25] expanded the protection of trade dress by eliminating the abstruse requirement of secondary meaning.[26] Part IV analyzes how current trade dress law is ineffective in the protection of fashion designers. This section also examines *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*,[27] where the Supreme Court restricted protection of trade dress, specifically for product designs.

Finally, Part V concludes that sufficient protection is not provided for the fashion designers. This comment argues that courts appear oblivious to the importance of the correlation between innovative fashion designs and the identity of the designer. More protection is needed to safeguard the creativity and originality of designers.

II. THE DEVELOPMENT OF TRADE DRESS LAW

A. Background of Trademark Law

1. The development of trademark law

Due to severe unfair competition in the nation's marketplace, Representative Fritz G. Lanham introduced the first national trademark bill in 1938.[28] After modification, the bill was finally enacted in 1946 and became

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[24] *See* James E. Stewart & J. Michael Huget, *Trade Dress: Protecting a Valuable Asset*, 74 MICH. B.J. 56, 56 (1995). "Once a fairly narrow subset of trademark law, trade dress doctrine has expanded significantly in recent years.... The law regarding trade dress builds on the law of trademark. Therefore a brief review of trademark concepts and terminology is in order." *Id.*

[25] 505 U.S. 763 (1992).

[26] *See id.* at 766-67. The U.S. Supreme Court affirmed the jury's findings that trade dress must be nonfunctional, inherently distinctive (without a finding of a secondary meaning in the particular market), and that an infringement of the trade dress creates a likelihood of confusion among the consumers. *See id.*

[27] 120 S. Ct. 1339 (2000).

[28] *See* Erin S. Dufek, *The Same Uniform, A Different Team: Copycats Suit Up for Competition*, 60 ALB. L. REV. 1317, 1319 (1997). "The resultant market tension caused by unfair competition amongst competitors led to the birth" of the Lanham Act. *Id.*

effective in 1947.[29] The purpose of the statute was to protect both the public and the trademark owner. In theory, quality is assured when purchasing a product bearing a particular trademark, and therefore the public can purchase products in the marketplace with confidence.[30] Additionally, the owner of the trademark is protected from misappropriation[31] of the mark, and therefore his or her investment of energy, time, and money is not wasted in presenting the product to the public.[32] Essentially, trademark law prohibits a competitor from impersonating another in order to take advantage of the developed goodwill.[33] This promotes the production of quality goods.[34] By promoting such fair competition, creativity is fostered among producers.[35]

Trademark rights originate from common law,[36] and are governed by the provisions of the Lanham Act,[37] codified by 15 U.S.C. sections 1051 through 1127. This Act is administered by the United States Patent and Trademark Office or PTO. A party may register its trademark with the PTO to obtain federal trademark protection.[38] Registration of a trademark provides

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[29] *See* EDMUND W. KITCH & HARVEY S. PERLMAN, INTELLECTUAL PROPERTY AND UNFAIR COMPETITION 177 (1998). This bill was originally called the Trademark Act of 1946, yet later, as amended, became known as the Lanham Act, 15 U.S.C. § 1051-1127. The first major revision of the bill was in 1988, and became effective on November 16, 1989. *See* KITCH & PERLMAN, *supra*, at 177.

[30] *See* Dufek, *supra* note 28, at 1319 (quoting S. Rep. No. 79-1333, at 1 (1946)).

[31] Misappropriation is defined as "[t]he unauthorized, improper, or unlawful use of . . . property for purposes other than for which intended." BLACK'S LAW DICTIONARY, *supra* note 11, at 998.

[32] *See* Dufek, *supra* note 28, at 1320.

[33] *See* Isidro, *supra* note 19, at 816 (citing Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 163 (1995)). Goodwill is the investment, time, and favorable repute that the original producer has established for its products. *See* Fabrication Enters., Inc. v. Hygenic Corp., 64 F.3d 53, 61 n.9 (2d Cir. 1995) (stating that goodwill is the original manufacturer's investment in its product's appearance); Upjohn Co. v. Schwartz, 246 F.2d 254, 258 (2d Cir. 1957) (establishing goodwill as the favorable repute which the manufacturer had established for its products).

[34] *See* Isidro, *supra* note 19, at 816.

[35] *See id.* (citing Williajeane F. McLean, *The Birth, Death, and Renaissance of the Doctrine of Secondary Meaning in the Making*, 42 AM. U. L. REV. 737, 739 (1993)). McLean wrote that courts have relaxed the traditional requirements of trade symbol protection in order to foster creativity and promote competition in the marketplace. *See* McLean, *supra*, at 851 n.35.

[36] *See* Stewart & Huget, *supra* note 24, at 56. Huget states that "[t]he Lanham Act codified and built upon the common law, but did not displace it -- a trademark that is not registered can nevertheless be protected." *Id.*

[37] Originally the Lanham Act was called the Trademark Act of 1946. After the 1988 revision, the Lanham Act is sometimes referred to as the Trademark Revision Act of 1988.

[38] *See* Travis L. Bachman, Note, *Inherent Distinctiveness, Product Configuration, and "Product Groups": The Developing Law of Trade Dress*, 23 J. CORP. L. 501, 505 (1998). Trademarks may also receive protection under state law, however, protection under the federal law of the Lanham Act will preempt state law. *See id.*

constructive notice to the public that the mark is in use, and thus protects the owner of the trademark from infringement of that mark by competitors.[39]

Trademark is defined in section 45 of the Lanham Act as:

> [A]ny word, name, symbol, or device or any combination thereof-
> (1) used by a person, or
> (2) which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this chapter, to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown.[40]

2. *Three categories of trademark*

Not all trademarks are protected under the Lanham Act. Judge Friendly, in the classic case, *Abercrombie & Fitch, Co. v. Hunting World, Inc*,[41] set forth three major categories of trademarks, and the specific category under which a trademark is categorized governs if that trademark can be protected under the Lanham Act.[42] The first category is comprised of generic trademarks, which are not protectable.[43] Generic trademarks use common descriptive

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[39] *See* Stewart & Huget, *supra* note 24, at 56. "The owner of a trademark is protected against the use of the same mark, or a confusingly similar one, by anybody else on similar merchandise or services." SIDNEY A. DIAMOND, TRADEMARK PROBLEMS AND HOW TO AVOID THEM 9 (1981). Registration of a mark under section 2 of the Lanham Act, 15 U.S.C. § 1052, enables the trademark owner to sue an infringer under section 32, 15 U.S.C. § 1114. It also entitles the trademark owner to a presumption that its mark is valid under section 7(b), 15 U.S.C. § 1057(b), and renders the registered trademark incontestable after five years of continuous use under section 15, 15 U.S.C. § 1065.

[40] 15 U.S.C. § 1127 (1988).

[41] 537 F.2d 4 (2d Cir. 1976).

[42] *See id.* at 9. Judge Friendly noted four categories, but his last two categories (suggestive and arbitrary or fanciful) now fall under one category: inherently distinctive. *See* Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 768 (1992). The courts have held that one category of trademark, colors, is never protectable, unless there is evidence of secondary meaning. In *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159 (1995), the Supreme Court reasoned, using the *Abercrombie* categories, that color does not "almost automatically tell a customer that [it] refer[s] to a brand" and does not immediately "signal a brand of a product's 'source'." *Id.* at 162-63. However, the Court noted that "over time, customers may come to treat a particular color on a product or its packaging . . . as signifying a brand." *Id.* at 163.

[43] *See Abercrombie*, 537 F.2d at 9. "At common law neither those terms which were generic nor those which were merely descriptive could become valid trademarks." *Id. See also* Canal Co. v. Clark, 80 U.S. 311, 323 (1872) (stating that a generic name or a name merely descriptive cannot be "employed as a trademark and the exclusive use of it be entitled to legal protection").

Authorities, including commentators, student authors, and judges, have spelled the term protectable as both "protectable" and "protectible." I have chosen the former spelling of the term to keep this comment uniform.

names or designs used by other manufacturers of the same good or service.[44] Understandably, a generic name is never protectable because this would deprive other competitors the ability to use the terminology for their products. Many problems would arise if one producer protected the trademark "lotion," thus preventing any other producer from using the word lotion to refer to his products.[45]

The second category of descriptive trademarks[46] are protectable only after acquiring secondary meaning.[47] A mark cannot be merely descriptive because, like generic names, this would deprive competitors from competing effectively. Secondary meaning for a name is demonstrated if consumers associate a specific trademark with a particular product.[48] This can be established with a showing of exclusive and continual use of the mark, substantial advertising featuring the mark, or survey research of consumers.[49] "TV Guide," is an example of a descriptive mark. The name could be merely descriptive, as a guide for the television, yet the public has come to associate that name with the little booklet that contains television listings and short articles, thereby acquiring secondary meaning.[50]

Geographic and personal trademarks are also categorized under the descriptive category.[51] Pursuant to section 2(e)(2) of the Lanham Act,[52] geographic trademarks cannot be protected unless the mark is misdescriptive[53]

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[44] *See* Kellogg Co. v. National Biscuit Co., 305 U.S. 111, 112-20 (1938).

[45] *See Abercrombie*, 537 F.2d at 9.

[46] *See* MCCARTHY, *supra* note 12, § 11:24 (listing marks held to be descriptive and non-descriptive).

[47] *See* Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U.S. 315, 335-36 (1938) (giving protection to Nu-Enamel trademark).

[48] *See* Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 769-70 (1992).

[49] *See* Stewart & Huget, *supra* note 24, at 56. This list does not exhaust all the possible methods of establishing secondary meaning. Compare these methods of proving secondary meaning for trademarks with the methods for proving secondary meaning for trade dress. *See infra* text accompanying notes 123-32.

[50] *See* Stewart & Huget, *supra* note 24, at 56.

[51] *See* KITCH & PERLMAN, *supra* note 29, at 183.

[52] 15 U.S.C. § 1052(e)(2) (1988).

[53] *See In re* Nantucket, Inc., 677 F.2d 95, 101 (C.C.P.A. 1982). The Court of Customs and Patent Appeals held that the trademark, Nantucket, was protectable because:

> [t]he only indication of record that NANTUCKET is primarily a geographical term resides in dictionary listings referring to Nantucket Island as a summer resort and former whaling center. There is no evidence of record to support a holding that the mark NANTUCKET as applied to men's shirts is "deceptively misdescriptive." There is no indication that the purchasing public would expect men's shirts to have their origin in Nantucket when seen in the market place with NANTUCKET on them. Hence buyers are not likely to be deceived, and registration cannot be refused on the ground that the mark is "primarily geographically deceptively misdescriptive."

Id.

of the goods. For personal names, generally, no one can be denied protection of their own surname.[54] However, if there are two competitors using the same personal name as trademarks, they must distinguish their products by disclaiming any connection with each other.[55]

The last category of trademarks are those that are inherently distinctive, and also protectable.[56] Inherently distinctive marks "serve no other purpose than to identify the commercial source of a product [or service]."[57] These trademarks are further divided into the sub-categories of suggestive marks, arbitrary marks, and fanciful marks. Suggestive marks utilize references to the quality or trait of the product.[58] Such marks require the usage of the imagination to find the correlation between the trademark and the product.[59] Coppertone suntan lotion is an example of such a suggestive mark. The term,

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[54] *See* Taylor Wine Co., Inc., v. Bully Hill Vineyards, Inc., 569 F.2d 731 (1978) (holding that competitors may use the same surname as their trademarks).

[55] *See id.* at 735 (citing Societe Vinicole de Champagne v. Mumm, 143 F.2d 240, 241 (2d Cir. 1944)). In *Societe Vinicole*, the court held that prohibition of an individual from using his true family surname is to "take away his identity: without it he cannot make known who he is to those who may wish to deal with him; and that is so grievous an injury that courts will avoid imposing it, if they possibly can." *Societe Vinicole*, 143 F.2d at 241.

However, confusion may result if there are several competitors with the same surname. "Once an individual's name has acquired a secondary meaning in the marketplace, a later competitor who seeks to use the same or similar name must take 'reasonable precautions to prevent the mistake.'" *Taylor Wine*, 569 F.2d at 734 (quoting L. E. Waterman Co. v. Modern Pen Co., 235 U.S. 88, 94 (1914)).

[56] *See* Isidro, *supra* note 19, at 821-22. According to Isidro:

> The doctrine of inherent distinctiveness developed due to judicial concern over the financial inability of small producers to establish secondary meaning with consumers before competition arrived, or to prove subsequently the existence of secondary meaning in court. The federal courts also have recognized inherent distinctiveness as a legal concept because protection of these trade symbols promotes entrepreneurship and innovation among producers.

Id. (citing Ralph S. Brown, *Design Protection: An Overview*, 34 UCLA L. REV. 1341, 1386 (1987)). Brown wrote that:

> If the product is one that requires substantial investment, whether of capital or of talent, the investment may not be made if the prospect of profit, cloudy at best, is made more risky by the likelihood that competitors will enter, drive prices down to their marginal costs, and leave the originator with no return on her sunk costs, and with no hope of profits that will balance the risk of failure.

Brown, *supra*, at 1386.

[57] Dufek, *supra* note 28, at 1323 (quoting Stewart & Huget, *supra* note 24, at 56). *See also* Bachman, *supra* note 38, at 510. "It is well-settled that some trademarks are, by their very nature, inherently distinctive and worthy of protection as source indicators even without evidence of acquired distinctiveness or secondary meaning." *Id.*

[58] *See* MCCARTHY, *supra* note 12, § 11:21. *See also* Stewart & Huget, *supra* note 24, at 56.

[59] *See* DIAMOND, *supra* note 39, at 5.

"coppertone," suggests a deep, copper-like tan.[60] Other possibilities are Raid bug spray, Sure deodorant, and Head and Shoulders shampoo. Arbitrary marks are common terms used outside their normal context to identify a product. Black & White liquor, Camel cigarettes, and Dial soap are examples of arbitrary trademarks.[61] Fanciful marks are imaginary words or symbols, specifically invented for use as a trademark of a particular product. Kodak and Exxon are two of the most well-known fanciful trademarks.[62]

B. The Development of Trade Dress Law

Unlike trademark law, trade dress law is less explicitly set forth in the Lanham Act.[63] The text of the statute provides little guidance as to the circumstances under which a trade dress may be protected. Trade dress law is embodied within the broad scope of trademark law in section 43(a) of the Lanham Act, which provides:

> Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact [is liable].[64]

The breadth of the elements recited as actionable by section 43(a) has been held to embrace not just trade logos and names, but product packaging and design.[65] Courts have assumed that trade dress constitutes a "device" in that it is capable of carrying meaning.[66] This reading of section 43(a) is buttressed by the recent supplement to the section, section 43(a)(3), which specifically

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[60] *See* Stewart & Huget, *supra* note 24, at 56.

[61] *See id. See also* DIAMOND, *supra* note 39, at 5.

[62] *See* Stewart & Huget, *supra* note 24, at 56.

[63] *See* Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763 (1992) (noting that section 43(a) of the Lanham Act does not provide a basis to enable trademarks and trade dress to be distinguished from each other). "[T]rademarks (wordmarks and logos) are familiar. Trade dress, on the other hand, is more amorphous because it encompasses so many things." Bachman, *supra* note 38, at 503 (footnote omitted).

[64] 15 U.S.C. § 1125(a)(1)(1988).

[65] *See, e.g.*, Standard Terry Mills, Inc. v. Shen Mfg. Co., 803 F.2d 778 (3d Cir. 1986) (expanding trade dress protection to the woven design of towels); Harlequin Enterprises Ltd. v. Gulf & W. Corp., 644 F.2d 946 (2d Cir. 1981) (holding that book covers are protectable under trade dress law); Rolls-Royce Motors, Ltd. v. A&A Fiberglass, Inc., 428 F. Supp. 689 (N.D. Ga. 1977) (extending trade dress protection to the appearance of the grille on Rolls-Royce automobiles).

[66] *See* Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 162 (1995). "Since human beings might use as a 'symbol' or 'device' almost anything at all that is capable of carrying meaning, this language, read literally, is not restrictive." *Id.*

allows "civil action for trade dress infringement under this chapter for trade dress not registered on the principal register."[67]

Trade dress protection is broader in scope than trademark protection, and for a very good reason. Trade dress protects aspects of a product's packaging and design that cannot be registered for trademark protection.[68] These elements encompass the manufacturer's total selling image, unlike trademarks that merely identify and distinguish the manufacturers from the competitors.[69]

Trade dress is not defined in the Lanham Act, but case law has developed two categories of trade dress: product packaging and product configuration.[70] At one time, trade dress was defined only as "the total image of a product,"[71] in other words, the *product packaging* in which a product is marketed.[72] This includes features such as size, shape, color, color combinations, texture, and

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[67] 15 U.S.C.A. § 1125(a)(3) (West Supp. 1999).

[68] *See* Bachman, *supra* note 38, at 503. "[T]rademarks (wordmarks and logos) are familiar. Trade dress, on the other hand, is more amorphous because it encompasses so many things." *Id.*

[69] *See id.* "Trade dress protection is broader in scope than trademark protection . . . because it protects aspects of packaging and product design that cannot be registered for trademark protection and because it requires the court to focus on the plaintiff's entire selling image, rather than the narrow single facet of trademark." *Id.* (quoting Vision Sports, Inc. v. Melville Corp., 888 F.2d 609, 613 (9th Cir. 1989)) (brackets omitted).

But see, Bradley K. Groff, *Bare-Fisted Competition or Palming Off? Protection of Product Design as Trade Dress Under the Lanham Act*, 23 AIPLA Q.J. 65, 67-68 (1995) (arguing that extension of trade dress protection treads into the territory of patent law). Groff writes that this expansion of trade dress protection goes beyond identifying the source of the product, allowing protection to product design features that cannot be protected with a patent. *See id.* According to Groff:

> Expanded protection of trade dress is consistent with the purposes of the Lanham Act when the trade dress at issue serves to identify the source of the product, thereby reducing the likelihood of consumer confusion. . . . When courts extend trade dress protection to design features of the product itself, rather than merely the product's packaging or labeling, they risk upsetting the delicate balance of interests which Congress has established through the patent system. . . . [C]ourts must make a greater effort to distinguish the design of a product itself from that of a product's packaging or labeling, recognizing that the former is typically protectable, if at all, only under the patent laws, whereas the latter is generally trade dress, protectable under the Lanham Act.

Id.

[70] Groff mentions that Congress has specified that patent law is the appropriate means of protecting color and scent, among other things, where the product element serves any significant purpose other than source-identifying purposes. *See* Groff, *supra* note 69, at 67-68. *See* Bachman, *supra* note 38, at 503.

[71] John H. Harland Co. v. Clarke Checks, Inc., 711 F.2d 966, 980 (11th Cir. 1983); *see also* L.A. Gear, Inc. v. Thomas McAn Shoe Co., 988 F.2d 1117, 1129 (Fed. Cir. 1993) (defining trade dress as "the overall combination and arrangement of design elements into the total image by which the product is perceived by the consuming public").

[72] *See* Bachman, *supra* note 38, at 503 n.8.

graphics of the package in which a product is sold.[73] Examples of protectable product packaging[74] are the PAM cooking spray can,[75] the ORAL-B toothbrush box,[76] the Dallas Cowboy Cheerleaders' uniforms,[77] and the NEVR-DULL metal polish can.[78]

In recent years, the law of trade dress has expanded to the actual product design, in other words, *product configuration*.[79] Unlike product packaging, product configuration trade dress is the three dimensional aspect of the product.[80] It is the design of the entire product, including its configuration or shape.[81] This development of trade dress law provides protection to paperback books and their covers,[82] style and look of rock groups,[83] and restaurant

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[73] *See Harland*, 711 F.2d at 980.

[74] Protection for packaging is determined by the nonfunctional, arbitrary features that do not describe or contribute to its effective packaging. In *AmBRIT, Inc. v. Kraft, Inc.*, 812 F.2d 1531 (11th Cir. 1986), the Klondike ice cream bar wrapper was found protectable after an evaluation of:

> [w]hether it is a "common" basic shape or design, whether it is unique or unusual in a particular field, and whether it is a mere refinement of a commonly-adopted and well-known form of ornamentation for a particular class of goods viewed by the public as a dress or ornamentation for the goods . . . .

Id. at 1536 (brackets omitted) (quoting Brooks Shoe Mfg. Co. v. Suave Shoe Corp., 716 F.2d 854, 858 (11th Cir. 1983)).

[75] *See* AHP Subsidiary Holding Co. v. Stuart Hale Co., 1 F.3d 611 (7th Cir. 1993) (holding the red and yellow aerosol can with picture of fried eggs on one side as protectable).

[76] *See* Oral-B Lab., Inc. v. Mi-Lor Corp., 810 F.2d 20 (2d Cir. 1987) (holding Oral-B's numbering system, revealing window on toothbrush box, and descriptive labeling on white box as protectable under trade dress law).

[77] *See* Dallas Cowboy Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200 (2d Cir. 1979) (determining that the cheerleaders' outfit of white vinyl boots, white shorts, white belt with blue stars, blue blouse, and white vest with fringe, was protectable).

[78] *See* George Basch Co. v. Blue Coral, Inc., 968 F.2d 1532 (2d Cir. 1992) (holding the navy blue can with white lettering was protectable under trade dress law).

[79] *See* MCCARTHY, *supra* note 12, § 8:4 (stating trade dress is "the total look of a product and its packaging and even includes the design and shape of the product itself"). *See also* LeSportsac, Inc. v. K Mart Corp., 754 F.2d 71, 75 (2d Cir. 1985) (recognizing that "the design of a product itself may function as its packaging," and, hence be protectable trade dress).

[80] *See* Bachman, *supra* note 38, at 504 (citing J.H. Reichman, *Design Protection and the New Technologies: The United States Experience in a Transnational Perspective*, 19 U. BALT. L. REV. 6, 116 (1989)).

[81] *See id.* (quoting Devan Designs, Inc. v. Palliser Furniture Corp., 25 U.S.P.Q.2d (BNA) 1991, 1995 (M.D.N.C. 1992)).

[82] *See* Harlequin Enters. Ltd. v. Gulf & Western Corp., 644 F.2d 946 (2d Cir. 1981) (holding that book covers are protectable under trade dress law).

[83] *See* Cesare v. Work, 520 N.E.2d 586 (Ohio Ct. App. 1987) (deciding a rock group's look was protectable under state unfair competition laws).

décor.[84] Courts have also protected the following types of product configuration: Ferrari automobiles,[85] the grille of a Rolls-Royce,[86] and a slipper shaped like a bear's paw.[87]

Product configuration is distinct from product packaging,[88] therefore, categorizing certain sophisticated products is difficult. As mentioned, the uniform for the Dallas Cowboys Cheerleaders was protected as a trade dress under product packaging.[89] Yet, considering the three dimensional aspect of clothing, the cheerleaders' uniforms could also be a type of product configuration.[90]

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[84] *See* Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763 (1992) (expanding trade dress protection to décor of restaurants without the requirement of secondary meaning). *See also* discussion section III.

[85] *See* Ferrari S.P.A. Esercizio Fabriche Automobil E Corse v. Roberts, 944 F.2d 1235 (6th Cir. 1991) (protecting the shape of the Ferrari Daytona Spyder and Testarossa automobiles).

[86] *See* Rolls-Royce Motors, Ltd. v. A&A Fiberglass, Inc., 428 F. Supp. 689 (N.D. Ga. 1977) (extending trade dress protection to the appearance of the grille on Rolls-Royce automobiles).

[87] *See* Animal Fair, Inc. v. AMEFSCO Indus., Inc., 620 F. Supp. 175 (D. Minn. 1985) (concluding that the bear paw shape of a slipper was protectable under trade dress law and also under copyright law).

[88] *See* Fun-Damental Too, Ltd. v. Gemmy Indus. Corp., 111 F.3d 993, 996 (1997). Consumers generally rely on the package of the product, and not the design on the product, for information about that product and its source. *See id.*

[89] *See* Dallas Cowboy Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200 (2d Cir. 1979).

[90] *See* Bachman, *supra* note 38, at 504. Bachman mentions that it is difficult to categorize certain trade dress as product packaging or product configuration. "[D]ifferent tests are utilized to determine the protectability of product configuration trade dress than are used for product packaging. . . . Moreover, these product configuration tests are usually more difficult to pass, thus the classification of the trade dress at issue is often outcome-determinative." *Id.* at 519 n.27.

Bachman illustrates the difficulty in categorizing products with the Eleventh Circuit case, *Original Appalachian Artworks, Inc. v. Toy Loft, Inc.*, 684 F.2d 821 (11th Cir. 1982). The trade dress in issue was a particular form of a marketing technique with regard to the Cabbage Patch Kid doll. Bachman states:

> The plaintiff doll producer named each doll individually, provided purchasers with the doll's "birth certificate" and "adoption papers," sent the buyer a "birthday card" for the doll on the first anniversary of the date of sale, and signed each doll to created a "limited signed edition." The court categorized this trade dress as packaging, but it seems obvious that the court could have viewed these accoutrements as part of the product itself, and hence categorized the trade dress as product configuration.

Bachman, *supra* note 38, at 504. In *Rock and Roll Hall of Fame & Museum, Inc. v. Gentile Prods.*, 134 F.3d 749 (1998), the court readily found recognizable trademarks as identifiers of source on the museum's memorabilia (product packaging). However, the court declined to find any such recognizable indicators of source on the museum's building design (product configuration). *See id.* at 755.

C. Three Elements Required to Acquire Trade Dress Protection

Three elements must be demonstrated to prevail in a trade dress infringement claim. Protection under the Lanham Act is provided when the trade dress is not functional, a likelihood of confusion exists as to the source of the competing products, and the trade dress is distinctive.[91]

1. Non-functionality

If the trade dress of a product serves some utilitarian or aesthetic function, then the product falls outside the scope of the Lanham Act, and therefore is not protectable.[92] Denial of protection to functional trade dress promotes fair competition by allowing the public to access useful articles by not limiting the number of producers of those articles.[93] In other words, because the granting of trade dress protection precludes competitors from copying that particular trade dress, then the first producer of a functional trade dress would have exclusive rights on that particular product and its features.[94] Consumers would be required to purchase that product from only that specific producer, and most likely at a high price.[95] Essentially, permitting such valuable protection disrupts free market competition.[96]

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[91] The three elements required to acquire trade dress protection were first introduced in *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992).

[92] *See* Duraco Prods., Inc. v. Joy Plastic Enter., Ltd., 40 F.3d 1431, 1439 (3d Cir. 1994). Dufek also notes that:

> Even where a national producer establishes that the dress of its product is deserving of protection because of its distinctiveness and the likelihood that consumers would be confused about the origin of knockoff products, where a product's trade dress serves some utilitarian or aesthetic function, it will necessarily fall outside the ambit of the Lanham Act's protection.

Dufek, *supra* note 28, at 1327.

[93] *See* Isidro, *supra* note 19, at 817.

[94] *See* Aromatique, Inc. v. Gold Seal, Inc., 28 F.3d 863, 873 (8th Cir. 1994) (quoting *In re* Walter Gremlin Co., 635 F.2d 841, 844 (C.C.P.A. 1980)). Also, in *Duraco*, the court denied protection to plastic planters that resembled marbled urns because they were at best, descriptive and functional. *See Duraco*, 40 F.3d at 1440.

[95] *See Aromatique*, 28 F.3d at 873.

[96] *See* Mitchell M. Wong, *The Aesthetic Functionality Doctrine and the Law of Trade-Dress*, 83 CORNELL L. REV. 1116, 1155 (1998). Wong states that:

> [P]ermitting a valuable feature to receive trade-dress protection disrupts free market competition by enabling the trade-dress holder to establish a price above the competitive equilibrium for products bearing that feature. Such a privilege (i.e., a monopoly over a useful design) is anathema to the cardinal tenet of free-market economics: namely, that prices are optimally established in the long run only through the unregulated interaction between supply and demand.

Id.

There are three policy reasons for not granting protection to functional trade dress.[97] The first reason is to comply with the statutory purpose for trade dress protection, which is to provide support to the public in identifying the commercial source of a product.[98] Functional features do not accomplish this goal of source identification. Second, allowing protection for functional trade dress would conflict with federal patent law[99] which provides limited protection to products with functional features and designs that are truly innovative.[100] This limited protection allows competitors fair opportunity to enter the market. Third, and finally, refusal of protection for functional trade dress creates a market that permits fair competition, thereby allowing a free exchange of ideas in the public domain.[101]

To receive protection, every trade dress element of the entire product does not have to be non-functional.[102] A functional element is defined as one essential for a product to fulfill its purpose or one which "affects the cost or quality of the article."[103] "[F]unctional elements can be included in the mix," but the end result must be nonfunctional when considered as a whole.[104]

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[97] *See* Joseph P. Bauer, *A Federal Law of Unfair Competition: What Should Be the Reach of Section 43(a) of the Lanham Act?*, 31 UCLA L. REV. 671, 717 (1981). *But see* Wong, *supra* note 96, at 1154 (setting forth two purposes for the "functionality doctrine"). Wong states that the functionality doctrine: (1) prevents perpetual monopolization of valuable product features, and (2) partitions the law of intellectual property between trademark, copyright, and patent. *See id.*

[98] *See* Bauer, *supra* note 97, at 717. *See also* section 43(a)(1) of the Lanham Act, 15 U.S.C. § 1125(a)(1).

[99] *See* Bauer, *supra* note 97, at 717.

[100] *See Aromatique*, 28 F.3d at 873. *See also* 35 U.S.C. § 171 (1982).

[101] *See* Bauer, *supra* note 97, at 717. Bauer states that the "innovator of a useful product or product feature should not be allowed to appropriate that improvement indefinitely . . . ." *Id. See also* Dogloo, Inc. v. Doskocil Mfg. Co., 893 F. Supp. 911, 918 (C.D. Cal. 1995) (stating that if a configuration is functional, "then everyone has the right to use the configuration for its functional purpose" because extended protection would hinder fair competition); Laurence R. Hefter, *Protection Against Simulation and Imitation*, C122 A.L.I.-A.B.A. 141, 141 (1995) (recognizing the right to compete as a fundamental right).

[102] *See* Dufek, *supra* note 28, at 1327.

[103] Inwood Labs., Inc. v. Ives Labs., Inc., 456 U.S. 844, 850 n.10 (1982). Wong's article sets forth two primary theories of functionality, and there are several tests under each theory. The "Identification Theory" focuses on the cost or value of the functional feature. Wong, *supra* note 96, at 1132. There are four tests under this theory: indicia of source test; actual benefit test; consumer motivation test; and commercial success test. The "Competition Theory" looks at the essentiality of a feature to its use or purpose. *Id.* at 1142. There are six tests under this theory: comparable alternatives test; essential to usage test; relation to usage test; ease of manufacture test; effective competition test; and de facto/de jure test. *See id.* at 1144.

[104] Stewart & Huget, *supra* note 24, at 58. *See, e.g.*, Taco Cabana Int'l, Inc. v. Two Pesos, Inc., 932 F.2d 1113, 1119 (5th Cir. 1991) (stating that arbitrary combination of functional elements of a product can be protected); *In re* Morton-Norwich Prods., 671 F.2d 1332, 1342 (C.C.P.A. 1982) (noting the relationship between distinctiveness of design of a product and functionality of a product).

Trade dress can be functional either in the "utilitarian" sense or the "aesthetic" sense.[105]

"Utilitarian functionality is the primary doctrine governing the functionality determination."[106] Elements that are functional in the utilitarian sense contribute to the product's use, purpose, or performance. Such features may also affect the quality of the product or its cost of production.[107] To determine a product's utilitarian functionality, courts consider the availability of alternative designs, and whether the design achieves economies in manufacture and use.[108] As stated, a mere finding of a product design's utilitarian function does not preclude that product from trade dress protection. It is important to note the distinction between functionality, which "is something that would be difficult for *competitors* to do without," and utility, which is something that would be difficult for *consumers* to do without.[109]

Aesthetic functionality focuses on ornamental features of a product that are "neither essential nor helpful" to the utilitarian function of the product.[110] The purpose of these features is not to identify the source, but to be visually pleasing.[111] The issue of aesthetic functionality was first addressed in 1952,

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[105] *See* Roberta Jacobs-Meadway et al., *Product Simulation*, SC68 A.L.I.-A.B.A. 355, 363 (1998).

[106] Dufek, *supra* note 28, at 1328.

[107] *See id.*

[108] *See* Dogloo, Inc. v. Doskocil Mfg. Co., 893 F. Supp. 911, 919 (C.D. Cal. 1995). In addition, Dufek writes that:

> [T]he ultimate determination of whether protection will be afforded to a product's trade dress will turn upon "whether it would be too difficult for competitors to design around the protected feature." Forcing newly formed companies to incur great expense and burden to bring a comparable product into the commercial market would unduly hinder fair competition and thus deprive consumers of the choices they deserve.

Dufek, *supra* note 28, at 1328-29 (quoting Stewart & Huget, *supra* note 24, at 57).

[109] Stewart & Huget, *supra* note 24, at 57 (emphasis added).

[110] Wong, *supra* note 96, at 1153. "The aesthetic functionality problem asks whether a design that is intrinsically attractive may receive trademark protection. Specifically, the problem focuses on ornamental features that have the potential to influence consumer behavior, but are neither essential nor helpful to the primary function of the product." *Id.* (citations omitted).

[111] *See* Dufek, *supra* note 28, at 1329-30. "The use of the aesthetic functionality doctrine in affording protection to a product's trade dress does turn upon 'the product's features in relation to whether other manufacturers need them to compete in the marketplace . . . [but instead focuses] on whether the . . . feature serves the purpose of merely being ornamental or visually pleasing instead of identifying the source of goods or services.'" *Id.* (quoting Michael B. Landau, *Trademark Protection for Color Per Se After* Qualitex Co. v. Jacobson Products Co.*: Another Grey Area in the Law*, 2 UCLA ENT. L. REV. 1, 19 (1995)) (brackets in original). *See also* Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 170 (1995) (stating that a design is functional if its aesthetic value lies in its ability to confer a significant benefit to the product that cannot be duplicated by using alternative design. The ultimate test of aesthetic functionality is whether the protection of those elements would significantly hinder competition).

in *Pagliero v. Wallace China Co.*,[112] where the Ninth Circuit Court of Appeals denied protection to the patterns of china for the following reasons:

> [i]f the particular feature is an important ingredient in the commercial success of the product, the interest in free competition permits its imitation in the absence of a patent or copyright. On the other hand, where the feature or, more aptly, design, is a mere arbitrary embellishment, a form of dress for the goods primarily adopted for purposes of identification and individuality and, hence, unrelated to basic consumer demands in connection with the product, imitation may be forbidden where the requisite showing of the secondary meaning is made. Under such circumstances, since effective competition may be undertaken without imitation, the law grants protection.[113]

Commentators have criticized this expansive interpretation of aesthetic functionality for being over-inclusive.[114] A strict application of *Pagliero* may lead to unfair results, but only a lenient application is necessary to understand the crux of aesthetic functionality. Essentially, if the success of a product is due to the attractiveness of a design feature, then that product possesses aesthetic functionality, and is therefore unprotectable under trade dress law.[115]

2. *Distinctiveness*

The distinctiveness requirement for trade dress protection facilitates the fundamental purpose of trade dress and trademark law. This purpose is "to identify product source by ensuring that protected trade symbols be clearly distinguishable from others."[116] The Restatement (Third) of Unfair Competition states that trade dress is considered distinctive, and protectable, if it is either inherently distinctive or acquired distinctive status through secondary meaning.[117]

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[112] 198 F.2d 339 (9th Cir. 1952).

[113] *Id.* at 343 (citations omitted).

[114] *See* Chapman, *supra* note 22, at 22-23. *Pagliero* has been strictly limited, distinguished, and repudiated by the courts. "Strict application of this extreme interpretation would deny trade dress protection for any product design which could be characterized as attractive or 'aesthetically pleasing'. . . . Accordingly, *Pagliero* has been strictly limited by the courts, routinely distinguished by the Federal Circuit, and explicitly repudiated by the Second Circuit." *Id.* (citation omitted).

[115] *See* Chapman, *supra* note 22, at 27. "The true test of functionality is not whether the feature performs a function, but whether the feature is dictated by the functions to be performed." *Id.* (citation and bracket omitted).

[116] Isidro, *supra* note 19, at 820.

[117] *See* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 13 cmt. a (1995).

An inherently distinctive trade dress is one that is so unusual in identifying the product source that it is unique to that particular source.[118] In other words, the trade dress is inherently representative of its source. Like trademark law, inherently distinctive trade dress can be suggestive, arbitrary, or fanciful.[119] As mentioned, suggestive trade dress requires one's imagination to make the connection between the product and the source, arbitrary trade dress has no relation to the product and its source, and fanciful trade dress is created by the source and has no previous meaning.[120] Essentially, a product with an

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[118] *See* Isidro, *supra* note 19, at 823. In *Krueger International Inc. v. Nightingale Inc.*, 915 F. Supp. 595 (S.D.N.Y. 1996), the court stated that determining whether a product design is inherently distinctive is "one of the most analytical issues in all of trade dress law. . . . The issue is particularly pressing and unresolved . . . ." *Id.* at 600.

[119] *See* Isidro, *supra* note 19, at 823. The jurisdictions are split on the application of the *Abercrombie* (trademark classification) test to evaluate inherent distinctiveness for trade dress. Some courts stated that trademark law should strictly apply to trade dress law because trade dress is based in trademark law. For example, *Mana Products, Inc. v. Columbia Cosmetics Manufacturing, Inc.*, 65 F.3d 1063, 1070 (2d Cir. 1995), deemed the product configuration of black, rectangular-shaped cosmetic compacts to be generic, and therefore not protectable trade dress. Also, *Paddington Corp. v. Attiki Importers & Distributors, Inc.*, 996 F.2d 577, 583-84 (2d Cir. 1993) adopted the *Abercrombie* test and determined that the product packaging of "No. 12 Ouzo" liquor was arbitrary, and therefore protectable.

Other courts have observed varying degrees of frustration because *Abercrombie* classifications do not translate neatly to the trade dress context. They are particularly skeptical as to the appropriateness of the application of traditional trademark law to modern trade dress law, such as product configuration. "Both before and after *Two Pesos,* courts have suggested that product configurations could not be subjected to the same test as product packaging." KITCH & PERLMAN, *supra* note 29, at 248. *Duraco Products Inc. v. Joy Plastic Enterprise, Ltd.*, 40 F.3d 1431, 1434 (3d Cir. 1994), was one of the first cases to explicitly state that the two types of trade dress need to be analyzed differently. Although trade dress law is based on trademark law, product configuration differs fundamentally from a product's trademark. Product configuration "is not a symbol according to which one can relate the signifier (the trademark, or perhaps the packaging) to the signified (the product)." *Id.* at 1440 (parentheses in original). In other words, the very basis for the three different categories of trademark (the descriptive relationship between the mark and the product, along with the degree to which the mark describes the product) is inapplicable to the product itself. *See id.* at 1434.

[120] *See* Isidro, *supra* note 19, at 823. *Duraco* clearly explains that it is not "helpful or proper to transplant the categorical distinctiveness inquiry developed for trademarks to product configurations, where the alleged trade dress lies in the very product itself." *Duraco*, 40 F.3d at 1440. The court stated that:

> In any event, the analysis appropriate for a product's packaging . . . is not necessarily appropriate for a product's configuration. Product packaging designs, like trademarks, often share membership in a practically inexhaustible set of distinct but approximately equivalent variations, and an exclusive right to a particular overall presentation generally does not substantially hinder competition in the packaged good, the item in which a consumer has a basic interest. A product configuration, contrariwise, commonly has finite competitive variations that, on the whole, are equally acceptable to consumers. . . . Moreover, because of consumers' common abundant experience with similar goods being

inherently distinctive trade dress has a memorable producer because the trade dress is "unique, unusual or unexpected in the market."[121]

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sold in differing packaging, a consumer is substantially more likely to trust a product's packaging, rather than its configuration, as an indicum of source.

Id. at 1448 (citation omitted). "Being constitutive of the product itself and thus having no such dialectical relationship to the product, the product's configuration cannot be said to be 'suggestive' or 'descriptive' of the product, or 'arbitrary' or 'fanciful' in relation to it." *Id.* at 1440-41. *See also* Fun-Damental Too, Ltd. v. Gemmy Indus. Corp., 111 F.3d 993 (2d Cir. 1997) (recognizing that the *Abercrombie* classification applies to product packaging, but not to product configuration); Jay Dratler, Jr., *Trademark Protection for Industrial Design*, 1988 U. ILL. L. REV. 887, 903 (stating "[u]nlike verbal marks, industrial designs do not describe anything; they 'just are'").

Other courts question whether product configuration can ever be inherently distinctive. *Seabrook Foods, Inc. v. Bar-Well Foods Ltd.*, 568 F.2d 1342 (C.C.P.A. 1977) was an early case that set forth a stringent alternative test for inherent distinctiveness. The *Seabrook* court inquired whether the configuration: (1) was a common and basic, or whether it was unique or unusual in a particular trade; (2) was a mere refinement of a commonly-adopted and well-known form of ornamentation for a particular class of goods "viewed by the public as a trade dress or ornamentation for such goods;" or (3) was capable of creating a commercial impression separate from the accompanying words. *Id.* at 1344.

More recently, both *Knitwaves* and *Duraco* have applied a more rigorous standard for determining inherent distinctiveness of product configuration. In *Knitwaves, Inc. v. Lollytogs Ltd. (Inc.)*, 71 F.3d 996 (2d Cir. 1995), the court required that the product design serve primarily to indicate the product's source. *See id.* at 1008-09. In *Duraco*, the court required the product design to be: "(i) unusual and memorable; (ii) conceptually separable from the product; *and* (iii) likely to serve primarily as a designator of origin of the product." *Duraco*, 40 F.3d at 1449 (emphasis added).

Compare the above case law with the RESTATEMENT (THIRD) OF UNFAIR COMPETITION:

> As a practical matter, . . . it is less common for consumers to recognize the design of a product or product feature [as opposed to packaging features] as an indication of source. Product designs are more likely to be seen merely as utilitarian or ornamental aspects of the goods. In addition, the competitive interest in copying product designs is more substantial than in the case of packaging, containers, labels, and related subject matter. Product designs are therefore not ordinarily considered inherently distinctive and are thus normally protected only upon proof of secondary meaning.

RESTATEMENT (THIRD) OF UNFAIR COMPETITION, *supra* note 117, § 16, cmt. b.

[121] RESTATEMENT (THIRD) OF UNFAIR COMPETITION, *supra* note 117, § 16, cmt b. (citing MCCARTHY, *supra* note 12, § 8:13) (citation omitted); *see also* E. Lynn Perry, *The Supreme Court Gives* Two Pesos' *Worth – Trade Dress and the Franchise Trademark Portfolio*, 12 FALL FRANCHISE L.J. 35, 38 (1992) (writing that inherent distinctiveness is found where "(a) the design, shape, or combination of features is unusual . . . ; (b) it is unique in the particular field; (c) it is not merely ornamentation or merely a refinement of a common form of ornamentation; or (d) it can create a commercial impression distinct from accompanying words") (footnote omitted).

Acknowledgment of the importance of protection for an inherently distinctive trade dress is consistent with the two competing public policy concerns: (1) protection of consumers and innovation in the marketplace and (2) recognition of the trade dress owner's "legitimate proprietary interest in its unique and valuable informational device, regardless of whether

If the trade dress of a product is not inherently distinctive, then distinctiveness may be acquired with secondary meaning.[122] Secondary meaning is buyer association, or when consumers identify a product with a particular producer because of its distinct trade dress.[123] To establish secondary meaning, producers must show that the consuming public identifies the trade dress with the specific producer, and not the product.[124] The Second Circuit, in *Centaur Communications, Ltd. v. A/S/M Communications, Inc.*,[125] set forth the following types of evidence as establishing secondary meaning: advertising expenditures; consumer studies linking the trade dress to a source; unsolicited media coverage of the product; sales success; attempts to plagiarize the trade dress; and length and exclusivity of the use of trade dress.[126] The above evidence may provide some kind consumer perception of a trade dress in the market, but secondary meaning is very expensive and difficult to establish.[127]

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substantial consumer recognition yet bestows the additional empirical protection of secondary meaning." Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 770-71 (1992) (quoting Taco Cabana Int'l, Inc. v. Two Pesos, Inc., 932 F.2d 1113, 1120 n.7 (5th Cir. 1991)).

[122] *See Two Pesos*, 505 U.S. at 770-71.

[123] *See id.* at 766 n.4. Secondary meaning is acquired when the trade dress "'has come through use to be uniquely associated with a specific source.'" *Id.* (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 13 cmt. e (Tent. Draft No. 2, Mar. 23, 1990)); *See also* Coach Leatherware Co. v. AnnTaylor, Inc., 933 F.2d 162, 168 (2d Cir. 1991) (defining secondary meaning as consumer association with a product feature and a particular source) (citations omitted); Inwood Labs., Inc. v. Ives Labs., Inc., 456 U.S. 844, 851 n.11 (1982) (providing that secondary meaning consumer association between a feature and the "source of the product rather than the product itself"); Isidro, *supra* note 19, at 824 (stating that secondary meaning is "acquired over time after consumers begin to identify a product with its producer due to its design or packaging").

[124] *See* Dufek, *supra* note 28, at 1324. Identification of the producer is defined loosely. Dufek clarifies that:

> This is not to say that in order to achieve distinctiveness the mark or dress of a product must, upon visual inspection by a consumer, direct him or her to the specific identity of the commercial source. Rather, it is enough that the consuming public associates the dress of a product as emanating from a "single-although anonymous-source." As such, the focus of any acquired distinctiveness determination must concentrate on the consuming public.

Id. (citing Centaur Communications, Ltd. v. A/S/M Communications, Inc., 830 F.2d 1217, 1221 (2d Cir. 1987)).

[125] 830 F.2d 1217 (2d Cir. 1987).

[126] *See id.* at 1222. *Cf.* Perry, *supra* note 121, at 38-39 (listing as factors "significant sales," "consumer testimonials," "long-term relatively exclusive use of the trademark in the industry," "survey evidence of consumer association," "substantial numbers of customers," "proof of an infringer's copying," and extensive or substantial advertising).

[127] *See* Isidro, *supra* note 19, at 824 (citations omitted).

3. Likelihood of confusion

The trade dress section of the Lanham Act specifically forbids misleading or false representation of any goods or services that is likely to cause confusion.[128] Trade dress law protects a product's reputation.[129] Because consumers often distinguish and purchase products by brand names (trademarks) or packaging (trade dress),[130] it is important to ensure non-deceptive conduct in the market so consumers are not misled.[131] Basically, determining likelihood of confusion is "not whether the [competing] products can be differentiated when subjected to a side-by-side comparison, but rather whether they create the same general overall impression."[132]

Courts consider many factors when deciding whether a likelihood of consumer confusion exists. Although there is no definitive test to make such

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[128] *See* Lanham Act section 43(a)(1). 15 U.S.C. § 1125(a)(1), provides in pertinent part:

> Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of face, or false or misleading representation of fact, which -
>
> (A) *is likely to cause confusion*, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
>
> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities
>
> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

Id. (emphasis added).

[129] *See* Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 164 (1995) (stating that trade dress protection "seeks to promote competition by protecting a firm's reputation").

[130] Notice that consumers rely on the product packaging, and not the product configuration, to distinguish manufacturers. Manufacturers, especially those of daily consumer goods, rarely use product design to distinguish their product from competitors' products. Unless the configuration is distinctive and specific to a particular manufacturer, consumers will look at the package, which most likely includes the trademark, and identify that product to be produced by a particular company.

[131] *See* Wong, *supra* note 96, at 1126. Wong writes that trademark law permits meaningful consumer participation in the market. This participation "enables consumers to purchase what they believe they are purchasing" and also "promotes clarity of the consumer's voice in the marketplace." *Id.* (citations omitted); *see also* R.G. Smith v. Chanel, Inc., 402 F.2d 562, 566 (9th Cir. 1968) (stating that meaningful competition in quality could not exist without some method of product identification and informed consumer choice).

[132] Dufek, *supra* note 28, at 1326 (quoting RJR Foods, Inc. v. White Rock Corp., 603 F.2d 1058, 1060 (2d Cir. 1979)).

a determination,[133] the Second Circuit, in the notable case, *Polaroid Corp. v. Polarad Electronics Corp.*,[134] set forth some determining factors which have gained universal acceptance: "strength of the prior owner's mark or dress;" "degree of similarity between the national product's trade dress and the trade dress of the knockoff product;" "proximity of the products" in the market; "likelihood that the prior owner will bridge the gap;" "actual confusion;"[135] bad faith of knockoff company; "quality of defendant's product;" and "sophistication of the buyer."[136] In essence, if two products appear similar, then the distinction between the two sources blurs, and likelihood of confusion increases, thereby trade dress protection will be denied for the product.[137]

III. THE REVOLUTION OF TRADE DRESS LAW

With the understanding of the development of trade dress law, this section of this comment explores its doctrinal revolution. This section briefly presents the case that revolutionized trade dress protection. In 1992, the United States Supreme Court in *Two Pesos, Inc. v. Taco Cabana, Inc.*,[138] a case involving product configuration, expanded trade dress protection by eliminating the requirement of secondary meaning after a finding of inherent distinctiveness.

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[133] *See* Isidro, *supra* note 19, at 825 (citing Willajean F. McLean, *The Birth, Death, and Renaissance of the Doctrine of Secondary Meaning in the Making*, 42 AM. U. L. REV. 737, 752-53 (1993)).

[134] 287 F.2d 492 (2d Cir. 1961).

[135] Evidence of actual confusion is not required, but this would certainly help prove the likelihood of confusion argument. Likelihood of confusion must be shown to obtain an injunctive relief, but actual confusion must be shown to obtain an award of money damages. *See* Conopco, Inc. v. May Dep't Stores Co., 46 F.3d 1556, 1563 (Fed. Cir. 1994) (citing Woodsmith Publ'g Co. v. Meredith Corp., 904 F.2d 1244, 1247 n.5 (8th Cir. 1990)).

[136] *Polaroid Corp.*, 287 F.2d at 495.

[137] *See* Dufek, *supra* note 28, at 1327 (citing L. & J.G. Stickley, Inc. v. Canal Dover Furniture Co., 892 F. Supp. 413, 420 (N.D.N.Y. 1995)). *Cf.* Health O Meter, Inc. v. Terraillon Corp., 873 F. Supp. 1160, 1174-75 (1995) (setting forth seven factors to determine likelihood of confusion: "(a) the similarity of the trade dress, (b) the similarity of the products to which those trade dresses are attached, (c) the area and manner of concurrent consumer use, (d) the degree of care likely to be exercised by consumers in making their purchasing decision, (e) the strength of plaintiff's trade dress, (f) actual confusion among consumers, and (g) the intent of the alleged infringer 'to palm off his product as that of another'") (quoting Smith Fiberglass Prods., Inc. v. Ameron, Inc., 7 F.3d 1327, 1329 (7th Cir. 1993)).

[138] 505 U.S. 763 (1992). Justice White delivered the opinion for the Court. Chief Justice Rehnquist, Justice Blackmun, Justice O'Connor, Justice Scalia, Justice Kennedy, and Justice Souter joined in the opinion. Justice Scalia filed a concurring statement, and Justice Stevens and Justice Thomas filed concurring judgments. *See id.* at 763.

Taco Cabana is a Mexican fast food restaurant chain in Texas.[139] The first Taco Cabana restaurant opened in San Antonio in September 1978, and by 1985, there were a total of six Taco Cabana restaurants in San Antonio.[140] The restaurant has a very distinct look, and Taco Cabana described its restaurant trade dress as:

> a festive eating atmosphere having interior dining and patio areas decorated with artifacts, bright colors, paintings and murals. The patio includes interior and exterior areas with the interior patio capable of being sealed off from the outside patio by overhead garage doors. The stepped exterior for the building is a festive and vivid color scheme using top border paint and neon stripes. Bright awnings and umbrellas continue the theme.[141]

In December 1985, Two Pesos opened a restaurant in Houston.[142] The trade dress for Two Pesos was very similar to that of Taco Cabana.[143] Two Pesos expanded rapidly in Houston, and other Texas cities, except for San Antonio.[144] In 1986, Taco Cabana entered the Houston, Austin, Dallas, and El Paso markets, where Two Pesos was already doing business.[145] Taco Cabana noticed the similarity in the restaurants and sued Two Pesos for trade dress infringement pursuant to section 43(a) of the Lanham Act, 15 U.S.C. section 1125(a).[146]

In the United States District Court for the Southern District of Texas, the jury answered the instructions as follows:

> (1) Taco Cabana has a trade dress; (2) taken as a whole, the trade dress is nonfunctional; (3) *the trade dress is inherently distinctive*; (4) *the trade dress has not acquired a secondary meaning in the Texas market*; and (5) the alleged infringement creates a likelihood of confusion on the part of ordinary customers as to the source or association of the restaurant's goods or services.[147]

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[139] *See Two Pesos*, 505 U.S. at 765.

[140] *See id.*

[141] *Id.* (quoting Taco Cabana Int'l, Inc. v. Two Pesos, Inc., 932 F.2d 1113, 1117 (5th Cir. 1991)).

[142] *See id.* at 765.

[143] *See id.*

[144] *See id.*

[145] *See id.*

[146] *See id.* at 765-66. Taco Cabana also sued Two Pesos for theft of trade secrets under Texas common law. *See id.*

[147] Taco Cabana Int'l, Inc. v. Two Pesos, Inc., 932 F.2d 1113, 1117 (5th Cir. 1991) (emphasis added). The district court provided to the jury that:

> "[T]rade dress" is the total image of the business. Taco Cabana's trade dress may include the shape and general appearance of the exterior of the restaurant, the identifying sign, the interior kitchen floor plan, the décor, the menu, the equipment used to serve food, the servers' uniforms and other features reflecting on the total image of the restaurant.

Id. at 1118. The district court case also provided definitions of trade dress by quoting *Blue Bell*

Consequently, judgment was entered awarding damages to Taco Cabana, and in 1992, the United States Supreme Court unanimously affirmed this decision.[148]

Before *Two Pesos*, infringement of trade dress was difficult to prove because a showing of secondary meaning was necessary to receive protection.[149] The federal circuits were split on whether to require a showing of secondary meaning to obtain protection for trade dress.[150] The Supreme Court reasoned that secondary meaning is not required when a trade dress is inherently distinctive because "it is capable of identifying products or services as coming from a specific source[.]"[151] The concept of secondary meaning is not mentioned in section 43(a) of the Lanham Act, and therefore, there is no basis for requiring such a factor.[152] In addition, making source identification more difficult, with a secondary meaning requirement, would hinder improving or maintaining the producer's competitive position.[153] On the

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Bio-Medical v. Cin-Bad, Inc., 864 F.2d 1253, 1256 (5th Cir. 1989) (stating trade dress "is essentially its total image and overall appearance) and *John H. Harland Co. v. Clarke Checks, Inc.*, 711 F.2d 966, 980 (11th Cir. 1983) (holding trade dress is "the total image of a product and may include features such as size, shape, color or color combinations, texture, graphics, or even particular sales techniques").

[148] *See Two Pesos*, 505 U.S. at 765-67.

[149] *See* Helen Jorda, *Law of Trade Dress Comes of Age:* Two Pesos, Inc. v. Taco Cabana, Inc., 26 BEVERLY HILLS B. ASS'N J. 119, 120 (1992) (noting that "[u]ntil *Two Pesos*, many courts required a plaintiff to show both inherent distinctiveness and secondary meaning in order to protect trade dress[,] [s]econdary meaning, by far the more difficult prong to establish"). Essentially, the public had to associate the particular trade dress with a particular source or manufacturer. Compare this with secondary meaning in trademark law, where the public had to associate the mark with a particular product. Secondary meaning was determined by length of use, sales success, substantial advertising expenditure, focus of design features in advertising, intent of competitors, and surveys. *See supra* notes 122-28 and accompanying text.

[150] *See Two Pesos*, 505 U.S. at 769-79.

[151] *Id.* at 773. The court stated that the "'proposition that secondary meaning must be shown even if the trade dress is a distinctive, identifying mark, [is] wrong . . . .'" *Id.* (quoting Blau Plumbing, Inc. v. S.O.S. Fix-It, Inc., 781 F.2d 604, 608 (7th Cir. 1986)). The Ninth Circuit Court of Appeals also stated that proof of secondary meaning is "superfluous if a trade dress is inherently distinctive." Fuddruckers, Inc. v. Doc's B.R. Others, Inc., 826 F.2d 837, 843 (9th Cir. 1987).

[152] *See Two Pesos*, 505 U.S. at 774. The Court observed that:

> It would be a different matter if there were textual basis in § 43(a) for treating inherently distinctive verbal or symbolic trademarks differently from inherently distinctive trade dress. But there is none. The section does not mention trademarks or trade dress, whether they be called generic, descriptive, suggestive, arbitrary, fanciful, or functional.

Id. The Court mentioned that secondary meaning appears under 15 U.S.C. section 1052, yet this requirement applies to only descriptive marks and not to inherently distinctive marks. *See id.*

[153] *See id.* Improving and maintaining competition was the foundation for the Lanham Act. Congress concluded that national protection of trademarks is desirable "'because trademarks

contrary, such a requirement may produce anti-competitive effects. This is because protection of inherently distinctive trade dress from its inception will be critical for the success of new and small companies entering into the market.[154]

The *Two Pesos* case clearly finds that trade dress warrants strong protection under the Lanham Act "from the outset of its creation, without proof of secondary meaning, if that trade dress is inherently distinctive."[155] Many uniquely identifiable products exist in the marketplace, and removing the secondary meaning requirement expands trade dress law protection by extending protection to those creative and unknown producers.

IV. TRADE DRESS LAW AS APPLIED TO THE FASHION DESIGN INDUSTRY

A. Inconsistency of Law

With the background knowledge in trademark law and trade dress law, this section examines the application of trade dress law to the fashion design industry. Extensive research of trade dress infringement cases revealed only a small number of cases within this industry. Not surprisingly, most of the cases are from the fashion capital of the United States – New York.[156] Additionally, two interesting cases hail from Illinois and one case from Kansas. These cases reveal that although the Supreme Court clearly set forth the requirements for trade dress protection in *Two Pesos*, the courts nevertheless struggled in the application of trade dress law specifically to the fashion design industry.

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foster competition and the maintenance of quality by securing to the producer the benefits of good reputation.'" *Id.* (quoting Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 198 (1985) (citing S. REP. NO. 1333, at 3-5 (1946)).

[154] *See id.* at 775. The Court explains this anti-competitive possibility:

> would present special difficulties for a business, such as [Taco Cabana], that seeks to start a new product in a limited area and then expand into new markets. Denying protection for inherently distinctive nonfunctional trade dress until after secondary meaning has been established would allow a competitor, which has not adopted a distinctive trade dress of its own, to appropriate the originator's dress in other markets and to deter the originator from expanding into and competing in these areas.

Id.

[155] Chapman, *supra* note 22, at 11.

[156] "When it comes to the fashion and creative businesses, New York is the center of the universe." *About FIT* (visited Mar. 11, 2000) <http://www.fitnyc.suny.edu/about/1.0.html>.

1. New York

Most relevant New York cases emanate from the District Court for the Southern District of New York, with a few cases ultimately brought on appeal to the Federal and Second Circuit Court of Appeals. Despite sharing similar origins, these cases reveal a disturbing inconsistency in the analysis for the granting of trade dress protection.

Of the trade dress cases originating in New York, only two examined all three requirements of trade dress protection: (1) non-functionality; (2) distinctiveness; and (3) likelihood of confusion.[157] In *L.A. Gear, Inc. v. Thom McAn Shoe Co.*,[158] the Federal Circuit Court analyzed the trade dress of athletic shoes – one from the famous brand designer of athletic shoes, L.A. Gear, and the other from a private label designer of various shoe styles, Thom McAn.[159] The court found non-functionality and distinctiveness through secondary meaning.[160] In addressing whether there was likelihood of confusion, the court considered the different places of sale and placement of prominent trademarks.[161] After comparing the two shoes side by side, the court acknowledged that consumers are sophisticated enough to differentiate the two shoes.[162] The court, thus, denied trade dress protection to L.A. Gear.[163]

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[157] *See supra* section II.C (explaining in detail the three requirements of trade dress protection).

[158] 988 F.2d 1117 (Fed. Cir. 1993).

[159] Both shoes were high-top sneakers with a colored triangular shape in the center side panels of the shoe, with eight shoelace holes. *See id.* at 1121-23.

[160] *See id.* at 1130-34. The court applied "Second Circuit law as [it perceived] it in this evolving area . . . ." *Id.* at 1129. The court stated that:

> If products having the same utility can not [sic] be made without duplicating the design, the product design is deemed essential to the function and is not protectable as a matter of trade dress. . . . A design feature of a particular article is essential only if the feature is dictated by the functions to be performed; a feature that merely accommodates a useful function is not enough.

Id. at 1129-30 (internal citations and brackets omitted).

[161] *See id.* at 1132-34. Both athletic shoes were labeled with readable and prominently positioned trademarks. The court found "consumer confusion unlikely given the overall differences in appearance and the highly visible individual names of each of the brands of shoes." *Id.* at 1134 (quoting Reebok Int'l Ltd. v. Alon, 5 U.S.P.Q.2d (BNA) 1830, 1831 (C.D. Cal. 1987)).

The court also deemed it relevant that the shoes "move in different retail channels." *Id.* at 1134. Thom McAn's shoes were only sold in its private labeled stores at a relatively lower price. *See id.*

[162] *See id.* at 1134 (stating the "[p]urchasers in discount stores are sufficiently sophisticated, we believe, to know whether they are buying the cheaper copies or the expensive originals").

[163] *See id.*

In *Henri Bendel, Inc. v. Sears, Roebuck and Co.*,[164] the Southern District of New York compared private label cosmetic bags from the upscale department store, Henri Bendel, with those from the department store Sears.[165] The court looked at the three major elements of the Bendel Bag: (1) plastic coated fabric; (2) striped fabric design; and (3) gold zipper.[166] The court found that the gold zipper and plastic coated fabric were functional, and therefore not protectable under trade dress laws.[167] Further, because of the limited number of designs available for cosmetic bags, the stripes could possibly also be considered functional.[168] Bendel argued that the image of Bendel Bags, and all other Bendel's private label items, rely on the signature brown and white stripes.[169] The court, however, commented that even if the Bendel stripes were protectable, "no reasonable jury could conclude that the brown and white striped trade dress was infringed by [Sears'] green and white striped bags."[170]

The remaining New York trade dress cases considered only two of the three required elements for trade dress protection: (1) inherent distinctiveness and (2) likelihood of confusion, and failed to address the important element of functionality.[171] Certainly, it is easy to dismiss the factor of functionality if

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[164] 25 F. Supp. 2d 198 (S.D.N.Y. 1998).

[165] Henri Bendel cosmetic bags, first introduced in 1936, are noticeable because of their sophisticated look of brown and white stripes with a gold zipper. *See id.* at 200.

[166] *See id.* at 202. Bendel alleged that its trade dress comprised of the following features:

> (1) natural and brown vertical signature stripes on fabric, which stripes are also used by Henri Bendel on items other than the Bags, such as, Henri Bendel's signature fragrance, shopping bags, hat boxes, and accessory items such as, umbrellas and wallets; (2) easy-to-clean clear, plastic coating; (3) shiny, gold zipper pulls; and (4) the HENRI BENDEL registered trademark and service mark . . . [that] appears on the zipper pulls.

Id. at 201.

[167] *See id.* at 202.

[168] *See id.* "The record demonstrates that no less than twelve retailers and/or manufacturers of cosmetic bags sell bags containing some or all of these extremely common features. A reasonable jury could only conclude, therefore, that these features are functional." *Id.*; *see also* Landscape Forms, Inc. v. Columbia Cascade Co., 113 F.3d 373, 378 n.3 (2d Cir. 1997) (stating that to evaluate a common design, "objective consideration or the product and its similarity to others on the market will always be relevant and often decisive"). The manufacturers of striped cosmetic bags that resembled the Bendel Bags included the following: Trina; Christian Dior; Designs on Travel; Lancome; Victoria's Secret; La Costa Spa; Graham Webb International; Saks Fifth Avenue; Samsonite; Fendi; and Giorgio of Beverly Hills. *See Henri Bendel*, 25 F. Supp. 2d at 200.

[169] *See Henri Bendel*, 25 F. Supp. 2d at 202. Bendel's signature brown and white stripes adorn its hat boxes, wallets, umbrellas, perfumes, and lipsticks. The stripes even decorate the store's shopping bags, gift boxes, tissue paper, and store awning. *See id.*

[170] *Id.* at 202-03.

[171] *See* Judith Ripka Designs, Ltd. v. Preville, 935 F. Supp. 237 (S.D.N.Y. 1996); Knitwaves, Inc. v. Lollytogs Ltd. (Inc.), 71 F.3d 996 (2d Cir. 1995); Mulberry Thai Silks, Inc. v. K & K Neckwear, 897 F. Supp. 789 (S.D.N.Y. 1995).

the answer seems obvious, nevertheless, functionality may be the determining factor in whether to continue analysis of the other two factors. *Banff Ltd. v. Express, Inc.*[172] illustrates this procedure of elimination. Banff is a knitwear manufacturer[173] and alleged that the trendy Express stores were selling knockoffs of Banff's fisherman sweater.[174] Initially, the Southern District of New York found that Express infringed the sweater's trade dress, but then Express moved for judgment as a matter of law.[175] The court stressed the importance of source identification and determined that Banff did not design the sweater "primarily to identify the source of its product," but more for aesthetic reasons.[176] Recall that a design feature that is visually pleasing, but does not identify the source, is aesthetically functional.[177] Therefore, in this case, non-functionality could not be established, so the court ended the trade dress infringement analysis, and determined that Banff's trade dress infringement claim could not stand.[178]

As mentioned, the remaining New York cases, *Knitwaves, Inc. v. Lollytogs Ltd. (Inc.)*,[179] *Mulberry Thai Silks, Inc. v. K & K Neckwear, Inc.*,[180] and *Judith Ripka Designs, Ltd. v. Preville*,[181] required only the elements of inherent distinctiveness and likelihood of confusion, and, ultimately, also did not

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[172] 921 F. Supp. 1065 (S.D.N.Y. 1995).

[173] Banff advertises in both Bergdorf Goodman's and Bloomingdale's catalogues, and features its sweaters in women's fashion magazines such as *Glamour*. *See id.* at 1067.

[174] *See id.* at 1066. Banff's sweater conformed to the Aran style of knitting, and featured a variety of cabled patterns, traditional stitching and hand-crocheted roses. *See id.* at 1067. An Aran sweater usually consists of a center panel with the two side panels bordered with "cable, signifying the ropes or lifelines on which a fisherman's life might depend." *Id.* at 1067 n.2.

[175] *See id.* at 1066.

[176] *Id.* at 1071. The court noted that the "proper inquiry was, 'whether the designs were likely to serve primarily as a designator of origin of the product.'" *Id.* at 1070 (quoting Knitwaves, Inc. v. Lollytogs Ltd. (Inc.), 71 F.3d 996, 1008 (2d Cir. 1995) (internal brackets omitted)).

[177] *See supra* notes 110-16 and accompanying text.

[178] *See Banff*, 921 F. Supp. at 1071. The court looked to the factually similar *Knitwaves* for guidance:

> Knitwaves makes it clear that, in order to prevail on a claim for trade dress infringement, a plaintiff must do more than demonstrate that the appearance of its product serves some source identifying function. It must demonstrate that the primary purpose behind the design was to identify its product's source. In the case at hand, there is absolutely no evidence that Banff chose its design primarily to identify the source of its product. In fact, it is clear that Banff, like the plaintiff in Knitwaves, chose its design primarily for aesthetic reasons. As a result, the jury's verdict as to Banff's trade dress claim cannot stand.

Id. (citing *Knitwaves*, 71 F.3d at 1008).

[179] 71 F.3d 996 (2d Cir. 1995).

[180] 897 F. Supp. 789 (S.D.N.Y. 1995).

[181] 935 F. Supp. 237 (S.D.N.Y. 1996).

provide trade dress protection. Knitwaves is a children's knitwear company in New York and New Jersey. The clothing items at issue were the "Leaf Sweater" and "Squirrel Cardigan," which were intended for release in the fall of 1990.[182] Knitwaves alleged trade dress infringement of these two knitted items. Lollytogs' leaf sweater, like Knitwaves, had multi-toned stripes, however, Lollytogs used three, not eight, large leaves on the front.[183] Lollytogs' squirrel cardigan divided the front of the cardigan, similar to Knitwaves, but each quarter panel possessed a different design element than Knitwaves' cardigan.[184]

The court in *Knitwaves, Inc. v. Lollytogs Ltd. (Inc.)*,[185] looked at the fall motif design elements in both of Knitwaves' sweater designs. This case is interesting because the trial court, the Southern District of New York, found a protectable trade dress in Knitwaves' design elements; however, on appeal, the Second Circuit Court of Appeals reversed the decision because it determined that such ornamental elements were indeed functional, and thereby not protectable.[186]

In *Mulberry Thai Silks, Inc. v. K & K Neckwear, Inc.*,[187] at issue was the "Ziggurat tie collection" for the spring of 1994.[188] Around March 1994, a buyer for the discount retailer, NBO, suggested to K & K that it should

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[182] *See Knitwaves*, 71 F.3d at 999-1000. The front of the Leaf Sweater had eight leaf motifs placed on a multi-toned striped sweater. The front of the Squirrel Cardigan is divided into quarters, and each quarter possesses a fall motif design element – the top left, a squirrel standing on two legs; the top right, jacquard pattern of mushrooms; the bottom right, two leaves; and the bottom left, jacquard pattern of acorns. *See id.* at 1014-16.

[183] *See id.* at 1016-17.

[184] *See id.* at 1017. The top left, one leaf; the bottom right, a squirrel on four legs; and the remaining two quarters had the jacquard pattern of tiny leaves. *See id.*

[185] 71 F.3d 996 (S.D.N.Y. 1995).

[186] *See id.* at 1006-09. If an ornamental feature is claimed to be protected, this would "hinder competition by limiting the range of adequate alternative designs, the aesthetic functionality doctrine denies such protection." Wallace Int'l Silversmiths, Inc. v. Godinger Silver Art Co., 916 F.2d 76, 81 (2d Cir. 1990). RESTATEMENT (THIRD) OF UNFAIR COMPETITION states that a "design is functional because of its aesthetic value only if it confers a significant benefit that cannot practically be duplicated by the use of alternative designs." RESTATEMENT (THIRD) OF UNFAIR COMPETITION, *supra* note 117, § 17 cmt. c.

Defendant, Lollytogs, argued Knitwaves' sweater designs are functional and their primary purpose is aesthetic, or enhances the sweater's ornamental appeal, rather than to identify the sweater as produced by Knitwaves. The court stated that "[b]y precluding Lollytogs from making sweaters with the basic 'fall motifs' of squirrels and leaves, . . . Knitwaves would significantly restrict the number of designs available for apparel manufacturers" to compete in the children's fall clothing line. *See Knitwaves*, 71 F.3d at 1006.

[187] 897 F. Supp. 789 (S.D.N.Y. 1995).

[188] *See id.* at 790. Mulberry Thai Silks has in-house designers, and markets its neckties to such department stores as Macy's, Bloomingdales's, and Abraham & Strauss. *See id.* at 791.

produce a necktie collection similar to the Ziggurat.[189] In August 1994, Mulberry learned of the imitated tie collection, and commenced court action two months later.[190] The Southern District of New York examined Mulberry's fabric designs for its Ziggurat collection and denied its protection.[191] In doing so, the court candidly dismissed the fabric designs as being "little more than bits of fabric cut and sewn into a particular form . . . [and they] have no meaningful information content. They are not inherently distinctive."[192]

In *Judith Ripka Designs, Ltd. v. Preville*,[193] Ripka alleged trade dress infringement by Preville and many other jewelry designers and retailers.[194] Judith Ripka began designing and selling jewelry from her home in 1970. Since the early 1980's, Judith Ripka's unique accessories were sold at various boutiques and upscale stores, including Henri Bendel and Neiman-Marcus.[195] Her jewelry incorporated eighteen-karat matte gold with ancient inspired designs.

The Southern District of New York looked at all the various design elements of Ripka's jewelry collection.[196] The court found that eighteen-karat gold matte jewelry with ancient inspired motifs is common in the market, and

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[189] *See id.* at 791.

[190] *See id.* (noting that "Mulberry learned that ties made of fabrics apparently copied from Mulberry's designs were on sale at Abraham & Strauss and NBO").

[191] *See id.* at 792-94.

[192] *Id.* at 794. The court noted that:

> Neckties are little more than bits of fabric cut and sewn into a particular form. One is visually distinct from another almost entirely by virtue of differences in color and pattern, and this is as true of neckties made by a single manufacturer as of those made by different manufacturers. A manufacturer perhaps might incorporate sufficiently uncommon and striking design features in its otherwise different neckties as to make those common features inherently serve a trademark function, i.e., identify the different neckties as coming from a single source. Indeed, it is unnecessary here to articulate precisely the standard that would govern a close case.

Id.

[193] 935 F. Supp. 237 (S.D.N.Y. 1996).

[194] The defendants in this action were: Penny Preville; Lisa Horowitz; Norman Landsberg; Sheri Miller; HWR Jewelers; Jeffrey Robert, Ltd.; Jeffrey Stevens; Two Carols; 14 KT; The House of Clasps, Inc.; Michael Eigen; Laviano Jewelers; Julius Oxenhorn Jewelers; Robert Fabrikant, Inc.; Shine Jewelry; On Broadway; Golden Touch; Nancy and David; J.R. Gold Designs, Ltd; Rose Jewelers; Lux Bond & Green; and Gold N' Gems. *See id.*

[195] *See id.* at 240-41.

[196] *See id.* at 258. The defendants presented several examples of other designers' jewelry that used similar elements as Judith Ripka's jewelry. These included "ancient inspired design elements such as beading, fluting, rope twists, toggle bar and ring closures, 18-karat gold matte finish green gold, gold bracelets that screw into pearls with mystery clasps, gold and leather combinations, padlock shaped links, art deco design, clip-on pendants, bezel-set or bead-set gemstones and diamonds." *Id.* at 257.

that consumers did not associate such jewelry with the Judith Ripka name.[197] The court incorrectly examined only time-of-sale confusion, failing to address post-sale confusion.[198] Post-sale confusion is important for more sophisticated products because misidentification of products may tarnish the producer's reputation.[199] Logically, there will hardly be any sort of confusion at the time of sale because designer jewelry will be sold at exclusive stores with a higher price and the name of the designer labeling the jewelry box.

2. *Illinois*

While New York is the fashion capital of the United States, two cases that are helpful in examining trade dress protection, in the context of fashion design, originated in the Northern District of Illinois. Disturbingly, these cases required different elements from each other. *Fashion Victim, Ltd. v. Sunrise Turquoise, Inc.*,[200] properly required all three required elements for trade dress protection.[201] Fashion Victim claimed that it was the first to produce T-shirts with a "fanciful design depicting skeletons engaged in sexual activities."[202] Each T-shirt, called "Skeleton Woopee," illustrated a particular sexual position.[203] The court looked at Fashion Victim's "use of the theme of skeletons in sexual positions,"[204] and determined that such a theme could not satisfy the elements for trade dress protection without unfairly "granting a

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[197] *See id.* at 257-58.

[198] *See id.* at 258. *Payless Shoesource, Inc. v. Reebok International Ltd.*, 998 F.2d 985 (Fed. Cir. 1993), cogently acknowledged the importance of post-sale confusion. The court recognized that consumer confusion in trademark and trade dress infringement cases may be based on both direct purchasers and observers of the purchased apparel. *See id.* at 989. *See also* Keds Corp. v. Renee Int'l Trading Corp., 888 F.2d 215, 222 (1st Cir. 1989) (recognizing that "point of sale [is] not the only issue"); U.S.A., Inc. v. Levi Strauss & Co., 799 F.2d 867, 872 (2d Cir. 1986) (stating that post-sale confusion is actionable under the Lanham Act); Polo Fashions, Inc. v. Craftex, Inc., 816 F.2d 145, 148 (4th Cir. 1987) (explaining that confusion in "after sale context" can also harm the plaintiff's reputation); Lois Sportswear, Levi Strauss & Co. v. Blue Bell, Inc., 632 F.2d 817, 822 (9th Cir. 1980) (acknowledging that mitigation at the time of sale confusion does not obviate the confusion by prospective consumers); United States v. Torkington, 812 F.2d 1347, 1352 (11th Cir. 1987) (setting forth a test to determine likelihood of confusion by questioning potential customers).

[199] For further discussion on dilution and tarnishment of a designer's reputation, *see infra* note 294.

[200] 785 F. Supp. 1302 (N.D. Ill. 1992).

[201] *See id.* at 1308.

[202] *Id.* at 1304-06.

[203] *See id.* at 1304. Fashion Victim alleged trade dress infringement against Sunrise for its T-shirt depictions of four skeletal activities, and also for the use of the word "Boners" on the shirts. *See id.* at 1305-06. The court stated that the skeletal depictions of Fashion Victim were "materially different" from those of Sunrise. *See id.* at 1305.

[204] *Id.* at 1308.

monopoly in the theme – the idea – itself."[205] The court amusingly implied that this illustrative idea was uncreative and such depictions are "of sufficiently common knowledge so as scarcely to require that the artist be a student of the Kama Sutra to come up with the idea."[206]

The second Illinois case, *Sara Lee Corp. v. American Leather Products, Inc.*,[207] required only the two elements of distinctiveness and likelihood of confusion. Sara Lee produces Coach handbags.[208] Coach alleged that sixteen of American Leather's handbags and briefcases were "strikingly similar" or equivalent in design to its own and claimed trade dress infringement.[209] The court thoroughly examined Coach's leather-goods collection[210] and found that Coach established sufficient evidence of both inherent and acquired distinctiveness.[211] Additionally, the court did a lengthy examination of consumer's likelihood of confusion – analyzing such factors as similarity of product, infringer's intent, actual confusion, and post-sale confusion.[212]

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[205] *Id.*

[206] *Id.* at 1306.

[207] No. 97 C 4158, 1998 WL 433764 (N.D. Ill. Jul. 29, 1998).

[208] Sara Lee Corporation took over Coach Leatherware Company sometime between 1991 and 1998. In 1991, Coach alleged unfair competition under state laws against AnnTaylor in *Coach Leatherware Co., Inc. v. AnnTaylor, Inc.*, 933 F.2d 162 (1991). The current case, also initiated by Coach leather goods, *Sara Lee Corp. v. American Leather Products, Inc.*, No. 97 C 4158, 1998 WL 433764 (N.D. Ill. Jul. 29, 1998), was decided in 1998.

[209] *See Sara Lee*, 1998 WL 433764, at *6. All Coach products are made of full-grain cowhide, contain exterior bindings on external seams, and use brass hardware components. *See Coach*, 933 F.2d at 165-66. The following list entails the names of the Coach products and the American Leather imitations: (1) Taft bag and American Leather Top Zip Shoulder Bag 53334; (2) Waverly and Donna; (3) Bleeker bag and "a" handbag; (4) Anderson Zip and "d" handbag; (5) Station Bag and Ilona; (6) Janice's Legacy and "f" handbag; (7) Pocket Purse and Deborah; (8) Casino and Denise; (9) Multi-Zip and "i" handbag; (10) Turnlock Case and Rebecca; (11) Classic bag and Sara bag; (12) Metropolitan Brief and "VIP" briefcase; (13) Colebrooke and "Executive" briefcase; (14) Prescott Brief and "Ambassador"; (15) Station Bag and "CEO" case; and (16) Patricia's Legacy and 1109. *See Sara Lee*, 1998 WL 433764, at *6.

[210] *See Sara Lee*, 1998 WL 433764, at *1. According to the court in *Sara Lee*:

> Among more than sixty handbags within the COACH Classic Collection are several products directly relevant to this lawsuit: the Pocket Purse, the Casino Bag, the City Bag, the Willis Bag, the Station Bag, the Classic Backpack, the Duffle Sac, Janice's Legacy, the Anderson Zip, the Multi-Zip, and the Taft Bag. Included among the twelve products in the COACH Business Collection are the Colebrooke Case, the Lexington Brief, the Metropolitan Brief, the Organizer Brief, the Kensington Brief, and the Beekman Brief.

Id. (internal parentheses omitted).

[211] *See id.* at *12-*15.

[212] *See id.* at *15-*17. "Post-sale confusion is clearly actionable under the Lanham Act." Dorr-Oliver, Inc. v. Fluid-Quip, Inc., 94 F.3d 376, 381 (7th Cir. 1996). Post-sale confusion occurs when subsequent purchasers may misidentify a product's source, although the actual purchaser possesses no actual confusion of the product's source. *See Sara Lee*, 1998 WL 433764, at *17. "The damage to the senior user . . . is that consumers could acquire the prestige

These two Illinois decisions reveal the confusion of the courts. *Fashion Victim*, although considering all three elements required for protection, denied trade dress protection. However, *Sara Lee*, which only considered two of the three requirements, afforded trade dress protection.

3. Kansas

The only case from Kansas, *Winning Ways, Inc. v. Holloway Sportswear, Inc.*,[213] looked at only two of the three required elements for trade dress protection. Winning Ways sells jackets under the trademark Gear for Sports.[214] The markets of Winning Ways and Holloway overlap in certain areas because they both focus in sport goods dealers, resort stores, and college bookstores.[215] In 1994, after seeing the success of the Victory and Clipper jackets, Holloway imitated the designs and immediately began selling similar jackets. [216]

The court analyzed the overall appearance of each jacket, and did not find Winning Ways' jackets distinctive from any other jacket on the market. [217] In addition, the court applied an interesting test for likelihood of confusion. The court required Winning Ways to show only that "potential customers are likely to be confused."[218] Although courts must recognize likelihood of confusion by potential customers, the *Winning Ways* court's analysis is too restrictive because it neglected to consider likelihood of confusion by the actual purchaser and the general public.

B. Stringent Standard Set in Wal-Mart Stores, Inc. v. Samara Brothers, Inc.

The examination of cases demonstrates the discrepancy in the application of trade dress law to the fashion designing industry. *Two Pesos* clearly put forth the elements required for trade dress protection, yet the courts were obviously struggling with its application to the fashion industry. Therefore, the high court set out to establish an even more defined and stringent standard

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value of the senior user's product by buying the copier's cheap imitation." MCCARTHY, *supra* note 12, § 23:7.

[213] 913 F. Supp. 1454 (D. Kan. 1996).

[214] *See id.* at 1460.

[215] *See id.* at 1461.

[216] *See id.* The Victory jacket was "a front zipped, hooded jacket with a nylon outer shell and an interior fleece lining . . . ." *Id.* at 1460. The Clipper jacket was "a front zipped jacket with a poly/cotton outer shell, front and rear caping, two way side pockets and a standup, double collar." *Id.*

[217] *See id.* at 1463-64, 1476.

[218] *Id.* at 1462.

for protection of trade dress specifically applicable to the fashion design industry.

At the turn of the millennium, the United States Supreme Court heard oral arguments in *Wal-Mart Stores, Inc. v. Samara Brothers, Inc.*[219] The Court noted that when *Samara Brothers* was first decided by the District Court for the Southern District of New York in 1998, because of "the different standards in the various courts of appeals, there [was] a need for some certainty . . . the law was very confusing at that time . . . ."[220] Samara Brothers is a designer and manufacturer of children's clothing, specializing in spring and summer seersucker outfits.[221] Samara's collection possessed such design elements as seersucker fabric, large collars, and full-cut one-piece bodies.[222] Wal-Mart contracted with Judy-Philippine, Inc. to manufacture children's outfits that imitated the popular Samara children's line.[223] Judy-Philippine's knockoffs were sold at several major retailers, including Wal-Mart, Kmart, Caldor, Hills, and Goody's.[224] After sending several cease-and-desist letters, Samara brought action for "infringement of unregistered trade dress under section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a)."[225]

The District Court for the Southern District of New York considered only distinctiveness and likelihood of confusion, and found in favor of Samara, awarding almost $1.5 million for damages, interest, costs, and fees, as well as injunctive relief.[226] The Second Circuit Court of Appeals looked at the

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[219] 120 S. Ct. 1339 (2000).

[220] United States Supreme Court Official Transcript 2000 WL 72053 at *7-8, Wal-Mart Stores, Inc. v. Samara Bros., Inc, 2000 WL 72053 (U.S. S. Ct. January 19, 2000) (No. 99-150). "[T]here is a need for some certainty so that juries can be properly instructed. And that is what we submit should be an outcome here, that this jury was instructed on *Abercrombie*. It was instructed on partial *Seabrook*. It was instructed on partial *Knitwaves*. It was a very confusing set of instructions because, we submit, the law was very confusing at that time." *Id.*

[221] *See Wal-Mart*, 120 S. Ct. at 1341.

[222] *See* Samara Bros., Inc. v. Wal-Mart Stores, Inc., 165 F.3d 120, 133 (2d Cir. 1998) (Newman, J., dissenting). Samara's designer, Kathy Gosda, testified to the presence of the following design elements in Samara's seersucker children's line: "(1) seersucker fabric; (2) large bold appliques; (3) large collars with the appliques generally integrated into the collar and the pockets, if any; (4) absence of printed images, black outlines, alphanumeric characters, or three-dimensional features; and (5) full-cut, one-piece conservative bodies." *Id.*

[223] *See Wal-Mart*, 120 S. Ct. at 1341. Wal-Mart sent Judy-Philippine photographs of several of Samara's garments, which Judy-Philippine "duly copied, with only minor modifications . . . ." *Id.*

[224] *See id.* at 1342.

[225] *Id.* Samara brought action against Wal-Mart, Judy-Philippine, Kmart, Caldor, Hills, and Goody's. Besides trade dress infringement, Samara sued for copyright infringement under federal law and consumer fraud and unfair competition under New York law. *See id.*

[226] *See Samara*, 165 F.3d at 123. The jury awarded Samara $912,856.77 for the copyright claims, $240,458.53 for the Lanham Act violation and $50 for the state law violations. The district court then awarded $275,000 for attorneys' fees and $33,196 for costs. *See id.*

"distinctive combination of ingredients" depicted in Samara's collection and affirmed the district court's holding in favor of trade dress protection for Samara.[227] The United States Supreme Court granted certiorari, and oral arguments were held on January 19, 2000. On March 22, in an opinion delivered by Justice Antonin Scalia, the Court unanimously decided that, in an action for trade dress infringement under section 43(a) of the Lanham Act, a product's design is distinctive, and thus protectable, only upon a showing of secondary meaning.[228]

In so holding, the Court disregarded the fact that product configuration, or "product design," can be inherently distinctive.[229] The Court explained that while trademarks may "invoke positive connotations in the consumer's mind" and product packaging "may attract an otherwise indifferent consumer's attention," their predominant function is source identification.[230] However, the Court stated that "[i]n the case of product design, as in the case of color . . . consumer predisposition to equate the feature with the source does not exist."[231] The Court assumed that "[c]onsumers are aware of the reality that, almost invariably, even the most unusual of product designs – such as a cocktail shaker shaped like a penguin – is intended not to identify the source, but to render the product itself more useful or more appealing."[232] This

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[227] *Id.* at 126. To find likelihood of confusion, the circuit court considered Wal-Mart's intentional design copying and identified an intent to deceive and confuse consumers. *See id.* at 127-28. The court looked to *George Basch Co. v. Blue Coral, Inc.*, 968 F.2d 1532 (2d Cir. 1992), for guidance on the proposition that there is an "essential distinction . . . between a deliberate attempt to deceive and a deliberate attempt to compete" and the plaintiff must show more than the defendant's intent to imitate the trade dress. *Samara*, 165 F.3d at 128 (citing *Basch*, 968 F.2d at 1536). The court then concluded that extent of the copying in addition to the intent to copy demonstrate the intent to deceive consumers. *See id.* "Close similarity of trade dress in a plethora of detail raises a serious question of copying and intent to confuse customers. In such a situation, all heads turn to the defendant to hear some explanation." *Id.* (quoting MCCARTHY, *supra* note 12, § 8:19).

The dissent, however, objected to the majority's analysis of distinctiveness, stating that Samara's product line consists of ordinary unprotectable design elements. *See id.* at 133 (Newman, J., dissenting). "This is not to say that product design or configuration can never achieve trade dress protection for a line. But until this case, we have permitted such protection only in very extreme circumstances. . . . On the facts of this case, it was not reasonable to find distinctiveness of Samara's entire product line." *Id.*

[228] *See Wal-Mart*, 120 S. Ct. at 1346.

[229] *Id.* at 1344. "It seems to us that design, like color, is not inherently distinctive." *Id.*

[230] *Id.* The Court states that consumers are predisposed to regard trademarks as an indication of the producer because such marks "almost automatically tell a customer that they refer to a brand and immediately signal a brand or a product source." *Id.* (quoting Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 162-63 (1995)) (internal quotations, ellipses, and citations omitted).

[231] *Id.*

[232] *Id.*

reasoning was misapplied in the context of fashion design. It is not appropriate to compare cocktail shaker designers, who are generally unknown manufacturers of various appliances, with fashion designers, whose success depends on source identification as a result of unique product design.

Justice Sandra Day O'Connor, in oral arguments, even declared that an inherently distinctive product design is "sort of like pornography: I know it when I see it . . . [but] how are we supposed to define that term?"[233] An inherently distinctive design, specifically fashion design, is not as blatant as pornography because one must be knowledgeable within the fashion world to recognize a distinctive style, or trade dress, among the many fashion designers' clothing lines. Further, the distinctive trade dress may vary each season with each fashion show, whereas the definition and exhibition of pornography is more constant.

As discussed in Part II of this comment, the essential goal of the Lanham Act is to promote fair competition,[234] thereby fostering creativity.[235] The two policy concerns of the Lanham Act are protection for the consumer and protection for the producer.[236] The Court, however, failed to confer such protection to the producer stating that "[c]onsumers should not be deprived of the benefits of competition . . . and given the unlikelihood of inherently source-identifying design, the game of allowing suit based upon alleged inherent distinctiveness seems to us not worth the candle."[237] The Court asserted that producers can obtain protection for designs that are "inherently

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[233] United States Supreme Court Official Transcript 2000 WL 72053 at *6, Wal-Mart Stores, Inc. v. Samara Bros., Inc., 2000 WL 72053 (U.S. S. Ct. January 19, 2000) (No. 99-150). Respondent, Samara, and the United States as amicus curiae argued for the adoption of the *Seabrook* test to determine inherent distinctiveness. In *Seabrook Foods, Inc. v. Bar-Well Foods, Ltd.*, 568 F.2d 1342 (C.C.P.A. 1977), the Court of Customs and Patent Appeals developed a test based on *Abercrombie* to determine whether a design is arbitrary or distinctive. Among other things, the court looked to "whether it was a common basic shape or design, whether it was unique or unusual in a particular field, [and] whether it was a mere refinement of a commonly-adopted and well-known form of ornamentation for a particular class of goods viewed by the public as a dress or ornamentation for the goods." *Id.* at 1344 (internal quotations omitted). Adoption of this test, with the appropriate evidence, may result in more decisions protecting fashion designers because the test inquires into the subjective view of a particular field, and not the general public's view of that particular field.

[234] "[E]xploiting the goodwill of the article – the attractive features, of whatever nature, that the product holds for consumers – is robust competition; only deceiving consumers, or exploiting the goodwill of another producer, is unfair competition." Duraco Prods. v. Joy Plastic Enter., Ltd., 40 F.3d 1431, 1445 (3d Cir. 1994) (internal quotations and citations omitted).

[235] *See* Isidro, *supra* note 19, at 816.

[236] *See supra* notes 30-35 and accompanying text.

[237] Wal-Mart Stores, Inc. v. Samara Bros., Inc., 120 S. Ct. 1339, 1344-45 (2000).

source identifying[,] if any such exists," by securing a design patent or a copyright.[238]

Currently, artists, film-makers, authors, musicians, and computer programmers all have the comfort of ample protection under copyright law.[239] Although fashion designers provide similar visual, entertaining, and unique work as such other artists, they are not afforded the same protections. Although the Court, in *Wal-Mart*, dismissed protection for designers because of the availability of patent and copyright protections, these protections are not appropriate for fashion designers.[240]

Copyright law protects, not the facts, ideas, or functions, but "the form in which they may be expressed"[241] – "two-dimensional and three-dimensional works of fine, graphic, and applied art."[242] To establish copyright infringement, the copyright owner must prove that the infringer had access to

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[238] *Id.* at 1345. For discussion of why patent or copyright protection is inappropriate for fashion designs, *see infra* section IV.C.3.

[239] Copyright law is codified in 17 U.S.C. § 101 *et seq.*, originally named the Copyright Act of 1976.

[240] *See id.* at 1345. "The availability of these other protections greatly reduces any harm to the producer that might ensue from our conclusion that a product design cannot be protected under § 43(a) without a showing of secondary meaning." *Id.* Mohr compares protection of product trade dress with protection of literary works:

> Like literary works, the creators of an imitation product's trade dress should give credit to the company which, through its own creativity and innovation, designed an image for the original product to reflect its personal corporate image and to succeed in the market. The expression of a consumer product and its origin should be afforded the same protection literary works and their authors are afforded.

Moher, *supra* note 23, at 1342-43.

[241] Dratler, *supra* note 119, at 11 (quoting 17 U.S.C. § 102(b) (1982)). "In no case does copyright protection . . . extend to any idea, procedure, process, system, method of operation, concept, principle, or discover, regardless of the form in which it is described, explained, illustrated, or embodied in [the copyrighted] work." 17 U.S.C. § 102(b).

[242] ROBERT C. DORR & CHRISTOPHER H. MUNCH, PROTECTING TRADE DRESS 387 (1992). Copyright protection arises as soon as the original work is fixed in a tangible medium of expression; it is automatic upon the commencement of the work, but a copyright must be registered before filing an infringement cause of action. The registration process is to put other artists on notice that a particular piece of work is protected under federal law. *See* 17 U.S.C. § 101. Failure to register can limit monetary recovery from an infringer. In addition to monetary recovery, a copyright owner can destroy the infringing articles and enjoin any further infringement. *See* DORR & MUNCH, *supra*, at 388.

Commencement of copyright protection requires no government action. Prior to 1989, proper copyright notice was required, but it is no longer necessary. But a copyright notice will sever the innocent infringer defense. A proper notice includes: (1) the word "Copyright," the abbreviation "Copr.," or the symbol ©; (2) the year of the first publication of the work; and finally (3) the name of the owner of the copyright. KITCH & PERLMAN, *supra* note 29, at 536-37.

the work and that work is substantially similar.[243] Designers have the option of protecting ornamental features under copyright law, however, the statute states that the ornamental aspect must be capable of existing "independently of the utilitarian aspects" of the article.[244] Because most fashion designs embody both ornamental and utilitarian elements, this separation cannot occur, and therefore copyright protection is not a viable option for designers.

Patent is another form of protection for innovators. Design patents provide protection for non-obvious, "new, original, and ornamental design for an article of manufacture."[245] This particular patent protects the design for fourteen years.[246] Protection via design patents is only for ornamental designs, and not for functional or utilitarian designs.[247] To find patent infringement, the infringer's design must resemble "the patented design that a hypothetical ordinary observer/purchaser would be deceived to select the infringer's design supposing it to be the patented design or vice versa."[248] Fashion designers have the option of filing for a design patent, yet the standards for such protection are very high.[249] An invention must be novel and not obvious to those skilled

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[243] *See* DORR & MUNCH, *supra* note 242, at 388. "Substantially similar" is judged by the reasonable person, or "ordinary observer." *Id.* The determination of copyright infringement is based on similarities, rather than differences, of the copied work. *See id.*

[244] 17 U.S.C.A. § 101 (West Supp. 1988) provides that the design of a useful article "shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article." *Id.*

[245] 35 U.S.C. § 171 (1982). Like copyright law, patent law is constitutionally based.

[246] *Id.* § 173.

[247] The PTO states that a protectable "design consists of the visual ornamental characteristics embodied in, or applied to, an article of manufacture." *A Guide To Filing A Design Patent Application* (visited Apr. 20, 2000) <http://www.uspto.gov/web/offices/pac/design/definition.html>. Further, the "design for an article of manufacture that is dictated primarily by the function of the article lacks ornamentality and is not proper statutory subject matter under 35 U.S.C. § 171." *Id.*

[248] DORR & MUNCH, *supra* note 242, at 389. "Minor differences between the two designs will not prevent the finding of infringement." *Id.* However, the similarities between the two works must concern the novel or inventive aspects of the patented design. *See id.*

[249] *See* Dratler, *supra* note 119, at 8. "In practice patents fail to provide meaningful protection. . . . Almost all commentators agree on this point. . . . The primary reason patents are ordinarily useless for [designs] is the high standards required for patent protection." *Id.* Authors Dorr & Munch "succinctly" explain that:

> A design patent will be granted if the invention is new, original, and ornamental, as compared against prior art, and the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would not have been obvious at the time the invention was made.

DORR & MUNCH, *supra* note 242, at 389.

in the art.[250] Further, the application process may take several months,[251] and the costs for the patent application are high.[252] This serves as a disincentive because high-fashion designers only have three months from the designing of a fashion line to the time of the next fashion show.[253]

It is important to note that *Wal-Mart* did not overrule the trade dress requirements set forth in *Two Pesos*. The Court distinguished *Two Pesos* as a product packaging case, and *Wal-Mart* as a product configuration case.[254] Whereas *Two Pesos* established the legal principle that trade dress can be inherently distinctive, it did not establish that product configuration trade dress can be.[255] *Wal-Mart* firmly instructed courts to classify ambiguous trade dress as product design, thereby requiring secondary meaning. This was because the "very closeness will suggest the existence of relatively small utility in adopting an inherent-distinctiveness principle, and relatively great consumer benefit in requiring a demonstration of secondary meaning."[256]

This decision is a retreat from the expansive language regarding general trade dress of *Two Pesos*. *Wal-Mart*'s appeal was an opportunity for the Supreme Court to clarify the criteria for trade dress protection specifically applicable to the fashion design industry. The Court could have adopted a test that sets a "high factual standard" to determine trade dress distinctiveness, however it "adopted a legal rule that says, 'no matter what the facts are, we're not going to hear them.'"[257]

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[250] *See* 35 U.S.C. § 102 (1982).

[251] The PTO must review every patent application that is filed. The PTO does not state a specific time period in which the Office will respond to the applicant. However, the PTO's statistics reveal the high number of patents granted yearly, and one can only fathom how many thousand applications were denied. In 1998, 14,767 design patents were granted worldwide. *See Design Patents* (visited Apr. 22, 2000) <http://www.uspto.gov/web/offices/ac/ido/oeip/taf/design.pdf>. The mid-year report for 1999 showed 8,234 design patents were granted. *See Design Patents* (visited Apr. 22, 2000) <http://www.uspto.gov/web/offices/ac/ido/oeip/taf/des_mid.pdf>.

[252] The filing fee for a design patent is $310 and the issue fee is $430. Applications filed after December 12, 1980 have patent maintenance fees: due at 3.5 years – $830, due at 7.5 years – $1900, due at 11.5 years – $2910. Also, an extension of the term of the patent will cost $1120. *See* PTO Fees (visited Apr. 20, 2000) <http://www.uspto.gov/web/offices/ac/qs/ope/1999/ fee2000.htm>.

[253] Most fashion designers hold fashion shows every season.

[254] *See* Wal-Mart Stores, Inc. v. Samara Bros., Inc., 120 S. Ct. 1339, 1345, 46 (2000). The Court states that the décor of a restaurant "seems to us not to constitute product design. It was either product packaging . . . or else some tertium quid that is akin to product packaging and has no bearing on the present case." *Id.*

[255] *See id.* at 1345.

[256] *Id.* at 1346.

[257] *Product Design is Protectible as Trade Dress Only on Showing of Secondary Meaning*, IP L. WKLY. (visited Mar. 24, 2000) <http://www.lawnewsnetwork.com/practice/iplaw/news/

C. The Persistence of Unfair Competition in the Fashion Design Industry

Apparently, current trade dress law is inapplicable to the fashion industry as evidenced by the Supreme Court's decision in *Wal-Mart*. Understanding the fashion world requires deep inquiry into the different tiers within the industry, and the designer's role within that specific category.

1. Understanding the tiers within the fashion design industry

There are two broad levels within fashion industry: ordinary mass-market and high-fashion. Mass-marketed clothing is designed and sold to "as wide a range of people as possible, rather than to a particular group in society."[258] Mass-market clothing is usually designed by generic designers and is manufactured as cheaply and efficiently as possible. This type of clothing is sold in department stores and major retail stores, such as Wal-Mart and Kmart. Ready-to-wear ("RTW") clothing is also mass-marketed, but only to a limited extent. RTW clothing, generally, is already designed in standard sizes and patterns, rather than being specifically designed for an individual, an occasion, or a season.[259] Ordinary RTW clothing usually is sold in department stores and private-label stores. RTW may be designed by a familiar, name brand designer, and therefore the prices are higher than mass-marketed clothing. Examples of an ordinary RTW are XOXO, AnnTaylor, GUESS and GAP.

High-fashion includes designer ready-to-wear, avant garde, and haute couture.[260] Designer RTW is even more limited in production than the ordinary RTW. Designer RTW is also made with standard sizes and patterns, however, it is designed by a higher-end famous brand designer. Such designs are usually sold in high-end department stores (Barney's, Henri Bendel), specialty boutiques, and private-label stores. Examples of such designers are Calvin Klein, Prada, St. John's, and DKNY. Avant garde designs are very unconventionally artistic.[261] These designs are rarely worn to public functions. Rather, avant garde creations are presented at seasonal fashion shows more for purposes of entertainment rather than sale. Avant garde

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A19386-2000Mar22.html> (quoting Theodore H. Davis Jr., counsel of record for the International Trademark Association).

[258] ENCARTA WORLD ENGLISH DICTIONARY, *supra* note 18, at 1111.

[259] *See id.* at 1493.

[260] The designers in this category reveal a new fashion collection each season, whereas the mass-market designers do not have such a quick turn-over of creations.

[261] *See* ENCARTA WORLD ENGLISH DICTIONARY, *supra* note 18, at 116. Avant garde means "artistically new, experimental, or unconventional . . . [or] belonging to the artistically innovative." *Id.*

designers interpret a fashion trend and take it to the extreme. Such designers include Jean-Paul Gaultier and Alexander McQueen.

The highest level of fashion, in terms of quality and price, is haute couture.[262] Haute couture designs are specifically designed and made for an individual or an event.[263] Only a handful of such designs are sold throughout the world each season. These luxurious designs require patience and time to create because the majority of the fabric and the embellishments are sewn by hand. Haute couture is known as the "art of perfection."[264] Some highly admired haute couture designers are Christian Lacroix, Christian Dior, Givenchy, and Valentino.

Of course, there is some overlap within the different tiers of fashion.[265] For example, Calvin Klein not only creates designer RTW sold at his stores, but also ordinary, lower priced RTW sold in the junior section of department stores. Alexander McQueen specializes in avant garde, but has been Givenchy's head designer since 1996. Prada sometimes tip-toes into the opulent world of haute couture.

In the high-fashion industry, consumer motivation to purchase will primarily be predicated on an appreciation of the clothing's features, rather than on an appreciation of the clothing's designer. Unlike general consumer goods, the consumers of high-fashion clothing do not need to rely on the manufacturer's name and reputation to be assured of quality goods. It is understood that designers in the haute couture and avant garde industries produce the highest quality of clothing. Therefore, each season, high-fashion designers attempt to produce clothing that is visually distinctive and innovative in order to grab the attention of the consumer. When a high-fashion designer succeeds

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[262] Authentic haute couture is regulated by Chambre Syndicale de la Parisienne. The Chambre Syndicale originated in 1868 as a union to preside over France's various needle trades. It acquired its current title in 1885, when the son of Charles Frederick Worth, Gaston Worth, realized that France's couture designers required some kind of management. Part guild, part union, the Chambre Syndicale set forth the criteria for a designer to achieve haute couture status. *See* JACOBS, *supra* note 4, at 11-12.

Every dress design is registered in a file, before it can be produced for a fashion show. The file includes a sketch, photograph, and fabric swatches. Besides controlling the haute couture membership, the Chambre Syndicale took over labor relations, coordination of different designer collections, registration and monitoring of international store buyers and foreign press, and the passing of financial regulations. "Indeed, Paris couture was so high and mighty and it might be said, dictatorial, that Hitler himself wanted it." *Id.* at 13.

[263] *See* ENCARTA WORLD ENGLISH DICTIONARY, *supra* note 18, at 821. Haute couture is defined as "exclusive and expensive clothing made for an individual customer by a fashion designer, or the industry that produces such clothing . . . [or] literally high dressmaking." *Id.*

[264] JACOBS, *supra* note 4, at 9.

[265] Examples of designers' and their seasonal fashion shows in the various fashion categories are available at *Collections On-Line*, FirstView (visited Jun. 21, 2000) <http://www.firstview.com>.

in presenting a fashion collection that is distinctive, those distinctive features are soon imitated by ordinary RTW and mass-market designers.[266] The resulting "copied" designs are sold to the general public within several months.[267]

Due to rapid turn-over in the cutting edge trends, only the elite of the designing industry are capable with keeping on the cusp of the high-fashion world. Thus, when evaluating whether a designer's product line possesses a protectable trade dress, it is necessary to analyze through the eyes of a fashion designer.[268] Certainly, there is a different standard of awareness of trends between the consuming public and the fashion industry. Those who are involved in the trade are more aware of a designer's particular style and her design habits, whereas an ordinary department store shopper may not

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[266] Christian Dior was one of the first designers who fought a losing battle with "knockoff artists." As early as 1957, imitations of Dior's memorable hobble skirts were hanging on department store racks, long before he could produce the original skirts for his couture customers. *See* TERI AGINS, THE END OF FASHION: THE MASS MARKETING OF THE CLOTHING BUSINESS 24 (1999).

French design houses started to become obsessive about stopping knockoffs, "which were the oldest gambit in fashion." *Id.* at 42. These imitations had always "provided the gist for countless fashion dramas as designers staked their reputations" by being original and by being first. *Id.* The irony was that international designers stopped watching Paris to get their ideas and motivations, but instead looked to past and present trends and the streets. This made it impossible for any designer to claim ownership of a particular trade dress. Therefore, the Chambre Syndicale decided to get tough on knockoff designer, and focused on punishing freelance photographers and video cameramen who were accused of leaking Paris fashion to foreign competitors. *See id.* at 42-43. For a discussion of the Chambre Syndicale, *see supra* note 262.

In 1995, the Chambre Syndicale strictly regulated the press by setting forth several rules. Photographers and video cameramen could only publish photos from fashion shows for "journalistic information." Nothing was to be published on the internet. Also, these publications were to be released three months after the fashion shows. Jacques Monclier, director of the Chambre Syndicale, threatened that French prosecutors were ready to press charges against any violators. *First View*, a fashion website, violated the above rules in 1997. However, when asked about the prosecutors, *First View* replied that they only receive several threatening letters from Mr. Monclier, and that was all. *See* AGINS, *supra*, at 42-43.

[267] Isaac Mizrahi complained that his Isaac collection "didn't click with shoppers, who were far too savvy to fork over $150 for a cotton shift designer dress when chains like Bebe and the Limited were turning out similar styles for as little as $49.99." AGINS, *supra* note 266, at 5. Marshall Field & Co. (later changed its name to Marshall Fields in 1982) created the first "bargain basement" where quality copies were sold at a less expensive price. Shoppers who once wistfully window-shopped, started to shop like crazy in order to "grab the cheaper silks, dress goods, hosiery, handkerchiefs, cloaks, ribbons, and shawls." *Id.* at 175-76.

[268] The Supreme Court has emphasized that an inherently distinctive trade dress is one whose "intrinsic nature serves to identify a particular source of a product," although it may not yet have widespread identification among the general public. Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 771 (1992).

recognize such unique aspects of clothing. A fashion magazine editor accurately observed that, "[t]he fact is that women are interested in clothes, but the average consumer isn't interested in the fashion world."[269]

Presently, in trade dress infringement cases, the plaintiff must provide evidence that her designs are non-functional, distinctive, and that likelihood of confusion exists in a claim of trade dress infringement. The evidence will then be examined by a jury of her peers to determine if a trade dress is, in fact, unique and recognizable. However, analyzing trade dress elements of a high-fashion designer is rife with complications if one is not familiar with the high-fashion world and its designers. Therefore, unless the members of a plaintiff's jury all work in the fashion industry, it will be difficult to accurately examine whether a party may be guilty of trade dress infringement. Given this reality, it is easy to understand why a fashion designer, in general, may not feel secure about taking infringement claims to court. Designers may well worry that the court will not have the proper appreciation of fashion to understand the necessity of a protecting a designer's trade dress. This basic lack of appreciation may explain why a settlement offer might appear attractive to a designer, and no cases involving the high-fashion industry are reported.

Of course, it would be unfair for the courts to deny protection to a particular trade dress because judges and juries do not realize or know the distinctiveness of a designer's style,[270] especially while the competing fashion designers are well aware of this distinctiveness and its key role in a designer's success.[271] Where experts might debate technical, fashion-specific questions beyond the understanding and appreciation of the court, the judge should obtain her own expert assistance.[272] Trade dress is a complex composite of

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[269] AGINS, *supra* note 266, at 14 (quoting Martha Nelson, editor of *InStyle* magazine).

[270] *See* Chapman, *supra* note 22, at 13-16, 40-42 (criticizing the "capable of identifying" distinctiveness standard).

[271] As stated, when evaluating the distinctiveness of a design, we must inquire whether the trade dress is "likely to serve primarily as a designator of origin of the product." Duraco Prods., Inc. v. Joy Plastic Enter., Ltd., 40 F.3d 1431, 1449 (3d Cir. 1994). *Cf.* Imagineering, Inc. v. Van Klassens, Inc., 53 F.3d 1260, 1263-64 (Fed. Cir. 1995) (explaining "[t]rade dress is inherently distinctive when, by its 'intrinsic nature,' it identifies the particular source of a product"); Tone Bros., Inc. v. Sysco Corp., 28 F.3d 1192, 1206 (Fed. Cir. 1994) (inquiring "whether or not the trade dress is of such a design that a buyer will immediately rely on it to differentiate the product from those of competing manufacturers"); RESTATEMENT (THIRD) OF UNFAIR COMPETITION, *supra* note 117, § 13(a) (stating "because of the nature of the [design] and the context in which it is used, prospective purchasers are likely to perceive it as a [design] that . . . identifies goods or services produced or sponsored by [Knitwaves]").

[272] *See* Thomas M. Reavley & Daniel A. Petalas, *A Plea For Return to Evidence Rule* 702, 77 TEX. L. REV. 493, 494 (1998). Expert testimonies are often used in trade dress litigation. An expert witness will be helpful in explaining why a certain design feature is functional or not functional. Expert testimonies can also demonstrate a designer's reputation in the industry. *See* Romm Art Creations Ltd. v. Simcha Int'l, Inc., 786 F. Supp. 1126 (E.D.N.Y. 1992) (using an

features and the law of unfair competition requires that all of features and circumstances be considered together.[273]

2. *Lack of guidance*

The courts need guidance to properly analyze the case specific technicalities of fashion design trade dress infringement suits.[274] When "no legislation

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expert to establish that the plaintiff was considered to be one of the two best poster artist in the world).

Determining likelihood of confusion is often difficult and expensive. Courts frequently use surveys to demonstrate confusion in the marketplace. Surveys may be the most practical method to find confusion within a large group of people, however, the proper representative sample must be examined in order to appropriately find confusion for your particular case. *See* Robert G. Sugarman & Nancy S. Scherer, *The Use Of Experts And Survey Evidence In Copyright, Trademark And Unfair Competition Litigation*, 395 P.L.I. PAT. 413, 521-23 (1993). For example, in *Hutchinson v. Essence Communications, Inc.*, 769 F. Supp. 541 (E.D.N.Y. 1991), the court rejected a survey of rap music confusion because the survey only questioned African-Americans. The court stated that the most appropriate universe would have consisted of any person who listen to and/or buy rap music.

Still, conducting surveys will only determine actual confusion and/or post-sale confusion. These surveys are also difficult to apply to the high-fashion industry because the proper universe would only be those associated with the fashion design industry because only those immersed in fashion culture purchase such high-end designs.

[273] *See* American Greetings Corp. v. Dan-Dee Imports, Inc., 807 F.2d 1136, 1141 (3d Cir. 1986) (quoting SK&F, Co. v. Premo Pharm. Lab., 487 F. Supp. 1184, 1187 (D.N.J. 1979)).

[274] *See* Dufek, *supra* note 28, at 1339-41. It is hoped that:

> future courts will see the current state of trade dress law as inadequate and take the opportunity to show industry leaders that their hard work and ingenious inventions warrant protection. Until then, the tension will continue to exist between industry leaders, inspired by *Two Pesos* which made it easier for companies to protect a product's size, shape, color, graphics – even how the product is pitched – from being illegitimately copied, and low-priced, store-brand knockoffs of national brands [which] remain encouraged by *Conopco*.

Id. at 1340-41 (citing Lisa I. Fried, *Trade Dress Suits Knock Knockoffs Off Store Shelf*, NAT'L L.J., Sept. 18, 1995, at B1) (internal quotations and brackets omitted).

In *Conopco, Inc. v. May Department Stores Co.*, 46 F.3d 1556 (Fed. Cir. 1994), the court denied trade dress protection to the Vaseline Intensive Care Lotion container. The court explained that the trade dress infringer, a generic private label, had its logo clearly marked, despite the similar logo and colors on the lotion label. *See id.* at 1565-66. Today's competitive marketplace encourages innovation and creativity to produce goods that grab the consumer's attention. However, there are many companies who intentionally misappropriate the successful image and reputation of national brands. *Conopco*'s decision promotes such imitations and this is unacceptable for two reasons: (1) inconsistency with the purpose for the creation of the Lanham Act and (2) stifling of any incentive for innovation, creativity, and ingenuity. As mentioned in section II of this comment, the Lanham Act was established so consumers are ensured quality products labeled with recognizable trade symbols, and producers are protected from misappropriation of its product trade symbols. Non-regulation of national brand imitations

controls an issue are lawyers and judges entitled to look elsewhere for solutions to legal problems[?]"[275] Judicial decisions[276] on trade dress litigation outside the scope of the fashion industry are at best applied by analogy. The complex branch of potential litigation within the fashion industry is in need of an explicit set of standards established by controlling precedent.[277]

The following section examines two cases from different parts of the world that may provide needed guidance for the nation's courts. In the first decision, a French court is eager to provide protection for the brilliant high-end designer, Yves St. Laurent. The second case, not surprisingly from the Southern District of New York, sets forth a welcome revolutionary analysis in the field of trade dress law.

In 1994, Yves St. Laurent ("YSL") sued Ralph Lauren, in a French court, for infringement of a sleeveless tuxedo gown design.[278] Although similarly designed sleeveless tuxedo gowns had been on the market for several years, Judge Madelaine Cotelle carefully examined both dresses. During proceedings, models paraded through the courtroom wearing both versions of the dress. YSL's gown was an haute couture design priced at $15,000. Lauren's gown was a relatively mass-produced $1000 gown.[279] Judge Cotelle remarked, "[c]learly there are differences . . . [Lauren's] buttons aren't gold,

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clearly contradict these two policy concerns. Further, because brand image is no longer protected under *Conopco*, national brands may not have the incentive to create unique and recognizable products.

[275] Instituto Per Lo Sviluppo Economico Dell'Italia Meridionale v. Sperti Prods., Inc., 323 F. Supp. 630, 636 (S.D.N.Y. 1971).

[276] *See* Bonner v. City of Prichard, 661 F.2d 1206, 1211 (11th Cir. 1981). "Judicial decisions are law only to the extent they either fill in the gaps left by legislation and custom or establish custom." *Id.*; *cf.* M. CAPPELLETII, ET AL., THE ITALIAN LEGAL SYSTEM 247, 252, 273-77 (1967) (stating "[b]asically precedent is not binding in Italian law"). Under the Italian system:

> [h]istorically there has been a distrust of the judiciary and the resultant attitude has been that lawmaking – which is a product of precedent – should not be practiced by the judges. Moreover, even the informal application of stare decisis is difficult, and dangerous, because there is only a scanty, abstract statement of facts published with each case decided by the Supreme Court of Cessation. However, times are changing and feelings toward the separation of powers are becoming more flexible. Cases and massime (headnotes) do have persuasive authority.

Id. at 636.

[277] The industry is lacking proper precedent that is on point with the complexities of the fashion couture world. *Stare decisis et non quieta movere* means "to adhere to precedents and not to unsettle things which are established. The prospect of decades of writing on a clean slate in pursuit of the possibility that in some case or cases we might find a rule we like better . . . is at best unappealing, at worst catastrophic." Joiner v. Diamond M. Drilling Co., 677 F.2d 1035, 1044 (5th Cir. 1982).

[278] *See* AGINS, *supra* note 266, at 43.

[279] *See id.*

while Mr. St. Laurent's are. The St. Laurent dress also has wider lapels and I must say is more beautiful, but of course, that will not influence my decision."[280]

Interestingly, Judge Cotelle appreciated the importance of stylistic design elements and the protection thereof – perhaps because she owned two boutiques in Paris.[281] The court found that Lauren, did indeed, copy YSL's dress. When the court entered judgment for YSL, St. Laurent's business partner, Pierre Bergé, exclaimed that the "victory was a great shot in the arm for our fellow designers. It's a clear warning that so-called designers, especially from America, cannot get away with lifting original ideas of true creators of fashion."[282]

It is interesting to note how a judge in France, involved in the fashion industry, was willing to offer protection to a high-end fashion designer. Judge Cotelle saw the need to protect YSL's highly innovative design and punish Lauren's intentional copying. The judge fined Lauren a relatively low $411,000, but also ordered him to advertise the court's decision in ten publications.[283] It is comforting to know that a court can effectively protect the ingenuity of high-end fashion designers and understand the fundamental need for such protection.

Although the next exemplary analysis addresses infringement in chair trade dress, *Krueger International, Inc. v. Nightingale Inc.*[284] is applicable to the high-fashion industry, and can provide guidance in appreciating and acknowledge distinctive designer styles. The two parties involved are established manufacturers of office and industrial furniture.[285] Both companies produce numerous lines of chairs for commercial use including so-called high density chairs, "strong, lightweight chairs, capable of being stacked up to 40 units high."[286]

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[280] *Id.* at 43-44.

[281] *See id.*

[282] *Id.* at 44 (internal quotations omitted).

[283] *See id.* at 43. After the proceedings, the case was later settled with Lauren paying a lower fine, and he was not forced to publicize the decision. *See id.* at 44.

[284] 915 F. Supp. 595 (S.D.N.Y. 1996). There are two cases that disagree with the analysis in *Krueger*, however they are not controlling. *See* Landscape Forms, Inc. v. Columbia Cascade Co., 113 F.3d 373 (2nd Cir. 1997); New York Racing Ass'n, Inc. v. Perlmutter Pub., Inc., 959 F. Supp. 578 (N.D.N.Y. 1997).

[285] *See Krueger*, 915 F. Supp. at 598. Krueger was founded in 1941, and is headquartered in Green Bay, Wisconsin. Nightingale is a Canadian corporation established in 1928. *See id.*

[286] *Id.* Krueger defined these high density chairs as follows:

> The stacking feature of the chairs makes them easy to transport and efficient to store. The chairs are sold in large volume, often through a competitive bidding process, to convention centers, school systems and other institutions that must accommodate crowds.

In *Krueger*, after a lengthy discussion of the available trade dress laws, including *Two Pesos*, *Abercrombie*, *Knitwaves*, and *Seabrook*,[287] Judge Sotomayer concluded that Krueger's chairs were protectable as trade dress. Judge Sotomayer seemed to deeply appreciate an artist's creativity and reasons for utilizing certain design elements. In considering these issues, interesting questions were put forth: "[i]nherently distinctive as compared to what?";[288] "[w]hat is the custom in this industry?";[289] and other industry specific inquiries. Consequently, Judge Sotomayer found:

> [Krueger] has a protectable trade dress in the overall look of its Matrix chair. Although each of the individual design elements serves both functional and aesthetic purposes, it is the overall look that I must consider .... I find that the seat, the back and the Z- shaped connecting rods of the [Krueger] chair give the Matrix chair a distinctive overall look. Applying *Seabrook*, I find that this particular look is unique among high density stacking chairs and that manufacturers of these chairs generally *seek unique designs as an important source identifier*. . . . [T]he chair industry does not rely heavily on labels to communicate with customers and its designs remain stable over time. Although the chair manufacturers' names appear prominently on shipping containers and hang tags, customers generally throw these away. The sole permanent label is molded into the plastic underneath the seat, where a *sophisticated buyer would find it but a less sophisticated one might not. No consumer would see the label without looking for it.*[290]

The *Krueger* court explicitly stated that the chair manufacturing industry relies on unique designs as indicators of source, and sophisticated buyers are familiar with the trademark and trade dress, whereas unsophisticated buyers are not. The fashion designing industry fits neatly within this analysis. Each season, high-fashion designers create unique clothing designs that represent the designer's particular vision. That season's collection is distinct and specific to the designer and her style. However, only sophisticated purchasers and followers of high-fashion will recognize and identify the designer's style of clothes.

I suggest that courts apply a heightened standard when determining inherent distinctiveness of a design. The fast-paced industry of high-fashion requires

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There is no direct retail market for the chairs, although some of these chairs are sold to furniture dealers.

Id.

[287] *See id.* at 601-06.

[288] *Id.* at 603.

[289] *Id.* at 604.

[290] *Id.* at 607 (emphases added).

a *subjective* inquiry into the industry.[291] Presently, the courts are attempting to apply trade dress law, which is frequently used in ordinary product infringement cases, to the complex world of fashion. High-fashion requires a greater awareness of the fashion trends because they are both fleeting and distinct. It is difficult for ordinary shoppers, who are not schooled in the fashion industry, to understand, appreciate, and acknowledge all the various fashion collections' distinctive styles.

As demonstrated in *Wal-Mart* and its previous cases, courts do not recognize the need for special standards in trade dress law for application to the fashion design industry. The Court in *Wal-Mart* proclaimed that "[a] piece of cloth that . . . can cover your body, and . . . that's all that goes into a dress."[292] Such an observation of the fashion world will never result in favorable decisions to protect fashion designers. An interesting struggle was the aesthetic functionality analysis in *Banff*, where the court concluded that the sweater design did not identify its source because of the sweater's aesthetic functionality. [293] This shows a lack of understanding regarding the fashion industry as many design elements in high-fashion clothing may be considered aesthetically functional, yet indicative of their sources. This error is not surprising because high-fashion design elements require a subjective analysis from within the fashion world itself to be fully appreciated. For example, design elements that may be functional for a mass-market designer may be the stylistic design elements for an avant garde designer. A distinct style of one designer may be obvious to those who shop at Neiman Marcus, but not so obvious to those who shop at Wal-Mart. Similarly, identification of high-fashion designer clothing may be easy for those who read fashion magazines and are aware of developing trends, yet confusing for those who do not read, watch, or even care about fashion styles. It may be impossible to require every jury to possess such an in-depth and sophisticated appreciation

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[291] Compare this concept with *Duraco Products, Inc. v. Joy Plastic Enterprise, Ltd.*, 40 F.3d 1431, 1451 (3d Cir. 1994) (hesitating in setting forth a definitive guide to determine inherent distinctiveness). The court stated:

> We acknowledge that, to a large extent, how courts resolve the inherent distinctiveness inquiry could, theoretically at least, cause a snowballing effect. If product configurations are easily protected, consumers might learn to rely on configurations as source designators; if protection is rare, consumers will disregard product configurations as source designators, and no confusion will result. But partial protection, if not carefully circumscribed, may eventually cause even greater consumer confusion, as consumers will face difficulties determining what features are legitimate source designators (because inherently distinctive) and which are not.

Id.

[292] United States Supreme Court Official Transcript 2000 WL 72053 at *38, Wal-Mart Stores, Inc. v. Samara Bros., Inc., 2000 WL 72053 (U.S. S. Ct. January 19, 2000) (No. 99-150).

[293] *See* Banff Ltd. v. Express, Inc., 921 F. Supp. 1065, 1071 (S.D.N.Y. 1995). *See also supra* section II.C.1.

of the fashion world, but that is what is necessary to understand, recognize, and distinguish all the various designers' trade dress styles.

Due to the lack of proper and clearly articulated precedents specifically for the high-fashion design industry, attorneys and judges have no guidance with the legal elements or damage awards. Further, the dearth of litigation provides no deterrent factor to the design infringers. Perversely, this encourages infringers to copy couture designs, and if faced with a lawsuit, to quickly settle out court, thereby providing no standards for future copiers.

Courts must set precedent on how to transfer traditional trade dress and trademark law concepts to the fashion designing industry or Congress must legislate such a mechanism. Only published decisions on trade dress infringement or statutory authority, specific to the high-fashion designing industry, will provide some sort of persuasive authority to set standards for future litigation in the industry. Perhaps Judge Cotelle's method of praising the innovators of fashion trends and humiliating the imitators of such trends may provide some guidance in how to proceed in future litigation. Imitation fashion designers are taking advantage of another's creativity and reputation,[294] leaving the original fashion designers with no incentive to utilize

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[294] A designer has a remedy if she feels that her distinctive and reputable style is at risk. 15 U.S.C. § 1125(c) (1) provides:

> The owner of a famous mark shall be entitled, subject to the principles of equity and upon such terms as the court deems reasonable, to an injunction against another person's commercial use in commerce of a mark or trade name, if such use begins after the mark has become famous and causes dilution of the distinctive quality of the mark, and to obtain such other relief as is provided in this subsection.

Id. In a federal dilution action, the plaintiff bears the burden of proving: "(i) that it owns a famous mark, (ii) that the defendant adopted its mark after the plaintiff's mark became famous, and (iii) that defendant's mark dilutes the famous mark." Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Dev., 955 F. Supp. 605, 613 (1997) (citing Clinique Lab., Inc. v. Dep Corp., 945 F. Supp. 547, 561 (S.D.N.Y. 1996)). Under 15 U.S.C. section 1125(c), a company claiming dilution of a mark must demonstrate ownership of distinctive trade dress or mark and dilution. Under 15 U.S.C. section 1127, dilution is defined as a "lessening of the capacity of a famous mark to identify and distinguish goods or services ...." Section 43(c) of the Lanham Act protects famous trademarks from later uses that blur the distinctiveness of the mark or tarnish or disparage it. *See* 15 U.S.C. § 1125(c).

Dilution can occur by tarnishment or blurring. Dilution by tarnishment is when the defendant uses the plaintiff's trade symbol in association with unwholesome, obscene, sexual, or illegal goods or services. *See Clinique*, 945 F. Supp. at 562. "The sine qua non of tarnishment is a finding that plaintiff's mark will suffer negative associations through defendant's use." Hormel Foods Corp. v. Jim Henson Prods., Inc., 73 F.3d 497, 507 (2d Cir. 1996); *see also Clinique*, 945 F. Supp. at 562. Dilution by tarnishment has a relatively limited scope in comparison to dilution by blurring.

Dilution by blurring occurs where the defendant uses the plaintiff's trade symbol to identify the defendant's goods or services, and as a result, plaintiff's trade symbol may lose its ability to identify and distinguish plaintiff's product. *See Clinique*, 945 F. Supp. at 562. Courts look

their imaginative skills to create.[295] Consumers are offered confusingly similar products in varying qualities and prices, therefore disguising the identity of actual source of the products.[296] The current trade dress law needs to be reevaluated and redeveloped to grasp the original policy concerns of the Lanham Act.

V. CONCLUSION

Whoever said, "[i]mitation is a way of the world in the fashion business,"[297] was very mistaken.[298] Without the original creators of fashion styles, the world would not be provided with an array of beautiful clothing. Fashion designers create memorable trends for the world.[299] Whether their innovative creations are praised and criticized, they are always striking. Giorgio Armani once said, "elegance is not merely to be noticed, but to be remembered."[300] This memorable elegance can be used for guidance, education, and inspiration, but should not be used for imitation.

Imitation is a form of flattery, but when imitators continuously benefit from other's work, creativity diminishes. Creators need protection from imitators.

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at five factors when determining dilution by blurring: (1) similarity of the trademarks and trade dress; (2) similarity of the products; (3) sophistication of consumers; (4) renown of the senior mark and trade dress; and (5) renown of the junior mark and trade dress. *See id.* at 562 (citing Merriam-Webster, Inc. v. Random House, Inc., 35 F.3d 65, 73 (2d Cir. 1994)). Essentially, dilution is concerned with the injurious effects to a famous brand's selling power, and not the demonstration of confusion of source.

Dilution often occurs with trademarks, and trademark dilution can also occur with a company that has a famous and recognizable trade dress. A perfect example is a can of Pepsi ONE-cola. Although most of the text on the can is protected by registered trademark, a private label can produce the same look on its cola can, and Pepsi would have a trade dress dilution claim. Trade dress dilution, unlike infringement, does not require a showing of a likelihood of confusion, mistake, or deception.

[295] The great designer Balenciaga complained that "[r]eal [fashion] is a luxury which is just impossible to do anymore." JACOBS, *supra* note 4, at 23.

[296] *See* Mohr, *supra* note 23, at 1343. "Such package plagiarism allows a copyist to reap what it has not sown and should be condemned as an unfair trade practice." *Id.*

[297] Donna Seiling, *Did American Eagle Filch From Abercrombie & Fitch?*, PITTSBURGH BUS. TIMES & J., July 10, 1998, at 2.

[298] *See id.* The article mentioned that Gucci's bamboo-handled handbags and Tiffany & Co.'s non-copyrighted jewelry are always imitated without legal action, because "[i]t's a very murky area." *Id.* (quoting Dorothy Lakner, a retail analyst).

[299] *See* LACROIX, *supra* note 6, at 147. "People often refer to the sixth sense of fashion designers, to their ability to anticipate new directions in taste and define them before anybody else. . . . But it is not enough to be able to foresee these things: you also have to be able to choose the right moment at which to do so, not too early, and not too late." *Id.*

[300] Asit Chandmal, *What the Best Dressed Men are Wearing*, INDIA TODAY PLUS, Oct. 1, 1998, at 1.

The object of being a fashion designer is to design and create clothing. Copying others' designs holds none of the enchantment of being a fashion designer. Designing is dreaming, inventing, and thinking on one's own. To Christian Lacroix, designing has, "no strategy. For me, [designing] is like fresh air. I create shapes impulsively, with no preconceived plan. . . . [Fashion will always be] crazy, contradictory, full of surprises and – above all – stronger than I am."[301]

Society must protect the great talent of fashion designing. Courts need to adequately safeguard innovation and creativity in the fashion business. Industry leaders, the American economy, and the American people require the protection of this industry. Only by protection will the gift of fashion designers be promoted in their work.

Christian Dior once said, "the maintenance of the tradition of fashion is in the nature of an act of faith. In a century which attempts to tear the heart out of every mystery, fashion guards its *secret* well, and is the best possible proof there is still *magic* abroad."[302] Let us protect that secret and preserve that magic.

Karina K. Terakura[303]

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[301] LACROIX, *supra* note 6, at 184.

[302] MARTIN & KODA, *supra* note 2, at 163 (emphasis added) (quoting Christian Dior).

[303] Class of 2000, William S. Richardson School of Law at the University of Hawai'i, aspiring to be a well-protected fashion designer. Thank you to all those who helped me with the development of my topic and my paper: Assistant Professor Mark Levin, Visiting Professor Sherri Burr, and the Publishability Committee and the Tech-Editors of the University of Hawai'i Law Review (much appreciation especially to my super-editors Kaleen Hasegawa and Ryan Sanada).

Hiner v. Hoffman: Strict Construction of a Common Restrictive Covenant

I. INTRODUCTION

When does a three story house exceed two stories in height? In *Hiner v. Hoffman*,[1] a divided Hawai'i Supreme Court concluded that it could not be sure without a precise, quantitative definition of a "story."[2] The court therefore refused to enforce a restrictive covenant that prohibited dwellings from exceeding "two stories in height" against land owners who erected a three story home on a lot subject to the covenant.[3]

Although *Hiner* presented the court with a question of first impression, whether the phrase "two stories in height" is ambiguous as a matter of law,[4] the case was only the latest in a line of Hawai'i appellate decisions dealing with the construction of restrictive covenants.[5] In relying on the rule of strict construction, i.e., the rule that ambiguous covenants are to be construed in favor of the free use of property, *Hiner* falls squarely within this line.[6] However, in resorting to the rule without first applying traditional intent-

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[1] 90 Hawai'i 188, 977 P.2d 878 (1999).

[2] *See id.* at 191, 977 P.2d at 881.

[3] *See id.* at 189, 977 P.2d at 879.

[4] *See id.* at 190, 977 P.2d at 880.

[5] *See* Waikiki Malia Hotel, Inc. v. Kinkai Properties Ltd. Partnership, 75 Haw. 370, 862 P.2d 1048 (1993) (construing a covenant that limited the height of buildings to 45 feet); Collins v. Goetsch, 59 Haw. 481, 583 P.2d 353 (1978) (construing a covenant that limited buildings on a lot to "no more than one single-family dwelling"); Sandstrom v. Larsen, 59 Haw. 491, 583 P.2d 971 (1978) (construing a covenant that set a one and one-half story height limit); Chang v. Magbee, 45 Haw. 454, 370 P.2d 479 (1962) (construing a covenant that prohibited "boarding houses"); Pelosi v. Wailea Ranch Estates, 10 Haw. App. 424, 876 P.2d 1320 (1994) (construing a covenant that restricted use of a home lot to residential purposes), *reh'g denied*, 10 Haw. App. 631, 879 P.2d 591, *cert. denied*, 77 Hawai'i 373, 884 P.2d 1149 (1994); DeMund v. Lum, 5 Haw. App. 336, 690 P.2d 1316 (1984) (construing a covenant that limited the use of property to "single family residences"); Clark v. Wodehouse, 4 Haw. App. 507, 669 P.2d 170 (1983) (construing a covenant that set a maximum building height of 24 feet).

[6] *Cf. Waikiki Malia Hotel*, 75 Haw. at 384-88, 862 P.2d at 1057-59 (invoking the rule of strict construction in holding that an ambiguous covenant was not held in gross); *Collins*, 59 Haw. at 481, 583 P.2d at 359 (relying on the rule of strict construction in determining that an ambiguous covenant did not prohibit a duplex); *In re* Johnson's Taxes, 44 Haw. 519, 537, 356 P.2d 1028, 1038 (1960) (adopting the rule of strict construction, but finding it inapplicable to the issue of whether a property owner is entitled to a tax exemption); *Clark*, 4 Haw. App. at 511, 669 P.2d at 173 (relying on the rule in arriving at an expansive definition of the words "building site").

seeking rules of construction[7] to determine the meaning of disputed language, the majority parted ways not only with general jurisprudential practice,[8] but with Hawai'i precedent.[9]

Courts traditionally apply the rule of strict construction where the meaning of a covenant is ambiguous.[10] It is well settled that the intent of the parties drives the determination of meaning.[11] Thus, invocation of the rule of strict construction logically follows a court's attempt to determine what the parties meant by the language used in a covenant.[12] Such an attempt normally involves reference to the popular usage of language,[13] surrounding

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[7] By "traditional intent-seeking rules of construction," I refer to generally accepted standards for determining the intent of parties to a restrictive covenant. Such rules include reliance on the common meaning of language, circumstances surrounding creation of the covenant, and the underlying object of the covenant. *See* 9 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 60.05, at 82 (Patrick J. Rohan ed., 1995). *See also infra* notes 14-27 and accompanying text.

[8] *See* POWELL, *supra* note 7, § 60.05, at 82.

[9] *Cf. Waikiki Malia Hotel*, 75 Haw. at 384-88, 862 P.2d at 1058-59 (applying the rule of strict construction after examining the "geographical location of the lands and the physical condition of the structures thereon"); *Collins*, 59 Haw. at 486, 583 P.2d at 358 (applying the rule of strict construction after considering the "popular" usage of language as well as surrounding circumstances); *Clark*, 4 Haw. App. at 511, 669 P.2d at 173 (looking to the "plain, ordinary, popular and reasonable" usage of language before construing a covenant in favor of the property owner).

[10] *See Waikiki Malia Hotel*, 75 Haw. at 385, 862 P.2d at 1058 ("[S]ubstantial doubt or ambiguity is resolved against the person seeking its enforcement."); *Collins*, 59 Haw. at 485, 583 P.2d at 356-57 ("Substantial doubt or ambiguity is to be resolved in favor of the free and unrestricted use of property."); *In re Johnson's Taxes*, 44 Haw. at 538, 356 P.2d at 1038("Substantial doubt or ambiguity is to be resolved in favor of the free use of property . . . ."); *Clark*, 4 Haw. App. at 511, 669 P.2d at 173 ("An ambiguous restriction . . . 'requires only a reasonable construction which is most favorable to the servient estate.'").

[11] *See Collins*, 59 Haw. at 487, 583 P.2d at 358 (noting that "in the determination of meaning of language used in restrictive covenants, the controlling factor is expressed intent"); Pelosi v. Wailea Ranch Estates, 10 Haw. App. 424, 436, 876 P.2d 1320 1327 (1994), *reh'g denied*, 10 Haw. App. 631, 879 P.2d 591, *cert. denied*, 77 Hawai'i 373, 884 P.2d 1149 (1994), 10 Haw. App. at 436, 876 P.2d at 1327 ("The fundamental rule is that the intent of the parties, as gleaned from the entire context of the covenant, governs."); DeMund v. Lum, 5 Haw. App. 336, 342, 690 P.2d at 1321 (1984) ("The fundamental rule in construing restrictive covenants is that the intention of the parties . . . governs."); Holmes Harbor Water Co. v. Page, 508 P.2d 628, 631 (Wash. Ct. App. 1973) ("The primary objective is to determine the intent of the parties."); Miller v. Bolyard, 411 S.E.2d 684, 684 (W. Va. 1991) ("The fundamental rule in construing covenants is that the intention of the parties governs.").

[12] *See, e.g., Waikiki Malia Hotel*, 75 Haw. at 384, 862 P.2d at 1057 (invoking the rule of strict construction after concluding that a covenant was unclear as to who was the intended beneficiary); *Collins*, 59 Haw. at 487, 583 P.2d at 358 (applying the rule of strict construction after failing to discern an intent to prohibit the use of a duplex).

[13] *See Collins*, 59 Haw. at 487, 583 P.2d at 358 (stating that the court "will first look to the plain, ordinary and popular usage of the words used in the covenant"); Sandstrom v. Larsen, 59 Haw. 491, 496, 583 P.2d 971, 976 (1978) (looking to the popular meaning in considering the purpose of a covenant); *DeMund*, 5 Haw. App. at 342, 690 P.2d at 1321 (noting that "words are

circumstances or extrinsic evidence[14] and emphasis on the purpose of the covenant.[15] In *Hiner*, the majority failed to apply any of these rules, prior to concluding that the phrase "two stories in height" was ambiguous. Accordingly, this note argues that the majority prematurely invoked the rule of strict construction.

Part II briefly examines the characteristics of restrictive covenants and reviews the rules of construction traditionally applied by American courts. Additionally, Part II surveys decisions from other jurisdictions that have directly addressed the issue of ambiguity in restrictive covenants that seek to limit height. Part III explores the construction standards adopted in past cases by the Hawai'i Supreme Court. Part IV examines the reasoning of the majority and the dissent. Finally, Part V critiques the majority's construction of the 1966 covenant and concludes that its failure to adequately seek the intended meaning of the covenant resulted in a premature application, and thus legal entrenchment, of the rule of strict construction.

II. BACKGROUND

A. Restrictive Covenants

Restrictive covenants are promises recorded in deeds that operate to limit the manner in which property is enjoyed.[16] Frequently used as part of a

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to be taken in their ordinary and popular sense, unless they have acquired a peculiar or special meaning"); *Clark*, 4 Haw. App. at 511, 669 P.2d at 173 ("In determining the meaning of the language used in a restrictive covenant, the court will first look to the plain, ordinary and popular meaning."). *See also In re Johnson's Taxes*, 44 Haw. at 530, 356 P.2d at 1034 ("Words in a statute are to be taken in their ordinary and familiar signification.").

[14] *See Waikiki Malia Hotel*, 75 Haw. at 384, 862 P.2d at 1058-59 ("If the language of the deed is ambiguous, surrounding circumstances may be considered but not parol evidence."); *Collins*, 59 Haw. at 487, 583 P.2d at 358 (stating that "a court may consider the general plan and appearance of existing structures established in the tract in order to ascertain the proper meaning to be accorded the covenant"); *Sandstrom*, 59 Haw. at 496, 583 P.2d at 976 (interpreting a covenant in light of "the general plan and appearance of existing structures established in the tract"); *DeMund*, 5 Haw. App. at 343, 690 P.2d at 1321 (concluding that "the taking of extrinsic evidence to arrive at the intention of the original parties would have been warranted").

[15] *See* Joslin v. Pine River Dev. Corp., 367 A.2d 599, 601 (N.H. 1976) (noting that "courts often consider . . . the purpose of the limitation"); Breeling v. Churchill, 423 N.W.2d 469, 470 (Neb. 1988) (concluding that "[a] restrictive covenant is to be construed in connection with . . . the purpose of the restriction"); *Miller*, 411 S.E.2d at 686 (stating that "intention is gathered from . . . objects which the covenant is designed to accomplish"). *See, e.g., Sandstrom*, 59 Haw. at 497, 583 P.2d at 977 (concluding that multi-story homes did not violate a one and one-half story height restriction because they did not defeat covenant's purpose in protecting view planes).

[16] *See* Cunningham v. Hiles, 395 N.E.2d 851, 854 (Ind. Ct. App. 1979), *modified*, 402 N.E.2d 17 (Ind. Ct. App. 1980); City of Olympia v. Palzer, 728 P.2d 135, 137 (Wash. 1986).

subdivision or planned development,[17] restrictive covenants generally regulate the appearance and size of structures within the development[18] to "maintain or enhance the value of lands adjacent to one another . . . ."[19] It is common for subdivision covenants to limit the height of structures placed on lots within the tract[20] by setting out a maximum allowable height in linear measurements[21] or through reference to a permissible number of "stories."[22]

In Hawai'i, covenants often limit the height of structures on subdivision lots by reference to an allowable number of "stories".[23] Courts have generally concluded that height limits are intended to protect view planes, even where such an intent is not explicitly stated.[24] Moreover, it is well settled that subdivision restrictions "run with the land" and thereby bind subsequent as well as original owners of property within the tract.[25] Indeed, because every

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[17] *See* Wallace v. St. Clair, 127 S.E.2d 742, 751 (W. Va. 1962).

[18] *See* Clayton P. Gillette, *Courts, Covenants, and Communities*, 61 U. CHI. L. REV. 1375, 1383-85 (1994).

[19] *Cunningham*, 395 N.E.2d at 854.

[20] *See* 40 AM. JUR. 3D *Proof of Facts* § 6 (1997).

[21] *See, e.g.*, Clark v. Wodehouse, 4 Haw. App. 507, 699 P.2d 170 (1983) (prohibiting a house from exceeding 20 feet in height); Holmes Harbor Water Co. v. Page, 508 P.2d 628 (Or. 1973) (prohibiting dwellings from exceeding 15 feet in height); Wesley v. Sulzer, 73 A. 338 (Pa. 1909) (limiting buildings on the "rear end" of the property from exceeding nine feet).

[22] *See, e.g.*, King v. Kugler, 17 Cal. Rptr. 504 (Cal. Ct. App. 1961) (limiting subdivision residences to one story in height); Pool v. Denbeck, 241 N.W.2d 503 (Neb. 1976) (limiting the height of subdivision houses to two stories); McDonough v. W.W. Snow Constr. Co., 306 A.2d 119 (Vt. 1973) (prohibiting tract homes from exceeding one story); Foster v. Nehls, 551 P.2d 768 (Wash. Ct. App. 1976) (restricting structures within a subdivision to "one and one-half stories in height").

[23] *See, e.g.*, Fong v. Hashimoto, No. 19424, 2000 Haw. LEXIS, at *4 (Hawai'i Feb. 1, 2000) (prohibiting structures from exceeding one story in height); Hiner v. Hoffman, 90 Hawai'i 188, 977 P.2d 878 (1999) (prohibiting lots from supporting dwellings in excess of two stories in height); Sandstrom v. Larsen, 59 Haw. 491, 583 P.2d 971 (1978) (prohibiting buildings from exceeding one and one-half stories in height); Pelosi v. Wailea Ranch Estates, 10 Haw. App. 424, 876 P.2d 1320 (1994) (restricting buildings "to a height not exceeding one and one-half stories").

[24] *See, e.g.*, *Sandstrom*, 59 Haw. at 495, 583 P.2d at 976 (finding that a height restriction was intended to protect view planes); *McDonough*, 306 A.2d at 119 (height restriction enforceable for purpose of protecting view planes).

[25] *See* LoBianco v. Clark, 596 N.E.2d 56 (Ill. Ct. App. 1992); Black Horse Run Property Owners Ass'n-Raleigh, Inc. v. Kaleel, 362 S.E.2d 619 (N.C. App. 1987), *cert. denied*, 366 S.E.2d 856 (1987); Woodstream Dev. Co. v. Payak, 637 N.E.2d 391 (Ohio Ct. App. 1994). A covenant may run with the land at law or at equity to bind successors to property, provided that it satisfies certain requirements. Specifically, to run with the land at law, a covenant must have been intended to run with the land by the original parties, be in writing, "touch and concern" the land, (i.e., both burden and benefit some land) and finally, involve "privity" between the original parties to a covenant and their successors in interest. *See* 9 POWELL, *supra* note 7, § 60-04, at 43-44. For a covenant to run in equity, privity need not exist as long as a land owner had notice of the covenant, the covenant was intended to run and it touches and concerns land.

owner in a subdivision is affected by uniform tract restrictions,[26] each has the right to enforce the restrictions against the other.[27]

B. Judicial Construction of Restrictive Covenants

1. Overview

When parties attempt to enforce a restrictive covenant, courts interpret and apply the covenant "by the same rules that are applicable to the construction of contracts."[28] Accordingly, courts seek the interpretation that gives effect to the intentions of the parties.[29] The parties' general intentions are gleaned from the entire language of the covenant,[30] and words are given the meaning intended by the parties.[31] In determining the intended meaning of language, courts look to the common usage of the words,[32] and the circumstances

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See Fitzstephens v. Watson, 344 P.2d 221 (Or. 1959). Covenants that are part of planned subdivisions usually run at equity. *See* William B. Stoebuck, *Running Covenants: An Analytical Primer*, 52 WASH. L. REV. 861, 889 (1977). Yet, the "distinction between real covenants and equitable servitudes is not of great importance in the subdivision setting as 'the theoretical mechanism by which such [subdivision] restrictions operate is exceedingly complicated and not at all well understood. In truth this is partly because courts, in their desire to enforce restrictions for policy reasons have outrun their understanding of theory.'" Casey J. Little, Note, Riss v. Angel: *Washington Remodels the Framework for Interpreting Restrictive Covenants*, 73 WASH. L. REV. 433, 457 n.2 (1998) (quoting Stoebuck, *supra* at 907).

[26] *See* Beeler Dev. Co. v. Dickens, 120 N.W.2d 414, 417 (Iowa 1963) (noting that "[e]very owner in the addition has dominant estate over that of his neighbors, and the neighbors are dominant over his"); Kajowski v. Null, 177 A.2d 101, 106 (Pa. 1962) (stating that each owner in a subdivision "has a dominant estate over that of his neighbors, and the neighbors are dominant over his, so that in full accord and harmony the pattern of tranquillity and family-like serenity envisaged by the patriarch grantor is maintained unbroken").

[27] *See Beeler*, 120 N.W.2d at 417 ("Each owner has the right to enforce the covenants as written.").

[28] Pelosi v. Wailea Ranch Estates, 10 Haw. App. 424, 436, 876 P.2d 1320, 1326, *reh'g denied*, 10 Haw. App. 631, 879 P.2d 591 (1994), *cert. denied*, 77 Hawai'i 373, 884 P.3d 1149 (1994); *see also* DeMund v. Lum, 5 Haw. App. 336, 342 n.7, 690 P.2d 1316, 1322 n.7 (1984), *cert. denied*, 67 Haw. 685, 744 P.2d 781 (1984).

[29] *See supra* note 11. *See also* 9 POWELL, *supra* note 7, § 60-05, at 82; 20 AM. JUR. 2D *Covenants, Conditions and Restrictions* § 171, 591-92 (1995); 26 C.J.S. *Deeds* § 163, 1098 (1956).

[30] *See* Waikiki Malia Hotel, Inc. v. Kinkai Properties Ltd. Partnership, 75 Haw. 370, 384, 862 P.2d 1048, 1057 (1993); 9 POWELL, *supra* note 7, § 60.05, at 82; 26 C.J.S., *supra* note 29, at 1098.

[31] *See* 20 AM. JUR. 2D, *supra* note 29, at 592.

[32] *See supra* note 13. *See also* 9 POWELL, *supra* note 7, § 60.05, at 82; 20 AM. JUR. 2D, *supra* note 29, at 592; 26 C.J.S, *supra* note 29, at 1105.

surrounding creation of the instrument.[33] Surrounding circumstances include the character of the tract of land covered by the covenant[34] as well as the overall object of the covenant.[35]

Where the meaning of a covenant is ambiguous, courts generally construe restrictive covenants against the grantor.[36] However, some courts have softened the rule of strict construction by holding that it will not defeat the general object of the covenant[37] particularly where the covenant arises in the subdivision context.[38] Other courts have discarded the rule altogether.[39]

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[33] *See supra* note 14. *See also* 9 POWELL, *supra* note 7, § 60.05, at 82; 20 AM. JUR. 2D, *supra* note 29, at 593; 26 C.J.S., *supra* note 29, at 1098.

[34] *See Waikiki Malia Hotel*, 75 Haw. at 384, 862 P.2d at 1058 (noting that "use of surrounding circumstances . . . usually concerns the geographical location of the lands and the physical condition of the structures thereon"). *See also* 20 AM. JUR. 2d, *supra* note 29; 2 AMER. LAW OF PROP. § 9.29, at 417 (1952).

[35] *See supra* note 15.

[36] *See* 9 POWELL, *supra* note 7, at 83. Historically, courts have disfavored restrictive covenants as hindrances on the alienability of land. *See* Stoebuck, *supra* note 25, at 904. The rule of strict construction serves to limit the situations in which covenants can jeopardize the alienability of land. *See* Hanley v. Misischi, 302 A.2d 79, 82 (R.I. 1973) (noting that ambiguous covenants are to be strictly construed "in order to increase the free use of land ").

[37] *See* Stockdale v. Lester, 158 N.W.2d 20, 22 (Iowa 1968) (noting that "[a]pplication of this strict rule of construction will not be allowed to subvert the manifest intention as shown by the entire instrument" and that "[p]roper regard for the contemplated purpose of the parties must be had"); *Hanley*, 302 A.2d at 82 (ruling that the rule of strict construction "will not be used to destroy the very purpose for which the restriction was established"); Mains Farm Homeowners Ass'n v. Worthington, 854 P.2d 1072, 1074-75 (Wash. 1993) (refusing to apply rule of strict construction to defeat the purpose of a covenant).

[38] *See* Riss v. Angel, 934 P.2d 669, 677 (Wash. 1997) (ruling that, with respect to subdivision covenants, the court would henceforth ignore the rule of strict construction and instead focus on the purposes sought to be effected). *See generally*, Robert D. Brusack, *Group Homes, Families and Meaning in the Law of Subdivision Covenants*, 16 GA. L. REV. 33, 42, 44 (1981) (arguing that the rule of strict construction is inapplicable to subdivision covenants because such covenants enhance, rather than hinder, the alienability of property in subdivision).

[39] *See* Beeler Dev. Co. v. Dickens, 120 N.W.2d 414, 417 (Iowa 1963) (adopting the view that the rule of strict construction no longer applies to building restrictions); Brandon v. Price, 314 S.W.2d 521, 523 (Ky. 1958) (concluding that "strict construction no longer applies"); Joslin v. Pine River Dev. Corp., 367 A.2d 599, 601 (N.H. 1976) (stating that "the former policy of strictly construing restrictive covenants is no longer operative"); Wallace v. St. Clair, 127 S.E.2d 742, 751 (W. Va. 1962) (declaring that the rule of strict construction did "not obtain with full force").

2. Construction of covenants that use the term "story" as a height restriction

For the most part, courts have upheld covenants that attempt to limit the height of structures through the use of the term "story."[40] However, only a limited few have directly addressed the issue of whether such height restrictions are ambiguous.[41] Although courts are evenly divided with respect to that narrow issue, a majority considering it have enforced the underlying, challenged covenants.[42]

In *King v. Kugler*,[43] California's Second District Court of Appeals became the first court in the nation to hold the term "story" unambiguous as a height limitation. In *King*, the defendants constructed a "garage with a room

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[40] *See* King v. Kugler, 17 Cal. Rptr. 504 (Ct. App. 1961) (enforcing a one story height limitation); Sandstrom v. Larsen, 59 Haw. 491, 583 P.2d 971 (1978) (enforcing a one and one-half story height limitation); Pool v. Denbeck, 241 N.W.2d 503 (Neb. 1976) (upholding a two story height limit); Dickstein v. Williams, 571 P.2d 1169 (Nev. 1977) (upholding a one story restriction); Drulard v. Le Tourneau, 593 P.2d 1118 (Or. 1979) (upholding a one story height restriction); Donaldson v. White, 493 P.2d 1380 (Or. 1972) (enforcing a one and one-half story height restriction); Glover v. Santangelo, 690 P.2d 1083 (Or. Ct. App. 1984) (upholding a one story limitation for purpose of protecting view planes), *petition for review denied*, 298 Or. 705 (1985); McDonough v. W.W. Snow Constr. Co, 306 A.2d 119 (Vt. 1973) (upholding a "one story" height restriction for the purpose of protecting view planes). *See also* Hobson v. Cartwright, 20 S.W. 281 (Ky. 1892) (concluding that a one story height restriction was enforceable to prevent erection of a two story building). *But see* Johnson v. Linton, 491 S.W.2d 189 (Tex. 1973) (invalidating a covenant that set a "one and one-half story" height limit after finding the language to be ambiguous). *See generally*, Thomas R. Trenkner, Annotation, *Restrictive Covenants as to Height of Structures or Buildings*, 1 A.L.R. 4th 1021 (1980).

[41] *See King*, 17 Cal. Rptr. at 506 (considering whether a "one story in height" is ambiguous); Metius v. Julio, 342 A.2d 348, 352-53 (Md. Spec. Ct. App. 1975) (considering whether a three story height limit is ambiguous); *Pool*, 241 N.W.2d at 506 (considering whether a two story height limit is ambiguous); *Dickstein*, 571 P.2d 1169, 1170-71 (Nev. 1977) (considering whether a one story height restriction is ambiguous); *Johnson*, 491 S.W.2d at 197 (considering whether a "one and one-half story" height restriction is ambiguous); Foster v. Nehls, 551 P.2d 768, 771 (Wash. Ct. App. 1976) (considering whether a "one and one-half stor[y]" restriction is ambiguous).

[42] *See King*, 17 Cal. Rptr. at 508 (enforcing a covenant that contained a "one story in height" restriction after finding the restriction to be unambiguous); *Pool*, 241 N.W.2d at 506 (enforcing a covenant that contained a two story height limit after concluding that the covenant was unambiguous); *Dickstein*, 571 P.2d at 1171 (enforcing a covenant that set a "one story from ground level" height limit after finding the phrase to be unambiguous); *Foster*, 551 P.2d at 771 (upholding a covenant that limited the height of structures to "one and one-half stories" despite finding the language ambiguous). *But see Metius*, 342 A.2d at 355 (declining to enforce an ambiguous covenant that set a three story height limit against a house with four levels, one of which was below grade); *Johnson*, 491 S.W.2d at 197 (refusing to enforce a covenant that set a "one and one-half story" height limit after finding the language to be ambiguous).

[43] 17 Cal. Rptr. 504 (Ct. App. 1961).

overhead" on their Torrance, California, residential lot.[44] Soon after, neighbors of the defendants sued to enforce a covenant which prohibited dwellings in the neighborhood from exceeding "one story in height."[45] On appeal, the defendants argued that the phrase "one story in height" was ambiguous because it did not represent a precise numerical height limit.[46] The court ruled that, because the phrase did not have a special meaning, it was to be interpreted according to its "ordinary and popular sense."[47] Further, the common meaning was to be gathered in light of the purpose of the instrument as a whole as well as from the "plan and appearance of existing structures in the tract."[48] Applying the foregoing rules, and emphasizing the fact that all the structures in the defendants' neighborhood were one story high, the court concluded that the language exhibited an intent to limit structures to one story so as to protect view planes.[49] It therefore held that the covenant did not permit the defendants' two story structure.[50]

In 1976, the Nebraska Supreme Court reached a similar result in *Pool v. Denbeck*.[51] There, the court found, without analysis, that language limiting the height of structures to "two stories" is unambiguous.[52] Soon after *Pool*, the Supreme Court of Nevada found a "one story" height restriction unambiguous in *Dickstein v. Williams*.[53] In *Dickstein*, the court agreed with the lower court that "common sense" required finding unambiguous the terms "one story from ground level in height."[54] It therefore upheld a covenant and an injunction prohibiting construction of a two story garage.[55]

Finally, in *Foster v. Nehls*,[56] the Washington Court of Appeals enforced a one and one-half story height limit despite finding the limiting language to be ambiguous.[57] In *Foster*, the Nehlses built a two story house on a lot subject to

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[44] *Id.* at 505.

[45] *Id.*

[46] *See id.* at 507.

[47] *Id.*

[48] *Id.*

[49] *See id.* at 507-08.

[50] *See id.* at 507.

[51] 241 N.W.2d 503, 506 (Neb. 1976).

[52] *See id.* at 506.

[53] 571 P.2d 1169 (Nev. 1977).

[54] *Id.* at 1171. In the words of the *Dickstein* court:

> There is no basis in the record for overturning the determinations of the trial court. Upholding a similar injunction restraining the building of a second level over a garage, a California appellate court found "nothing vague, ambiguous or uncertain in the meaning of the restrictive phrase 'one story in height.'"

Id. (quoting *King*, 17 Cal. Rptr. at 507).

[55] *See id.* at 1172.

[56] 551 P.2d 768 (Wash. Ct. App. 1976).

[57] *See id.* at 771.

a covenant that limited structures to "[o]ne and one-half stories in height."[58] The lower court found that the Nehls' residence obstructed view planes and therefore concluded that it violated the purpose of the covenant.[59] On appeal, the Washington Court of Appeals considered whether the phrase "one and one-half stories" had to be qualified by a numerical definition to be given effect.[60] The court noted that ambiguous intent "is to be clarified by reference to the instrument, together with all the surrounding facts and circumstances."[61]

After finding ambiguity in the use of a "floor-space description ('one and one-half stories') to describe a height restriction ('one and one-half stories in height')," the court relied on testimony to arrive at the conclusion that the covenant was intended to "protect the view enjoyed by other neighbors regardless of the actual height of the obstructing buildings."[62] The court found that the Nehls' house substantially obstructed views, and therefore affirmed the order requiring the Nehlses to remove the second story of their residence.[63]

In *Johnson v. Linton*,[64] the Texas Court of Appeals became the first court to refuse to uphold a height restriction utilizing the term "story" on the ground that the term was ambiguous as a matter of law. In finding the phrase "one and one-half stories in height" to be ambiguous, the Texas court relied on testimony showing the language to be reasonably susceptible to more than one meaning.[65] Noting that doubt was to be resolved "in favor of appellants' free use of their premises,"[66] the court refused to uphold an injunction prohibiting additions to a one story garage.[67]

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[58] *Id.* at 770. As in *Hiner*, the Nehls' residence was completed despite warnings from neighbors that it would violate a restrictive covenant. *See id.*

[59] *See id.*

[60] *See id.*

[61] *Id.* at 770-71. The *Foster* court summarized the rules for construction of a covenant as follows:

> Intent of the parties controls in the interpretation of a restrictive covenant. Intent is a question of fact to be discovered by reference to the instrument in its entirety and the manifest meaning of the language used by the parties. Doubtful intent must be resolved in favor of the free use of land. Ambiguous intent is to be clarified by reference to the instrument, together with all the surrounding facts and circumstances.

Id.

[62] *Id.* at 771. The developer of the subdivision testified below that the covenant's purpose was "to not obstruct any views from any house." *Id.*

[63] *See id.*

[64] 491 S.W.2d 189 (Tex. 1973).

[65] *See id.* at 196. In finding the language susceptible to different interpretations, the *Johnson* court focused on conflicting expert testimony concerning the height that might constitute a story. *See id.*

[66] *Id.* at 197.

[67] *See id.* at 198.

Two years later, the Maryland Court of Special Appeals concluded in *Metius v. Julio*[68] that the phrase "three stories in height" was ambiguous when applied to a partially below-grade structure.[69] In *Metius*, the issue was whether a building comprised of three stories above grade and an area "predominantly below grade" violated a "three stories in height" limitation.[70] The court determined that the outcome depended on whether the local zoning code definition of "story" or the building code standard for measuring height controlled.[71] The court concluded the building would violate the covenant under the zoning code because the below-grade level would constitute an impermissible fourth story.[72] On the other hand, under the building code, the structure would consist of an allowable three stories since the below-grade level would not count toward the building's height.[73] The *Metius* court concluded that the restriction was ambiguous and therefore unenforceable since "no given level or point from which to measure the 'height' of the buildings" was contained in the covenant.[74]

III. CONSTRUCTION OF COVENANTS IN HAWAI'I PRIOR TO *HINER*

Prior to *Hiner*, no Hawai'i appellate court had directly considered whether a height restriction utilizing the term "story" was ambiguous.[75] However, in *Collins v. Goetsch*[76] and *Waikiki Malia Hotel, Inc. v. Kinkai Properties Ltd.*

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[68] 342 A.2d 348 (Md. Ct. Spec. App. 1975).

[69] *See id.* at 351.

[70] *Id.*

[71] *See id.* at 353-54. The zoning code in *Metius* defined "story" as including a basement whose "ceiling is over six feet above the average level of the unfinished ground surface . . . or it is used for dwelling purposes." *Id.* at 352. If the zoning code applied, the structure would violate the covenant because the below-grade level would be counted as a story and thus, the building would be more than three stories when measured from the low side. *See id.* at 354. On the other hand, under the applicable building code, the height of a building included any story whose ceiling was six feet above grade. Since the ceiling of the terrace level in *Metius* was only four-and-one half feet above grade, that portion of the structure would not be counted toward the height of the building. In that case, the court concluded that the building would only be three stories tall and therefore, permissible. *See id.* at 353-54.

[72] *See id.* at 353. Even assuming exclusive use of the zoning code, the court noted that the permissibility of the residence would depend on whether it was viewed from the high or low side. *See id.* at 354.

[73] *See id.*

[74] *Id.*

[75] In *Sandstrom v. Larsen*, 59 Haw. 491, 583 P.2d 971 (1978), the Hawai'i Supreme Court considered whether a two story house violated a "one and one-half stories in height" restriction. However, no arguments concerning ambiguity were advanced in that case. *See id.* at 496, 583 P.2d at 976.

[76] 59 Haw. 481, 583 P.2d 353 (1978).

Partnership[77] the Hawai'i Supreme Court established applicable rules of construction where a covenant is challenged as ambiguous. In *Sandstrom v. Larsen*,[78] the Hawai'i Supreme Court relied on the underlying purpose of a restrictive covenant in concluding that a one and one-half story height limit had been violated.[79] Additionally, the *Sandstrom* court established the appropriate remedy for an intentional violation of a covenant.[80] To understand the precedential framework in which *Hiner* arose, it is necessary to review these cases.

In *Collins v. Goetsch*,[81] the Hawai'i Supreme Court considered whether a duplex was permissible under a covenant that limited structures to "no more than a single-family dwelling, except, where a second living unit is legally permitted, any such second unit shall be a part of and annexed to the main dwelling and maintain an outward appearance of a single-family dwelling rather than of a duplex."[82] The court noted that, as expressed by the language of the covenant, the intent of the parties governed its construction of the covenant.[83] Specifically, the court stated:

> In so determining the meaning of language used in a restrictive covenant, a court will take account of the language utilized in the instrument as a whole, and will first look to the plain, ordinary and popular meaning of the words used in the covenant. Additionally, where it may be of assistance, a court may consider the general plan and appearance of existing structures established in the tract in order to ascertain the proper meaning to be accorded the covenant.[84]

The court emphasized that the foregoing rules were to be applied within a framework wherein covenants are strictly construed against the grantor.[85] It then determined that, when viewed alone, the restriction limiting the lot to "no more than a single family dwelling" was sufficient to prevent the Goetschs from using their house as a duplex.[86] However, the court reasoned that, as a whole, the language revealed an intent to conform the appearance of the Goetschs' lot to that of single-family unit, rather than to completely prohibit construction of a duplex.[87] The court subsequently found that the Goetschs' house looked like a single-family dwelling, and therefore complied with the

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[77] 75 Haw. 370, 862 P.2d 1048 (1993).
[78] 59 Haw. 491, 583 P.2d 971 (1978).
[79] *See id.* at 497, 583 P.2d at 977.
[80] *See id.* at 498, 583 P.2d at 978.
[81] 59 Haw. 481, 583 P.2d 353 (1978).
[82] *Id.* at 483-84, 583 P.2d at 356.
[83] *See id.* at 487, 583 P.2d at 358.
[84] *Id.* at 488 n.3, 583 P.2d at 358 n.3 (citations omitted).
[85] *See id.* at 484, 488, 583 P.2d at 357-58.
[86] *See id.* at 485, 583 P.2d at 356.
[87] *See id.* at 488, 583 P.2d at 358.

covenant.[88] In consequence, the court reversed the lower court's injunction prohibiting use of the building as a duplex.[89]

On the same day that it laid down general rules for the construction of covenants in *Collins*, the Hawai'i Supreme Court upheld an injunction in *Sandstrom v. Larsen*[90] that required landowners to remove a portion of their house that violated a one and one-half story height restriction.[91] In *Sandstrom*, the Larsens built a two story house on a lot subject to a covenant that prohibited, among other things, structures exceeding "one and one-half stories in height."[92] In challenging a lower court order requiring them to remove the top story of their house, the Larsens argued that the covenant was abandoned and that the lower court improperly refused to balance hardships before issuing the injunction.[93]

In considering whether the covenant was abandoned, the Hawai'i Supreme Court ruled that the appellants had to show that property owners in the tract "acquiesced in substantial and general violations of the covenant."[94] The court found that the purpose of the covenant was to protect view planes[95] and that, although some houses in the Larsens' neighborhood exceeded "one and one-half stories," none but the Larsens' obstructed view planes. On this basis, the court concluded the covenant had not been abandoned by anyone other than the Larsens.[96]

In addressing the issue of whether a court may consider hardship when fashioning a remedy for the violation of a covenant, the *Sandstrom* court ruled that where a property owner "intentionally violates a valid express restriction running with the land or intentionally 'takes a chance,' the appropriate remedy is a mandatory injunction to eradicate the violation."[97] The court emphasized that an injunction was the correct remedy regardless of either the amount of damage caused by the breach or the amount of damage that might accrue to a

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[88] *See id.* at 489, 583 P.2d at 359.

[89] *See id.*

[90] 59 Haw. 491, 583 P.2d 971 (1978).

[91] *See id.* at 501, 583 P.2d at 979.

[92] *See id.* at 493, 583 P.2d at 975.

[93] *See id.* at 491, 583 P.2d at 974. The appellants conceded that their house violated the language of the covenant and therefore raised "no questions relating to any possible ambiguity." *Id.* at 496, 583 P.2d at 976.

[94] *Id.* at 497, 583 P.2d at 976.

[95] *See id.* at 496, 583 P.2d at 976. The court based its determination of the purpose "upon a consideration of the language of the covenants as a whole . . . in view of the plain, ordinary and popular meaning of the language utilized in the covenants, as well as the general plan and appearance of existing structures in the tract." *Id.* (citing Collins v. Goetsch, 59 Haw. 481, 583 P.2d 353 (1978)).

[96] *See Sandstrom*, 59 Haw. at 497-98, 583 P.2d at 977.

[97] *Id.* at 500, 583 P.2d at 978 (quoting Peters v. Davis, 231 A.2d 748, 752 (Pa. 1967)) (emphasis in original).

property owner as a result of the injunction.[98] Concluding that the Larsens "acted at their own risk" by constructing a two story house on their lot despite awareness of the covenant and in spite of repeated warnings from neighbors,[99] the court affirmed the order requiring removal of the second story of their house.[100]

Fifteen years after it decided *Sandstrom* and *Collins*, the Hawai'i Supreme Court endorsed consideration of extrinsic evidence as an appropriate method for interpreting covenants in *Waikiki Malia Hotel, Inc. v. Kinkai Properties Ltd. Partnership*.[101] There, JMK Associates ("JMK") sold a Waikiki lot to MNS Ltd. ("MNS") subject to the condition that no building constructed on the lot "shall exceed the lesser of four (4) stories or forty-five (45) feet in height."[102] The covenant stated that it was to "run with the land for a period of twenty-five (25) years . . . and shall be binding upon the property, the Grantee, its successors and assigns . . . ."[103] JMK subsequently sold the lot to Kinkai Properties Limited Partnership ("Kinkai") who was not a party to the covenant.[104] Pursuant to plans to build a six-story structure, Kinkai acquired a release of the covenant from the owner of an adjacent lot.[105] The successor to the Covenantor, Waikiki Malia Hotel ("WMH"), then sued under the covenant to halt Kinkai's proposed construction.[106] The lower court held that the covenant was intended to personally benefit JMK and its successor and therefore ordered Kinkai to remove any part of the structure that violated the height restriction.[107]

On appeal, the Hawai'i Supreme Court considered whether the covenant was held in gross.[108] After noting that its determination hinged on the intentions of the parties, the court emphasized that intentions are to be gleaned from the covenant's language and, in the case of ambiguous language, from the "surrounding circumstances."[109] In the court's view, "surrounding circumstances" referred principally to "the geographical location of the land

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[98] *See id.* at 501, 583 P.2d at 979.

[99] *See id.* at 499-500, 583 P.2d at 978.

[100] *See id.* at 500, 583 P.2d at 979.

[101] 75 Haw. 370, 862 P.2d 1048 (1993).

[102] *Id.* at 375, 862 P.2d at 1054.

[103] *Id.*

[104] *See id.* at 375 n.12, 862 P.2d at 1054 n.12.

[105] *See id.* at 377-78, 862 P.2d at 1054-55. According to the court, Kinkai sought the release from the adjacent lot in the belief that the covenant was meant to benefit that particular parcel. *See id.*

[106] *See id.* at 378-79, 862 P.2d at 1055.

[107] *See id.* at 379-80, 862 P.2d at 1055.

[108] *See id.* at 387, 862 P.2d at 1059. As the court explained, "[a] restrictive covenant in gross arises when the covenant does not benefit a specific parcel of land and the benefit is held personally by the grantor." *Id.*

[109] *See id.* at 384-85, 862 P.2d at 1057-58.

and the physical condition of the structures thereon."[110] After concluding that the language was ambiguous as to who benefited from the covenant, the court surveyed the circumstances surrounding creation of the covenant.[111] It was particularly impressed by the fact that "hotel rooms with views on adjacent lot 269 begin at approximately the forty-five foot level," the exact building height allowed by the covenant.[112] On the basis of this evidence, and in light of the rule that "ambiguity is resolved against the person seeking enforcement[,]"[113] the court held that the covenant was intended to benefit the lot which had ceded its right to enforce the covenant.[114] In filling out the rules of construction identified in *Collins*, *Waikiki Malia Hotel* set the stage for *Hiner*.

IV. *HINER V. HOFFMAN*

A. Factual and Procedural History

In 1988, Michael J. Hoffman and Minako S. Hoffman ("Hoffmans") purchased a home lot in Pacific Palisades, a neighborhood in Pearl City, Hawai'i.[115] Like the 118 other lots in the development, the Hoffmans' lot was subject to a 1966 restrictive covenant that stated: "No dwelling shall be erected, altered, placed or permitted to remain on any lot other than one detached single family dwelling . . . which exceeds two stories in height."[116] In 1993, the Honolulu City Building Department approved the Hoffmans' plans to build a three story residence on their property "designed to follow the downhill grade of their lot in a terrace-like form."[117]

Construction began the following year, at which time neighbors and the local homeowners association warned the Hoffmans that their intended three story structure would violate the terms of the 1966 covenant.[118] In November of 1994, the owners of two lots[119] located *mauka*[120] of the Hoffmans ("plaintiffs") joined in filing a complaint against the Hoffmans, seeking a

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[110] *Id.* at 385, 862 P.2d at 1058 (quoting 2 AMER. LAW OF PROP. § 9.29, at 417 (1952)).

[111] *See id.*

[112] *Id.*

[113] *Id.*

[114] *See id.* at 388-89, 862 P.2d at 1059.

[115] *See* Hiner v. Hofffman, 90 Hawai'i 188, 189, 977 P.2d 878, 879 (1999).

[116] *Id.*

[117] *Id.*

[118] *See id.*

[119] The Pacific Palisades Community Association subsequently intervened as a plaintiff. *See id.*

[120] "Mauka is defined as 'inland, upland, towards the mountain[.]'" Fong v. Hoshimoto, 92 Hawai'i 637, 640 n.1, 994 P.2d 569, 572 n.1 (Haw. Ct. App. 1998) (quoting M.K. PUKUI & S.H. EBERT, HAWAIIAN DICTIONARY 242, 365 (6th ed. 1986)).

declaratory judgment that the Hoffmans were violating the covenant.[121] The plaintiffs subsequently sought and were denied a temporary restraining order.[122] Soon after, the Hoffmans completed their house as planned.[123] As finished, the third story of the residence partially obscured the downhill view from the aforementioned *mauka* lots.[124]

In May of 1996, plaintiffs moved for summary judgment on their complaint.[125] The Hoffmans subsequently filed a cross-motion for summary judgment.[126] In considering the motions, the lower court determined that the covenant was unambiguous and that the Hoffmans' three story house violated the restrictive language contained therein.[127] The circuit court therefore granted plaintiff's motion for summary judgment and issued a mandatory injunction ordering the Hoffmans to remove the top story of their residence.[128] The Hoffmans appealed, and the Hawai'i Supreme Court agreed to hear their case.[129]

B. The Majority Opinion

In *Hiner*, the Hawai'i Supreme Court voted three to two to hold the 1966 covenant unenforceable against the Hoffmans.[130] The precise issue before the court was whether the language of the 1966 covenant was ambiguous and, if so, the effect of that ambiguity on the lower court's injunction.[131] Laying the framework for its analysis, the majority explained that the intentions of the parties to the covenant "are normally determined by the language of the deed[,]"[132] and that any ambiguity is to be "resolved against the person seeking its enforcement."[133] Additionally, the majority emphasized that the purpose

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[121] *See Hiner* at 189, 977 P.2d at 878.

[122] *See id.*

[123] *See id.*

[124] *See id.* at 189, 977 P.2d at 879.

[125] *See id.* at 190, 977 P.2d at 880.

[126] *See id.*

[127] *See id.*

[128] *See id.*

[129] *See id.*

[130] *See id.* at 196, 977 P.2d at 886. The majority included Chief Justice Ronald T.Y. Moon, and Justices Robert G. Klein and Steven H. Levinson. Justice Mario Ramil joined Justice Paula Nakayama in dissent. *See id.* at 188, 977 P.2d at 878.

[131] *See id.*

[132] *Id.* at 190, 977 P.2d at 880 (citing Waikiki Malia Hotel, Inc. v. Kinkai Properties Ltd. Partnership, 75 Haw. 370, 384, 862 P.2d 1048, 1057 (1993)). In a parenthetical, the majority noted that the *Waikiki Malia Hotel* court had looked at "the geographical location of the lands and the physical condition of the structures thereon" to resolve ambiguity. *Hiner*, 90 Hawai'i at 190, 977 P.2d at 880.

[133] *Id.* (citing *Waikiki Malia Hotel*, 75 Haw. at 384, 862 P.2d at 1057).

of the instrument was to restrict the height of the homes in the Pacific Palisades neighborhood.[134] It then turned quickly to the language in the instrument and concluded that the phrase "two stories in height" was ambiguous in the absence of precise dimensions for a "story."[135] Without such dimensions, the majority insisted that it could not determine whether the Hoffmans' structure exceeded the height restriction intended by the covenant.[136] Consequently, the phrase "two stories in height" was "meaningless" as a height restriction.[137]

The majority proposed two hypothetical situations to illustrate the perceived ambiguity of the covenant's language.[138] First, it noted that where "story" is left undefined, the phrase "two stories in height" would seemingly permit a two story house that consists of twenty-five foot high stories,[139] but preclude a three story residence where each story is only ten feet high.[140] Second, the court pointed out that the Hoffmans' residence would comply with the restrictive language if the middle floors of the residence were ordered removed instead of the top floor.[141] In light of the possibility that a two story house could be higher than the Hoffmans' three story residence, the majority reiterated that the language "two stories in height" was "inherently ambiguous."[142]

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[134] *See id.* at 191, 977 P.2d at 881. The majority opinion noted that the parties' concern with the protection of view planes and their "emphasis on 'height' implied that the object of the covenant was to protect view planes." *Id.*

[135] *See id.* In considering whether the term "story" was sufficiently defined to operate as a height restriction, the majority took judicial notice of the Revised Ordinances of Honolulu ("ROH"), which include the Land-Use Ordinance ("LUO") and the Uniform Building Code ("UBC"). The court determined that the ROH specifically defined the minimum height of a "story", but failed to set maximum dimensions. *See id.* at 192, 977 P.2d 882.

[136] *See id.* at 191, 977 P.2d at 881. In the words of the majority:

> The failure of the 1966 covenant to prescribe in feet, or by some other numerical measure, the maximum "height" of a "story" renders the language of the covenant ambiguous. As the Hoffmans point out, without such a definition, the "height restriction" of which the plaintiff-appellees speak is meaningless.

Id.

[137] *Id.* at 191-92, 977 P.2d at 881-82.

[138] *See id.*

[139] The majority did not note that its hypothetical 50 foot house would be 20 feet higher than the allowable height for residences within zone R-5 (the zone applicable to the Hoffmans' house) under the Revised Ordinances of Honolulu. *See id.* at 192, 977 P.2d at 882. *See also* 2 HONOLULU, HAW., REV. ORDINANCES, § 21-5.40-2(b), § & tbl. 21-5.8-B (1990).

[140] *See Hiner*, 90 Hawai'i at 191, 977 P.2d at 881.

[141] *See id.* The Hoffmans' house is "in a staggered, terrace-like form." *Id.* at 189, 977 P.2d at 879. Thus, it would be physically possible to remove the lower stories of the residence without affecting the top story.

[142] *Id.* at 192, 977 P.2d at 882. The majority emphasized that the "inherent" ambiguity of the language was particularly evident "where the parties agree that the purpose of the covenant

The majority supported its conclusions by citing to other jurisdictions that have found language similar to "two stories in height" to be ambiguous.[143] In the same breath, it dismissed without explanation authority supporting the contrary view.[144] The majority then rejected plaintiff's reliance on *Pelosi v. Wailea Ranch Estates*[145] and *Sandstrom v. Larsen*.[146] It first distinguished *Pelosi* on the basis that the purpose of the covenant in that case was to "[establish] and [insure] a sound and proper subdivision for residential purposes," not to restrict "height."[147] It also noted that *Pelosi* differed from *Hiner* in that the structures which violated the covenant in *Pelosi* were clearly not allowed by the restrictive language at issue in that case.[148] Turning to *Sandstrom*, the majority found that decision inapplicable because it did not involve questions of ambiguity.[149]

Finally, the majority considered the effect of its finding of ambiguity on the injunction against the Hoffmans.[150] Noting that the rule emanated from the need to conduce the "careful drafting of covenants"[151] and a "long-standing" policy that favored the "unrestricted use of property" in cases where a

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is to restrict the height of the homes in the neighborhood so as to protect view planes." *Id.*

[143] *See id.* at 193, 977 P.2d at 883. The majority pointed with favor to *Foster v. Nehls*, 551 P.2d 768, 771 (Wash. Ct. App. 1976) (concluding that "one and one-half stories" was ambiguous when used to describe a height restriction), *Metius v. Julio*, 342 A.2d 351, 353 (Md. Ct. Spec. App. 1975) (holding that "three-stories in height" is ambiguous"), and *Johnson v. Linton*, 491 S.W.2d 189, 196-97 (Tex. 1973) (concluding that "one and one-half stories in height" is ambiguous).

[144] *See Hiner*, 90 Hawai'i at 193, 977 P.2d at 883. In rejecting cases that found language similar to that in *Hiner* to be unambiguous, the court merely stated that they did not find them "persuasive." *See id.*

[145] 10 Haw. App. 424, 876 P.2d 1320, *reh'g denied*, 10 Haw. App. 631, 879 P.2d 591, *cert. denied*, 77 Hawai'i 373, 884 P.2d 1149 (1994). In *Pelosi*, the Intermediate Court of Appeals of Hawai'i considered whether Wailea Ranch Estates ("WRE") violated a covenant that prohibited subdivision lots from being used "except for residential purposes" by constructing a roadway and a tennis court upon such a lot. *See id.* at 426, 876 P.2d at 1323. Rejecting the argument that the covenant was ambiguous, the court concluded that the "plain, ordinary and accepted meanings" of its terms required the court to view the instrument as allowing only single-family dwellings and structures accessory thereto. *Id.* at 437, 876 P.2d 1327. The court subsequently determined that WRE breached the covenant when it utilized a lot for a roadway and tennis court since that lot did not contain single-family residences. *See id.* Suggesting that WRE may have knowingly violated the covenant, the court remanded the case for a determination of whether a mandatory injunction requiring removal of the offending structures was required under Hawai'i Supreme Court precedent. *See id.* at 445, 876 P.2d at 1330.

[146] 59 Haw. 491, 583 P.2d 971 (1978).

[147] *Hiner*, 90 Hawai'i at 194, 977 P.2d at 884 (brackets in original).

[148] *See id.*

[149] *See id.*

[150] *See id.*

[151] *Id.* (citing Waikiki Malia Hotel, Inc. v. Kinkai Properties Ltd. Partnership, 75 Haw. 370, 387, 862 P.2d 1048, 1059 (1993)).

covenant is found to be ambiguous,[152] the majority reiterated that doubt in a covenant is to be resolved against the person seeking its enforcement.[153] Following that principle, the majority concluded that it was compelled to allow the Hoffmans to keep the third story of their house.[154] However, the majority cautioned that its holding was not to be construed as invalidating all covenants that restricted homes to "two stories." On the contrary, it suggested that a "two story" restriction for aesthetic purposes might be enforceable since the phrase "two stories in height" was only ambiguous as an attempt to restrict height.[155] Further, the majority emphasized that its decision did not hinge the enforceability of restrictive covenants on the utilization of precise numerical specifications.[156] Instead, the decision merely required that language be more certain and amenable to "uniform enforceability" than "two stories in height."[157]

C. The Dissenting Opinion

In a dissenting opinion, Justice Paula Nakayama strongly disagreed with the majority's reasoning and conclusions.[158] The dissent specifically criticized the majority's conclusion that "where the height of a two story residence could equal or exceed the height of the Hoffmans' three story residence, the language 'two stories in height' is inherently ambiguous."[159] According to the dissent, the proper rule for construction of a covenant requires that "words are to be taken in their ordinary and popular sense."[160] Applying the "common meaning" rule to *Hiner*, the dissent contended that the language "two stories

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[152] *Id.* at 193, 195, 977 P.2d at 883, 885.

[153] *See id.* at 195, 977 P.2d at 885.

[154] *See id.* at 196, 977 P.2d at 886.

[155] *See id.* at 192, 977 P.2d at 882.

[156] *See id.* at 194, 977 P.2d at 884.

[157] *Id.* In the words of the majority, "our decision today merely requires drafters of covenants to use language that, in light of the purpose of the covenant, provides greater certainty and is more susceptible to uniform enforceability than that found in the 1966 covenant." *Id.*

[158] *See id.* at 196-99, 977 P.2d at 886-89 (Nakayama, J., dissenting).

[159] *Id.* at 197, 977 P.2d at 887 (Nakayama, J., dissenting) (quoting the majority opinion at 192, 977 P.2d at 882).

[160] *Id.* at 196, 977 P.2d at 886 (Nakayama, J., dissenting) (quoting Demund v. Lum, 5 Haw. App. 336, 343, 690 P.2d 1316, 1321 (1984)). It is interesting that Justice Nakayama quoted from *DeMund*, rather than Hawai'i Supreme Court precedent, to support the contention that covenants are to be construed according to their common meaning. *See Hiner*, 90 Hawai'i at 196, 977 P.2d at 886 (Nakayama, J., dissenting). One explanation may lie in the fact that the injunction upheld in *DeMund* was originally issued by then First Circuit Court Judges Robert G. Klein and Ronald T.Y. Moon, both of whom were among the majority in *Hiner*. *See Demund*, 5 Haw. App. at 336, 690 P.2d at 1316.

in height" was properly viewed as an ordinary expression that "manifests the purpose of limiting structures to two stories or less – without regard or reference to exact 'height' in feet or inches."[161] On the basis of this interpretation, Justice Nakayama concluded that the Hoffmans' three story house was simply not compatible with the phrase "two stories in height."[162] In the dissent's view, the majority failed to arrive at the same conclusion because it viewed the language in an "analytical vacuum" rather than considering the ordinary meaning of the terms.[163]

Even assuming that the language was ambiguous, Justice Nakayama disagreed with the conclusion that the covenant was unenforceable.[164] On the contrary, the dissent argued that evidence showing that the Hoffmans' third story impaired views, and thus undermined the purpose of the covenant, should have led the court to affirm the injunction ordering removal of the offending portion.[165] Further, the dissent expressed concern that a failure to grant such an injunction would undermine the validity of covenants not at issue in *Hiner*,[166] and unduly burden homeowners by forcing them to "seek out evidence of the drafters' intent" so as to determine the validity of restrictive covenants.[167] Finally, the dissent disagreed with the majority's policy of favoring the unrestricted use of property, protesting that it was "manifestly unjust to sanction the Hoffmans' willful noncompliance" based on such a policy, especially in light of evidence that the other homes in Pacific Palisades were limited to two stories.[168]

D. The Majority's Response to the Dissent

In response, the majority took the dissent to task for failing to acknowledge and give effect to the "in height" portion of the language "two stories in

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[161] *Hiner*, 90 Hawai'i at 196, 977 P.2d at 886 (Nakayama, J., dissenting).

[162] *See id.* at 196, 977 P.2d at 886 (Nakayama, J., dissenting). Justice Nakayama explained that "[o]ne need not analyze any further or inquire into the height of the structure in feet and inches to determine that the Hoffmans' house strays from the common and conventional meaning of 'two stories in height.'" *Id.* To support this conclusion, the dissent relied heavily on *King v. Kugler*, 17 Cal. Rptr. 504 (Ct. App. 1961). *See Hiner*, 90 Hawai'i at 196-97, 977 P.2d at 886-87 (Nakayama, J., dissenting).

[163] *See Hiner*, 90 Hawai'i at 196-97, 977 P.2d at 886-87 (Nakayama, J., dissenting).

[164] *See id.* at 198, 977 P.2d at 888 (Nakayama, J., dissenting).

[165] *See id.* (Nakayama, J., dissenting) (citing Foster v. Nehls, 551 P.2d 768 (Wash. 1976)).

[166] *See id.* (Nakayama, J., dissenting). Justice Nakayama protested that "[a]lmost any plainly worded covenant could become ambiguous under the majority's approach," and further, that "a duplex could qualify under the majority's analysis as a 'single family residence.'" *Id.* at 198 n.4, 977 P.2d at 888 n.4 (Nakayama, J., dissenting).

[167] *Id.* at 198, 977 P.2d at 888 (Nakayama, J., dissenting).

[168] *Id.* at 199, 977 P.2d at 889 (Nakayama, J., dissenting).

height."[169] In the majority's view, the dissent was able to avoid concluding that the term "story" was meaningless without precise definitions only because it failed to recognize the covenant's emphasis on "height."[170] Such selective reading caused the dissent to wrongly focus "on the fact that 'three stories' is greater than 'two stories'" instead of engaging the real issue of whether the Hoffmans' home exceeded "two stories in height."[171] Additionally, the majority scolded the dissent for concluding that *Hiner* would preclude homeowners from relying "on the plain language of covenants" and instead require them to determine the drafters' intent.[172] In the majority's view, such a charge was unwarranted because it rested on the flawed premise that the covenant's language was "plain" and unambiguous.[173] Finally, the majority dismissed the dissent's skeptical reception of the idea that a "two story" restriction would be enforceable for aesthetic purposes. Specifically, the majority criticized the dissent for not recognizing that the words "two stories" were susceptible to only one understanding when employed to signify an allowable appearance.[174]

V. ANALYSIS

The decision allowing the Hoffmans' to keep the third story of their house rests largely on the rule that ambiguous covenants are to be strictly construed in favor of the free use of property.[175] At first glance, application of such a rule appears to place the case well within the parameters of recent Hawai'i Supreme Court precedent.[176] However, a careful examination of the majority

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[169] *See id.* at 193, 977 P.2d at 883. The majority specifically noted that "[u]nlike that of the dissent, our approach does not treat any part of the language as surplusage to be ignored out of unsubstantiated fears about 'uncertainty, litigation, opportunistic non-compliance, and unneighborly relations.'" *Id.*

[170] *See id.* at 191-92, 977 P.2d at 881-82. The majority argued that "[t]he dissent attempts to avoid this problem by assuming that which it hopes to prove, as if, by declaring the house to be 'three stories,' that declaration provides a measurable and enforceable limit to the 'height' of each 'story.'" *Id.*

[171] *Id.* at 193, 977 P.2d at 883.

[172] *Id.*

[173] *Id.* The majority noted that "the dissent's criticism rests entirely on the premise that there is no ambiguity in the language 'two stories in height.' If we agreed with this point, the remaining disagreements would evaporate." *Id.*

[174] *See id.* at 193 n.5, 977 P.2d at 883 n.5. In the words of the majority, "[t]he fact that two story and three story houses may have the same external appearance has no bearing on the clarity of the phrase 'two stories'; either a structure is or is not two stories." *Id.*

[175] The majority opinion cites the rule favoring the strict construction of ambiguous covenants on four separate occasions in *Hiner*, a frequency unmatched by any other rule discussed in that case. *See id.* at 190, 193, 195, 977 P.2d at 880, 883, 885.

[176] *See supra* note 6 and accompanying text.

opinion shows that its critical finding of ambiguity, and the resulting rule of strict construction, derived from an incomplete analysis of the language in the 1966 covenant.[177] More specifically, the majority's approach to the language is deficient in its failure to seek the intended meaning of the phrase "two stories in height" through consideration of the common usage of the covenant's language, the circumstances surrounding its use, and the purpose it was meant to effectuate.

Given that the aforementioned rules are traditionally employed for the purpose of determining what the parties intended by language in a covenant,[178] it is disturbing that the majority opted not to apply any of these standard techniques. Its failure to consider the common usage of the covenant's language and the circumstances surrounding its creation is especially perplexing since Hawai'i courts have repeatedly stressed the importance of those rules for clarifying covenant disputes.[179] Yet, the majority's misuse of the underlying purpose of the covenant more dramatically illustrates its half-hearted approach toward ascertaining the parties' intent.

Courts increasingly rely on the general purpose of a covenant to determine what the parties meant by specific disputed terms.[180] *Foster v. Nehls*[181] provides a vivid example of this procedure. There, the Washington Court of Appeals continued its search for the meaning of the phrase "one and one-half stories in height" after finding that it was ambiguous.[182] Notably, it focused on the fact that the restriction was meant to preserve view planes in concluding that the language was not intended as a numerically precise height limit and was therefore enforceable.[183] Like the *Foster* court, the *Hiner* majority explicitly recognized that the underlying purpose of the 1966 covenant was to

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[177] In the words of the dissent, the majority operated in an "analytical vacuum." *Hiner*, 90 Hawai'i at 198, 977 P.2d at 888 (Nakayama, J., dissenting).

[178] *See supra* notes 13-15, 33-36 and accompanying text. *See, e.g., In re* Johnson's Taxes, 44 Haw. 519, 530, 356 P.2d 1028, 1034 (1960) (explaining that "interpretation of a statute by reference to the common meaning of its words is really nothing more than a rule of common sense, for it must be supposed that the legislature . . . intended that the words therein should be understood in the sense in which they are ordinarily and popularly understood by the people").

[179] *See* Collins v. Goetsch, 59 Haw. 481, 488 n.3, 583 P.2d 353, 358 n.3 (1978) (stating that the court will first look to the plain, ordinary and popular meaning of the words used in the covenant); Clark v. Wodehouse, 4 Haw. App. 507, 511, 669 P.2d 170, 173 (1983) (noting that "in determining the meaning of the language used in a restrictive covenant, the court 'will first look to the plain, ordinary and popular meaning of the words used in the covenant'" (citation omitted)). *See also* Sandstrom v. Larsen, 59 Haw. 491, 496, 583 P.2d 971, 976 (1978) (finding the purpose of a height restriction according to the "plain, ordinary and popular usage meaning of the language").

[180] *See supra* note 15, 36 and accompanying text.

[181] 551 P.2d 768 (Wash. Ct. App. 1976).

[182] *See id.* at 771.

[183] *See id.*

protect view planes.[184] However, in *Hiner*, the majority failed to use that knowledge to ferret out the intended meaning of "two stories in height." Instead, it informed its analysis by constant reference to the covenant's subordinate purpose as a height restriction.[185] This unwillingness to acknowledge, much less apply, the underlying purpose as an interpretive tool is all the more curious given that the majority was familiar with *Foster* and even cited that case with favor.[186]

Arguably, the application of the aforementioned intent-seeking rules would have led the *Hiner* court to conclude that the covenant's language was simply meant to prevent houses from exceeding two stories and was therefore unambiguous.[187] The apparent disregard for underlying purpose is troublesome, however, not only because it could have used that purpose to clarify language, but also because other courts have made the protection of view planes the dispositive factor when enforcing height limits that utilize the term "story."[188] Indeed, in jurisdictions outside of Hawai'i, underlying purpose is increasingly viewed as an element that cannot be defeated by application of the rule of strict construction.[189] The Intermediate Court of

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[184] *See* Hiner v. Hoffman, 90 Hawai'i 188, 190, 977 P.2d 878, 880 (1999).

[185] On at least four occasions, the majority stressed that the purpose of the covenant was to restrict height. *See id.* at 191-93, 977 P.2d at 881-83. Perhaps the majority's emphasis on the covenant as a height restriction, rather than as a protector of view planes, explains why the majority concentrated on finding a clear numerical expression for the covenant rather than on the possibility that it was meant as an imprecise "two story" limit that might nevertheless serve to protect view planes.

[186] *See id.* at 193, 977 P.2d at 883 (citing Foster v. Nehls, 551 P.2d 768 (Wash. Ct. App. 1976), for the proposition that the phrase "one and one-half stories" is ambiguous).

[187] The majority's failure to look to the common usage of language may have been particularly significant given that the Hoffmans first argued that their house was not two stories, thereby suggesting that they understood the phrase "two stories in height" to mean "two stories," and in light of the fact that other courts have relied on that rule in upholding height restrictions using the term story. *See* King v. Kugler, 17 Cal. Rptr. 504 (Ct. App. 1961); Dickstein v. Williams, 571 P.2d 1169 (Nev. 1977). Similarly, given evidence that all of the houses in the Hoffmans' neighborhood were two stories or less, the majority's neglect of surrounding circumstances may have had a profoundly negative impact on the plaintiff's ability to show that "two stories in height" was intended to mean "two stories." *See Hiner*, 90 Hawai'i at 199, 977 P.2d at 889 (Nakayama, J., dissenting).

[188] *See* Smith v. North, 53 Cal. Rptr. 94 (Cal. Ct. App. 1966) (refusing to enforce a covenant that prohibited dwellings from "contain[ing] more than one floor above ground level" because such enforcement would not effectuate the covenant's purpose in protecting view planes); Glover v. Santangelo, 690 P.2d 1083 (Or. Ct. App. 1984), *review denied*, 695 P.2d 1371 (1984) (enforcing a one story height restriction against a house with an above-grade basement and another floor because the house interfered with a view sought to be protected by the covenant); McDonough v. W.W. Snow Constr. Co., 306 A.2d 119 (Vt. 1973) (upholding a one story height restriction because its enforcement fulfilled the covenant's purpose in preserving views).

[189] *See supra* note 38 and accompanying text.

Appeals of Hawai'i has recognized this trend with favor.[190] Moreover, although it has not explicitly adopted such a view, the Hawai'i Supreme Court took a step in that direction when it determined in *Sandstrom* that a one and one-half story restriction had not been abandoned by property owners who built higher homes because such action did not defeat the covenant's purpose in protecting view planes.[191] Unfortunately, in *Hiner*, the majority followed the opposite approach, allowing the Hoffman's house to stand despite the fact that it clearly obstructed view planes and thus defeated the covenant's purpose.[192]

Like its failure to address the common meaning and surrounding circumstances, the *Hiner* court's disregard for the clear purpose of the height restriction action makes it difficult to believe that the court was properly committed to giving the challenged covenant its intended meaning.[193] This is not to suggest that the majority was unaware of the relevance of the parties' intentions. To be sure, it correctly noted that such intentions are primarily determined by reference to the language itself.[194] Moreover, it is clear that the majority gave considerable attention to the phrase "two stories in height."[195] However, appropriate regard for the parties own understanding of a covenant does not flow from a bare examination of its words, especially where there is ambiguity. Instead, it requires the use of established intent-seeking rules of interpretation. Viewed against its failure to apply such rules, it appears that the majority invoked the rule of strict construction on a thinly supported finding of ambiguity. Thus, one can only conclude that *Hiner* represents a

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[190] *See* Pelosi v. Wailea Ranch Estates, 10 Haw. App. 424, 440, 876 P.2d 1320, 1328 (1994) (quoting Rush v. Miller, 584 P.2d 960 (Wash. App. 1978) for the proposition that "the courts will not apply a rule of construction where it will defeat the obvious purpose of the restriction").

[191] *See* Sandstrom v. Larsen, 59 Haw. 491, 497, 583 P.2d 971, 977 (1978). *See also supra* notes 94-96 and accompanying text.

[192] The dissent exhibited considerable frustration with the majority's unwillingness to give effect to the purpose of the covenant: "Purporting to interpret the covenant in light of its purpose of limiting height and protecting view planes, the majority deprives the covenant of any limiting effect and thus defeats the very purpose it purports to uphold." Hiner v. Hoffman, 90 Hawai'i 188, 198, 977 P.2d 977, 888 (1999) (Nakayama, J., dissenting). Strangely, the majority never addressed this argument.

[193] Indeed, in the dissent's view, the majority "labor[ed] to create" rather than to resolve ambiguity. *Id.* at 196, 977 P.2d at 886 (Nakayama, J., dissenting). This conclusion is buttressed by the fact that, in responding to many of the dissent's criticisms, the majority never answered the dissent's argument that popular usage of "two stories in height" compelled the conclusion that the parties simply intended the covenant to limit houses to "two stories or less – without regard or reference to exact 'height' in feet and inches." *Id.* at 193-94, 977 P.2d at 883-84 (Nakayama, J., dissenting).

[194] *See id.* at 190, 977 P.2d at 880.

[195] *See id.* at 190-93, 977 P.2d at 881-83.

premature rush toward application of the rule and ultimately, the preservation of the Hoffmans' house.

V. CONCLUSION

In her dissent, Justice Nakayama expressed the fear that *Hiner* would increase "uncertainty" and "litigation" with respect to other restrictive covenants.[196] In the short term, this may indeed represent *Hiner*'s principle legacy. However, in the long run, *Hiner* is likely to exert more influence through its solidification of the rule of strict construction. While other jurisdictions have turned away from that rule,[197] *Hiner* ensures that it will continue to govern the construction of covenants in Hawai'i for some time to come. Further, because the majority resorted to the rule without first applying intent-seeking rules of construction to the disputed covenant, one might conclude that *Hiner* actually lowers the bar for application of the rule and thus signals a new round of skepticism toward private land use restrictions.[198]

J. David Breemer[199]

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[196] *See id.* at 196, 977 P.2d at 886 (Nakayama, J., dissenting).

[197] *See supra* notes 38-40 and accompanying text.

[198] In the first Hawai'i covenant case to follow *Hiner*, the court upheld *Hiner* in refusing to enforce a one story height restriction against owners who built a two story house. *See* Fong v. Hashimoto, No. 19424, 2000 Haw. LEXIS, at *4 (Hawai'i Feb. 1, 2000).

[199] Class of 2001, William S. Richardson School of Law. The author thanks Jesus Christ and his wife, Mirabai Breemer, for the support necessary to complete this paper.

Wyoming v. Houghton: The Bright Line Search Includes Passengers' Belongings

I. INTRODUCTION

These are the facts: A man is driving. A police officer stops him for speeding and a faulty brake light. During questioning, the officer sees a hypodermic syringe in the man's shirt pocket. The man admits to using the syringe. In the front seat is a female passenger. While searching the car for drugs, the officer finds her purse in the back seat. The woman claims the purse as hers. Here is the question: Should the officer be able to search her purse?[1] On the one hand, the officer should be permitted to do his job. On the other hand, the woman's right to privacy is at stake.

The warrant requirement implied in the Fourth Amendment[2] prevents overbroad or unjustified searches, and makes warrantless searches permissible only in "specifically established and well-delineated exceptions."[3] In 1925,

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[1] The scope of the question is dictated by the development of caselaw to date. Inquiries into whether the officer had probable cause to question the driver or to search the automobile have already been affirmatively answered. *See* discussion *infra* section II.A. Additionally, caselaw has also established that the officer is permitted to search containers found within the automobile that may contain the object of the search. *See* discussion *infra* section II.A. Thus, if the container belonged to the individual under suspicion, there presumably would be no question to pose. The facts, however, introduce intriguing elements, namely that Houghton was not under suspicion, and that she claimed the purse as her own. Therefore, the question posed – and the central question of this casenote – is whether a distinction should be drawn as to ownership of the container.

[2] The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. "Although the Fourth Amendment does not explicitly impose the requirement of a warrant, it is of course textually possible to consider that implicit within the requirement of reasonableness." California v. Acevedo, 500 U.S. 565, 582 (1981) (Scalia, J., concurring).

[3] *Acevedo*, 500 U.S. at 580 (quoting Mincey v. Arizona, 437 U.S. 385, 390 (1978), quoting Katz v. United States, 389 U.S. 347, 357 (1967) (footnotes omitted)). Among the exceptions to the warrant requirement for searches are: 1) searches of the person incident to lawful arrest, *see* Chimel v. California, 395 U.S. 752 (1969); 2) stop and frisk situations, *see* Terry v. Ohio, 392 U.S. 1 (1968); 3) inventory searches, *see* South Dakota v. Opperman, 428 U.S. 364 (1976); 4) other exigent circumstances, *see, e.g.*, Warden v. Hayden, 387 U.S. 294 (1967); and 5) the automobile exception, *see* Carroll v. United States, 267 U.S. 132 (1925). For an in-depth discussion of search and seizure, including exceptions to the warrant requirement, see WAYNE R. LAFAVE, A TREATISE ON THE FOURTH AMENDMENT §§ 5.5(a), (c), and 7.2 (3d ed. 1996). The fifth exception is the topic of this casenote.

For a discussion on traffic stops and the Fourth Amendment, see Chris K. Visser, *Without a Warrant, Probable Cause, or Reasonable Suspicion: Is There Any Meaning to the Fourth Amendment While Driving a Car?*, 35 HOUS. L. REV. 1683 (1999).

Carroll v. United States[4] established the automobile exception: the Court held that a warrantless search of an automobile stopped by police officers who had probable cause to believe the vehicle contained contraband was not unreasonable under the Fourth Amendment.[5] Applying *Carroll* to the fact pattern above, it is clear that the officer may search the automobile. Does the automobile exception, however, also authorize a search of the woman's purse? The United States Supreme Court answered "yes."

In the Supreme Court's most recent decision involving the automobile exception, *Wyoming v. Houghton*,[6] the Court held that "police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search."[7] Thus, an officer may arrest a passenger after finding drugs in her purse even though 1) the information prompting the search implicated the driver, not the passenger, and 2) the passenger claimed the purse as her own.[8]

At first glance, the results of the holding seem startling. The outcome understandably strikes concern that the individual rights provided by the Fourth Amendment are not being adequately protected, and that "the promotion of legitimate governmental concerns"[9] will lead to a further deterioration of rights.[10] The history of the automobile exception evinces these concerns, showcasing the Court's struggle over where to place the limitations on the exception.[11] However, while this case presents a vivid example of the conflict and tension that has erupted over the automobile exception, a careful analysis of the use and interpretation of past cases reveals that the Court has faithfully applied stare decisis.

The primary purpose of this casenote is to shed light on the Supreme Court's most recent extension of the automobile exception, and to predict its impact in Hawai'i. Part II of this casenote traces the history of the automobile exception from its inception in 1925 until the present. Part III sets out the

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[4] 267 U.S. 132 (1925).

[5] *See id.* at 162.

[6] 526 U.S. 295 (1999).

[7] *Id.* at 307. During the 1998-1999 term, the Supreme Court analyzed four cases that addressed the privacy rights individuals have in their cars. Three cases upheld the warrantless search or seizure of vehicles: *Florida v. White*, 526 U.S. 559 (1999); *Maryland v. Dyson*, 527 U.S. 465 (1999); *Wyoming v. Houghton*, 526 U.S. 295 (1999). Only in *Knowles v. Iowa*, 525 U.S. 113 (1998), did the Court determine that the search violated the Fourth Amendment.

[8] *See Houghton*, 526 U.S. at 295, 306.

[9] *Id.* at 300.

[10] For an in-depth discussion on the examination and assessment of the warrant rule, see James J. Tomkovicz, California v. Acevedo: *The Walls Close in on the Warrant Requirement*, 29 AM. CRIM. L. REV. 1103 (1992).

[11] This is evidenced in part by the fact that the Court has produced several dissenting opinions. *See, e.g.*, United States v. Ross, 456 U.S. 798, 826-43 (1982); California v. Acevedo, 500 U.S. 565, 585-602 (1981); United States v. Di Re, 332 U.S. 581, 595 (1948).

factual and procedural background to the issues raised in *Houghton*. Part IV summarizes the majority, concurring, and dissenting opinions of that case. Part V examines the Court's analysis of the automobile exception by contrasting the majority's and dissent's use of past cases in framing their arguments. Part VI analyzes the possible effects of *Houghton* on current caselaw in Hawai'i. Part VII concludes that federal and Hawai'i State caselaw are traveling in opposite directions.

II. HISTORY OF THE AUTOMOBILE EXCEPTION

A. Establishing the Automobile Exception

1. The seminal case: Carroll v. United States

Carroll v. United States,[12] decided in 1925, is the seminal case in establishing the automobile exception to the warrant requirement.[13] The *Carroll* Court examined the National Prohibition Act,[14] and concluded that both legislative history[15] and caselaw[16] distinguished between the necessity for a search

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[12] 267 U.S. 132 (1925).

[13] In September and October of 1921, federal prohibition agents obtained evidence that George Carroll and John Kiro were transporting liquor between Grand Rapids and Detroit in an Oldsmobile Roadster. *See Carroll*, 267 U.S. at 132-35. On December 15, 1921, the agents stopped Carroll's Oldsmobile Roadster, which had passed them as they were patrolling the road. *See id.* The agents searched the interior, slashed the upholstery and found 68 bottles of whiskey and gin hidden inside. *See id.* at 132-35. No warrant had been obtained for the search. *See id.*

[14] The seizure was made under Section 26, Title II of the National Prohibition Act, which provides in part:

> When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof.

National Prohibition Act, ch. 85, tit. 2, § 26. Section 25, Title II makes it unlawful to have or possess any liquor that was used or is intended for use in violating the Act, and provides that no property rights shall exist in such liquor. National Prohibition Act, ch. 85, tit. 2, § 25, 41 Stat. 305, 315 (1919) (repealed 1935).

[15] The Court cites the legislative history of section 6 of an Act supplemental to the National Prohibition Act, also known as the Stanley Amendment. *See Carroll*, 267 U.S. at 144-47. The Stanley Amendment was first passed through the Senate, and then was objected to in the House of Representatives. *See id.* at 144-45. The Judiciary Committee reported to the House a substitute draft. *See id.* at 145. The Court cited a portion of the Judiciary Committee's report, including the committee's concern that:

> [the Senate version would] make it impossible to stop the rum running automobiles

warrant in the search of private dwellings and the search of automobiles and other vehicles in the enforcement of the Prohibition Act.[17] The Court further concluded that the distinction, based on the impracticability of securing a warrant in cases involving the transportation of goods, is consistent with the Fourth Amendment.[18] The Court claimed "[i]t would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search."[19] Thus, the Court held that a law enforcement officer may, without a warrant, search an automobile and seize contraband liquor as long as the officer has probable cause to believe that the automobile contains contraband liquor.[20]

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engaged in like illegal traffic. It would take from the officers the power they absolutely must have to be of any service, for if they can not search for liquor without a warrant they might as well be discharged.

See id. at 146. The report resulted in an amendment that penalized any agent who searched a private dwelling without a proper search warrant, or searched maliciously and without reasonable cause any other building or property. *See* Act of Nov. 23, 1921, ch. 134, § 6, 42 Stat. 222 (repealed 1935). Thus, as the Court noted, the Act "left the way open for searching an automobile, or vehicle of transportation, without a warrant, if the search was not malicious or without probable cause." *Carroll*, 267 U.S. at 147. The Court also examined other provisions, and reached the following conclusion:

> Thus contemporaneously with the adoption of the Fourth Amendment we find in the First Congress, and in the following Second and Fourth Congresses, a difference made as to the necessity for a search warrant between goods subject to forfeiture, when concealed in a dwelling house similar place, and like goods in course of transportation and concealed in a movable vessel where they readily could be put out of reach of a search warrant.

Id. at 151.

[16] *See id.* at 147-50 (citing Amos v. United States, 255 U.S. 313 (1921); Gouled v. United States, 255 U.S. 298 (1921); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920); Weeks v. United States, 232 U.S. 383 (1914); Boyd v. United States, 116 U.S. 616 (1886)).

[17] *See id.* at 147.

[18] *See id.* The Court describes the Fourth Amendment as:

> recognizing a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained and a search of a ship, motor boat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

Id. at 153.

[19] *Id.* at 153-54.

[20] *See id.* at 162.

2. *Examining* Carroll

Twenty-three years later, the Court in *United States v. Di Re*[21] examined *Carroll*, and determined that the lesser protection afforded to automobiles was only valid under the enforcement of the National Prohibition Act.[22] The Court noted that "the *Carroll* decision falls short of establishing a doctrine that, without such legislation, automobiles nonetheless are subject to search without warrant in enforcement of all federal statutes."[23] Rather than take the opportunity to establish a doctrine, the Court avoided the issue and found that the car had not been searched at all.[24] The *Di Re* Court then ended with a suggestion that the rule in *Carroll* would not survive.[25]

Despite the dicta in *Di Re*, the Supreme Court later affirmed the *Carroll* holding. The following year, in *Brinegar v. United States*,[26] the Court affirmed

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[21] 332 U.S. 581 (1947). In *Di Re*, an investigator and detective went to the parked car of an individual suspected of selling counterfeit gasoline ration coupons. *See id.* at 583. The informant, sitting in the back seat, was holding two gasoline ration coupons that he claimed to have obtained from the driver. *See id.* The officers took the driver, the informant, and the defendant into custody. *See id.* At the police station, the defendant complied with an order to empty his pockets by placing two gasoline and several fuel oil ration coupons on the table. *See id.* When he was "booked" two hours later, the police found one hundred counterfeit gasoline ration coupons in an envelope concealed between his shirt and underwear. *See id.*

[22] "The search was made and its validity was upheld under the search and seizure provisions enacted for enforcement of the National Prohibition Act and that Act alone." *Id.* at 584. Note that Congress repealed the 18th Amendment in 1933.

[23] *Id.* at 585.

[24] The Court stated that it "need not decide whether, without such Congressional authorization as was found controlling in the *Carroll* case, any automobile is subject to search without warrant on reasonable cause to believe it contains contraband. In the case before us there appears to have been no search of the car itself." *Id.* at 585-86. Thus, the Court assumed that there was reasonable cause for searching the car, and addressed whether that conferred an incidental right to search Di Re. *Id.* at 586. The Court concluded that it could "see no ground for expanding the ruling in the *Carroll* case to justify this arrest and search as incident to the search of a car." *Id.* at 587.

[25] *Id.* at 595. The Court stated:

> We meet in this case, as in many, the appeal to necessity. It is said that if such arrests and searches cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment. Taking the law as it has been given to us, this arrest and search were beyond the lawful authority of those who executed them. The conviction based on evidence so obtained cannot stand.

Id.

[26] 338 U.S. 160 (1949). The facts of the case are very similar to those in *Carroll*. *See supra* note 13. Brinegar drove past two police officers parked on the side of the road. *See Brinegar*, 338 U.S. at 162. The officers recognized Brinegar as a past offender of bootlegging

and relied heavily on *Carroll*[27] to uphold the warrantless search of an automobile that was transporting illegal liquor.[28] Similarly, the later Supreme Court cases of *Husty v. United States*[29] and *Scher v. United States*[30] also affirmed *Carroll.*

B. Expanding the Automobile Exception to Include a Second Justification: Reduced Expectation of Privacy

1. Developing a second justification

In 1970, the Court in *Chambers v. Maroney*[31] reaffirmed *Carroll*[32] and also began the expansion of the automobile exception. The Court, deciding that it made no difference that a search was conducted at the station house and not at the scene of the police stop, held that where the officer had probable cause, the automobile may be searched later at the station house without a warrant.[33] This reasoning laid the foundation for later Courts to determine that the *Chambers* holding could not be satisfactorily explained in terms of exigencies arising out of a vehicle's mobility.[34]

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laws, and gave chase until they forced Brinegar off the road. *See id.* at 162-63. During questioning, Brinegar admitted that he had 12 cases of liquor in the car. *See id.* at 163. A warrantless search of the automobile confirmed his confession. *See id.*

[27] The Court cited *Carroll* extensively. It did not, however, cite *Di Re*, despite having decided that case one year earlier.

[28] *See id.* at 164-76.

[29] 282 U.S. 694 (1931).

[30] 305 U.S. 251 (1938).

[31] 399 U.S. 42 (1970). One hour after a robbery of a gas station on May 20, 1963, Pennsylvania police officers saw a station wagon matching the description of the getaway car. *See id.* at 44. The police arrested the occupants and drove the station wagon to the police station. *See id.* At the station, a thorough search of the car revealed two .38-caliber guns and other evidence of the robbery concealed in a compartment under the dashboard. *See id.* The search was conducted without a warrant. *See id.*

[32] *See id.* at 51.

[33] Justice White explained:

> For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.

Id. at 52.

[34] *See infra* notes 36-38 and accompanying text.

2. *Announcing a second justification*

Where *Carroll* based its justification of the automobile exception on the inherent mobility of automobiles, the Court in *South Dakota v. Opperman*[35] announced a second justification for the automobile exception. The Court noted that *Chambers* upheld a warrantless search even "where no immediate danger was presented that the car would be removed from the jurisdiction."[36] To explain the contradiction of the exigency requirement, the Court concluded that "besides the element of mobility, less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office."[37] Thus, the Court determined that the justification for the automobile was "twofold": the inherent mobility of automobiles and the reduced expectation of privacy.[38]

C. *Extending the Automobile Exception to the Search of Containers:*[39] *Probable Cause*

1. *The* Chadwick-Sanders *rule*

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[35] 428 U.S. 364 (1976).

[36] *Id.* at 367.

[37] *Id.* For this proposition, the Court cited *Cardwell v. Lewis*, 417 U.S. 583 (1974), and *Cady v. Dombrowski*, 413 U.S. 433 (1973). In *Cardwell*, the Court commented that "one has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects." *Cardwell*, 417 U.S. at 590. In *Cady*, the Court noted that:

> The constitutional difference between searches and seizures from houses and similar structures and from vehicles stems both from the ambulatory character of the latter and from the fact that extensive, and often noncriminal contact with automobiles will bring local officials in 'plain view' of evidence, fruits, or instrumentalities of a crime, or contraband.

Cady, 413 U.S. at 442. While both *Cardwell* and *Cady* initially formulated the second justification, later cases relied primarily upon *Opperman* for that proposition. *See* WAYNE R. LAFAVE, A TREATISE ON THE FOURTH AMENDMENT § 7.2(b) (3d ed. 1996).

[38] *Opperman*, 428 U.S. at 367.

[39] The analysis for the search of a container is distinguishable from the search of a person:

> A search is deemed to be 'of a person' if it involves an exploration into an individual's clothing, including a further search within small containers, such as wallets, cigarette boxes and the like, which are found in or about such clothing. By contrast, [there are the] seizures and searches directed at containers and other personal effects which, given the circumstances, do not have this intimate a connection with a person. This includes suitcases and similar containers in the possession of the suspect, and also such containers and other effects which are not in the possession of the suspect at the time the police either seize or search them.

LAFAVE, *supra* note 37, § 5.5(a).

In 1977, the Court in *United States v. Chadwick*[40] addressed the warrantless search of a footlocker in a car. The government did not contend on appeal that the footlocker's contact with the car invoked the automobile exception, but argued that the rationale of the automobile exception applied to luggage.[41] The Court disagreed, and held that "[t]he factors which diminish the privacy aspects of an automobile do not apply to respondents' footlocker,"[42] and that therefore, the search was unreasonable.[43]

Two years later, the Court in *Arkansas v. Sanders*[44] considered the hypothetical posed by Justice Blackmun in *Chadwick*:[45] whether the automobile exception permitted the warrantless search of a suitcase when taken from a moving vehicle.[46] Contrary to Justice Blackmun's *Chadwick*

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[40] 433 U.S. 1 (1977). On May 10, 1973, Boston narcotics agents watched two train passengers under surveillance claim their suitcases and footlocker. *See id.* at 3-4. Previously alerted that the footlocker potentially contained marijuana or hashish, the agents released a drug-sniffing dog that signaled the presence of drugs within the footlocker. *See id.* at 4. The defendant Chadwick then joined the couple, and together they carried the footlocker to a car and placed it in the trunk. *See id.* While the trunk was still open and before the engine was started, the agents arrested Chadwick and the couple. *See id.* They transported the footlocker to the Federal Building, and a warrantless search one and a half hours later revealed large amounts of marijuana. *See id.* at 5.

[41] *See id.* at 11-12. The dissent, written by Justice Blackmun, speculated that had the agents waited a few minutes longer, until Chadwick drove away, the automobile exception would have applied. *See id.* at 22-23 (Blackmun, J., dissenting). This scenario later arises and is addressed by the Court. *See infra* notes 44-48 and accompanying text.

[42] *See Chadwick*, 433 U.S. at 13. The Court determined that "[l]uggage contents are not open to public view . . . nor is luggage subject to regular inspections and official scrutiny on a continuing basis. Unlike an automobile, whose primary function is transportation, luggage is intended as a repository of personal effects." *Id.*

[43] *See id.* at 13, 15-16. The Court reasoned that the warrant requirement of the Fourth Amendment protects people from unreasonable government intrusions into their legitimate expectations of privacy regardless of the locale of the object of the search and that Fourth Amendment itself does not distinguish between the search of homes and other searches. *See id.* at 6-7. The footlocker had been both locked and padlocked, a clear indication of an expectation of privacy in the contents, and it was therefore due the protection of the Fourth Amendment. *See id.* at 4-5, 13. Without either an exigency or a warrant, the search was found to be unconstitutional. *See id.* at 15.

[44] 442 U.S. 753 (1979). The facts of *Sanders* were very similar to those in *Chadwick*, with the most significant difference being that the container in question was recovered from the trunk of a moving taxi. *See Sanders*, 442 U.S. at 755; *cf. supra* note 40. On April 23, 1976, an officer of the Little Rock Police Department received word from an informant that Sanders would arrive at the Little Rock Airport later that day carrying a green suitcase containing marijuana. *See Sanders*, 442 U.S. at 755. Sanders arrived and placed the green suitcase in the trunk of a taxi. *See id.* The officers stopped the taxi shortly after it drove away from the airport. *See id.* The officers found and opened the green suitcase, which contained 9.3 pounds of marijuana. *See id.*

[45] *See supra* note 41.

[46] *See Sanders*, 442 U.S. at 757.

dissent, the Court held that "the warrant requirement of the Fourth Amendment applies to personal luggage taken from an automobile to the same degree it applies to such luggage in other locations."[47] Thus, the automobile exception did not justify the warrantless search of luggage "merely because it was located in an automobile lawfully stopped by the police."[48]

The *Chadwick-Sanders* rule commenced the extension of the automobile exception to include the search of containers, but its utility was questionable. In *Robbins v. California*,[49] the Court stated that *Chadwick* and *Sanders* clarified that "a closed piece of luggage found in a lawfully searched car is constitutionally protected to the same extent as are closed pieces of luggage found anywhere else."[50] The Court thus viewed the warrant requirement for containers as applying without regard to whether there was probable cause to search the car.[51]

2. Ross *and its progeny*

In 1982, the facts of *United States v. Ross*[52] gave the Court the opportunity

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[47] *Id.* at 766.

[48] *Id.* at 765. The Court examined both justifications for the automobile exception (exigent circumstances that exist due to the inherent mobility of the vehicle, and reduced expectation of privacy), and concluded that neither applied to the suitcase. *See id.* at 764.

Chief Justice Burger's concurrence, joined by Justice Stevens, argued that *Sanders*, like *Chadwick*, did not involve the automobile exception. *See Sanders*, 442 U.S. at 766 (Burger, J., concurring). The concurrence suggested that the automobile exception does not apply where the focus of the probable cause is on the container, and where there is merely a coincidental relationship between the automobile and the container. *See id.* at 766-67. Thus, where the facts establishing probable cause focused on a container that happened to be in an automobile ("particular" or "specific" probable cause), the police need a warrant to search the container. Conversely, where the facts establishing probable cause merely point to contraband located somewhere in the car ("general" probable cause), the police may search the entire automobile without a warrant. This includes any containers located in the car, regardless of whether the contraband was ultimately located in a specific container. *See id.* at 767-68. This distinction suggested by the concurrence led to the eventual downfall of the *Chadwick-Sanders* rule.

[49] 453 U.S. 420 (1981). On January 5, 1975, California Highway Patrol officers stopped petitioner's station wagon for erratic driving. *See id.* at 422. When petitioner opened the car door, the officers smelled marijuana smoke. *See id.* In the ensuing search of the car, the officers found in the luggage compartment two packages wrapped in green opaque plastic. *See id.* They then unwrapped the packages, both of which contained bricks of marijuana. *See id.*

[50] *Id.* at 420.

[51] *See id.* at 428.

[52] 456 U.S. 798 (1982). In *Ross*, the District of Columbia Police Department learned from an informant that Ross was selling narcotics from the trunk of his Chevrolet Malibu. *See id.* at 800. The police located Ross' car, and later returned to see the Malibu turning the corner. *See id.* at 801. The police stopped the car and ordered Ross out of the vehicle. *See id.* While searching the interior of the car, the police found a bullet on the front seat, a pistol in the glove compartment, and a closed brown paper bag in the trunk. *See id.* The officer opened the bag

described by Justice Powell in his *Robbins* concurrence to examine the scope of the search authorized by the automobile exception.[53] The Court noted that distinct from *Chadwick* and *Sanders*, the police officers in *Ross* had probable cause to search respondent's entire vehicle.[54] Furthermore, unlike the parties in *Robbins*, those in *Ross* "squarely addressed the question whether, in the course of a legitimate warrantless search of an automobile, police are entitled to open [and search] containers found within the vehicle."[55]

Justice Stevens, writing for the majority, reasoned that excluding containers from the permissible scope of the search would "largely nullif[y]" the automobile exception, since the secretive nature of contraband almost certainly ensures its enclosure in a container.[56] The Court noted that distinctions between containers and non-containers "must give way to the interest in the prompt and efficient completion of the task at hand."[57] Additionally, the Court stated that "[c]ertainly the privacy interests in a car's trunk or glove compartment may be no less than those in a movable container."[58] Since those interests "must yield to the authority of a search . . . [that] does not itself require the prior approval of a magistrate,"[59] it follows that movable containers likewise would not require prior approval of a magistrate. Furthermore, the Court decided that the rule "applies equally to all containers" and does not distinguish between "worthy" and "unworthy" containers.[60] Thus, where the police lawfully stop an automobile and have probable cause to believe that contraband or evidence of a crime is located somewhere within the car, they may search all compartments and containers found in the car that might contain the object of the search.[61]

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and found several glassine bags of heroin. *See id.* At the police station, a more thorough search uncovered a zippered red leather pouch containing $3,200 in cash. *See id.*

[53] *See id.* at 817. The Court discussed Justice Powell's concurring opinion in *Robbins*, noting that he concluded that "institutional constraints made it inappropriate to reexamine [the] basic doctrine without full adversary presentation." *Id.*; *see also Robbins*, 453 U.S. at 435-36 (Powell, J., concurring).

[54] *See Ross*, 456 U.S. at 817.

[55] *Id.*

[56] *See id.* at 820.

[57] *Id.* at 821.

[58] *Id.* at 823.

[59] *Id.*

[60] *Id.* at 822.

[61] *See id.* at 825.

The *Ross* expansion continued in *United States v. Johns*,[62] where the Court held that the warrantless search of containers allowed by *Ross* may be conducted three days after the containers were removed from the vehicle.[63] The *Johns* Court echoed the *Ross* holding, noting that "notwithstanding *Chadwick* police officers may conduct a warrantless search of containers discovered in the course of a lawful vehicle search."[64] Thus, the *Chadwick-Sanders* rule remained the prevailing law where probable cause was aimed at a particular container in an automobile. However, *Ross* dispensed with the need for a warrant in all cases where there is probable cause to search the entire car. Additionally, the *Johns* Court indicated that once probable cause to search a vehicle is established, the scope of the permissible search is not limited because that probable cause can later be aimed at particular containers.[65]

The march towards the expansion of the automobile exception continued as *California v. Acevedo*[66] challenged the Court to decide what role the *Chadwick-Sanders* rule would play in the application of the automobile exception. The Court considered "the question deferred in *Ross*: whether the Fourth Amendment requires the police to obtain a warrant to open the sack in a movable vehicle simply because they lack probable cause to search the entire car."[67] The Court determined that the *Chadwick-Sanders* rule "provided only minimal protection for privacy and [has] impeded effective law enforcement."[68] Thus, the Court concluded that "it is better to adopt one clear-cut rule to govern automobile searches and eliminate the warrant requirement

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[62] 469 U.S. 478 (1985). Suspecting a drug smuggling operation, United States Customs officers in Arizona surveyed two trucks. *See id.* at 480. The officers smelled marijuana as they approached the trucks, and saw many packages in the back of the trucks wrapped in a way commonly known to contain smuggled marijuana. *See id.* at 480-81. The police arrested the suspects, but did not search the packages there. *See id.* at 481. Instead, they drove to the Drug Enforcement Agency ("DEA") headquarters in Tucson with the packages and stored them in a DEA warehouse for three days before opening them. *See id.* The police opened them without a warrant. *See id.*

[63] *See id.* at 487-88.

[64] *Id.* at 483.

[65] The Court stated that "the Customs officers conducted a vehicle search at least to the extent of entering the trucks and removing the packages. The possibility that the officers did not search the vehicles more extensively does not affect our conclusion that the packages were removed pursuant to a vehicle search." *Id.*

[66] 500 U.S. 565 (1991).

[67] *Id.* at 573. The Court described the *Ross* Court as having "recognized that it was arguable that the same exigent circumstances that permit a warrantless search of an automobile would justify the warrantless search of a movable container. In deference to the rule of *Chadwick* and *Sanders*, however, the Court put that question to one side." *Id.* (citations omitted).

[68] *Id.* at 574.

for closed containers set forth in *Sanders*."[69] The *Chadwick-Sanders* rule was vanquished. After *Acevedo*, the automobile exception would apply – and a search warrant would be unnecessary – regardless of whether the police had probable cause to search a container found in an automobile or the entire automobile itself.

It is against this backdrop of confusion, shifted viewpoints, and permutated applications that the *Houghton*[70] Court fashions its holding. Under the automobile exception, the Court had already sanctioned the warrantless search of the vehicle and of compartments and containers within the vehicle capable of containing the object of the search.[71] The question facing the *Houghton* Court was whether a distinction should be made as to the ownership of the containers. The history of the automobile exception saw several attempts to draw distinctions and to stunt its growing reach. These attempts ultimately failed because they created contradictions and anomalies, rather than a clear rule.[72] *Houghton* presented another opportunity to reign in the automobile exception, but harnessing the exception could only be accomplished by adding another dimension to an already troubled area. The Court thus declined to impose a limitation, choosing to solidify what is finally emerging as a clear and authoritative rule. By holding fast to a bright-line rule, *Houghton* simplifies a long history of bewildering decisions.

III. FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

On July 23, 1995, a Wyoming Highway Patrol Officer stopped a car for speeding and a faulty brake light.[73] The male driver and two female passengers sat in the front seat.[74] While questioning the driver, the officer saw

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[69] *Id.* at 579.

[70] Wyoming v. Houghton, 526 U.S. 295 (1999).

[71] *See* California v. Acevedo, 500 U.S. 565 (1991); United States v. Ross, 456 U.S. 798 (1982); United States v. Johns, 469 U.S. 478 (1985).

[72] For example, the *Chadwick-Sanders* rule created a "curious line between the search of an automobile that coincidentally turns up a container and the search of a container that coincidentally turns up in an automobile." *Acevedo*, 500 U.S. at 580. Even the *Ross* Court did not clearly outline the different outcomes and implications of this "curious line," and it was the *Acevedo* Court that eliminated this anomaly by clarifying the *Ross* holding. Note that this particular clarification is not particularly germane to the *Houghton* case, as the Court in *Houghton* is not concerned with the search of a container that coincidentally turns up in an automobile (as in *Acevedo*), but the search of an automobile that turns up a container (as in *Ross*).

[73] *See Houghton*, 526 U.S. at 297.

[74] *See id.* at 298.

a hypodermic syringe in the driver's pocket and ordered him out of the car.[75] Under questioning, the driver admitted to using the syringe to take drugs.[76]

The officers then ordered Sandra Houghton and the other female passenger out of the car.[77] Houghton complied, leaving her purse in the car.[78] In light of the driver's admission, the officer searched the car for drugs.[79] When he found a purse in the back seat, he opened it and located a driver's license.[80] Houghton claimed the purse as hers.[81]

The officer continued his search of the purse, and found a brown pouch and a black wallet-type container.[82] Houghton denied ownership and knowledge of the brown pouch, which contained drug paraphernalia and a syringe with 60 ccs of methamphetamine.[83] Houghton was arrested for possession of a controlled substance.[84]

B. Procedural Background

The State of Wyoming charged Houghton with felony possession of a controlled substance.[85] The trial court denied Houghton's motion to suppress all evidence from her purse as the fruit of a violation of a lawful search, holding that the officer had probable cause to search the car for contraband, and, by extension, any containers therein that could hold such contraband.[86] A jury found Houghton guilty and she was convicted.[87] Houghton was sentenced to not less than two nor more than three years at the Wyoming Women's Center.[88]

Houghton filed a timely appeal.[89] On appeal, the Wyoming Supreme Court, by divided vote, reversed Houghton's conviction.[90] The Wyoming Supreme

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[75] *See id.*

[76] *See id.*

[77] *See id.*

[78] *See id.*

[79] *See id.*

[80] *See id.*

[81] *See id.*

[82] *See id.*

[83] *See id.* While Houghton denied ownership and knowledge of the brown pouch, she admitted ownership of the black container, which contained drug paraphernalia and a syringe with 10 ccs of methamphetamine (an amount insufficient to support the felony conviction at issue in this case). *See id.*

[84] *See id.*

[85] *See id.*

[86] *See id.* at 299.

[87] *See* Houghton v. State, 956 P.2d 363, 365 (Wyo. 1998).

[88] *See id.*

[89] *See id.*

[90] *See Houghton*, 526 U.S. at 299.

Court held that a container is outside the scope of a lawful search where the officer knows or should know that the container belongs to a passenger who is not suspected of criminal activity, unless someone had the opportunity to conceal contraband within it to avoid detection.[91]

The United States Supreme Court granted certiorari on September 29, 1998[92] and heard oral argument on January 12, 1999.[93] Three months later, the Supreme Court, in an opinion written by Justice Scalia, reversed the Wyoming Supreme Court, holding that police officers with probable cause to search a car may inspect passengers' belongings found in the car that are capable of concealing the object of the search.[94] Justice Breyer filed a concurring opinion.[95] Justice Stevens, with whom Justice Souter and Justice Ginsburg joined, filed a dissenting opinion.[96]

IV. SUMMARY OF OPINION

A. The Majority Opinion

Justice Scalia's opinion for the Supreme Court begins with the test for determining whether a particular governmental action violates the Fourth Amendment: "inquire first whether the action was . . . unlawful . . . under the common law when the Amendment was framed. Where that inquiry yields no answer, . . . evaluate . . . under traditional standards of reasonableness . . . ."[97]

For the first inquiry of lawfulness, Justice Scalia cites *Carroll* for the automobile exception,[98] observing that the *Carroll* Court reviewed legislative history and concluded that "the Framers would have regarded such a search as reasonable."[99] Justice Scalia then asserts that the Court has drawn similar

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[91] *See id.* (citing Houghton v. State, 956 P.2d 363, 372 (Wyo. 1998)).

[92] Wyoming v. Houghton, 524 U.S. 983 (1998).

[93] *See Houghton*, 526 U.S. at 295.

[94] *See id.* at 307. Although the majority states the issue in the case in terms of a search for "contraband," *id.* at 297, the case is not limited only to cases where there is probable cause to search a car for contraband. In the majority's final statement of its holding, it uses the broader description "object of the search." *Id.* at 307.

[95] *See id.* (Breyer, J., concurring).

[96] *See id.* at 309-13 (Stevens, J., dissenting).

[97] *Id.* at 299-300 (citations omitted). The first part of this test is doctrinal and looks at the historical evidence. *See id.* The second part is policy driven and requires the balancing of competing interests, namely the individual's right to privacy and the state's interest in efficient law enforcement. *See id.*

[98] *See id.* at 300. The *Carroll* Court held that "'contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant' where probable cause exists." *Id.* (citing Carroll v. United States, 267 U.S. 132, 153 (1925)).

[99] *See id.* To reach its conclusion, the *Carroll* Court examined the "legislation enacted by Congress from 1789 through 1799 – as well as subsequent legislation from the Founding era and

conclusions with regard to containers within an automobile.[100] The *Houghton* Court discusses *United States v. Ross*, citing Justice Steven's argument that Congress intended customs officers "not merely to examine the exterior of cartons or boxes in which smuggled goods might be concealed," but to open shipping containers "when necessary."[101] Additionally, the Court explains *Ross* by citing subsequent cases that describe *Ross* "as applying broadly to all containers within a car, without qualification as to ownership."[102] The Court further supports this by reasoning that neither the *Ross* Court nor the historical evidence expresses any ownership limitations.[103] Lastly, the Court comments that *Ross* is consistent with the balance of Fourth Amendment jurisprudence.[104] The Court concludes that the Framers would have regarded as reasonable the warrantless search of a car that police had probable cause to believe contained contraband, as well as the warrantless search of containers within the automobile.[105]

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beyond – that empowered customs officials to search any ship or vessel without a warrant if they had probable cause to believe that it contained goods subject to a duty." *Id.* (citing *Carroll*, 267 U.S. at 150-53).

[100] The Court notes that it has "read the historical evidence to show that the Framers would have regarded as reasonable (if there was probable cause) the warrantless search of containers within an automobile." *Id.*

[101] *Id.* at 301 (citing United States v. Ross, 456 U.S. 798, 820 n.26 (1982)). Justice Stevens analogized modern police power to inspect containers found within automobiles with the authority historically given to customs officers to inspect containers. Justice Stevens also observed that "it is inconceivable that [Congress] intended a customs officer to obtain a warrant for every package discovered during the search" and that for "virtually the entire history of our country – whether contraband was transported in a horse-drawn carriage, a 1921 roadster, or a modern automobile – it has been assumed that a lawful search of a vehicle would include a search of any container that might conceal the object of the search." *Id.* (citing *Ross*, 456 U.S. at 820 n.26).

[102] *Id.*

[103] The Court reasons that:

> [I]f the rule of law that *Ross* announced were limited to contents belonging to the driver, or contents other than those belonging to passengers, one would have expected that substantial limitation to be expressed. And, more importantly, one would have expected that limitation to be apparent in the historical evidence that formed the basis for *Ross*'s holding.

Id.

[104] The Court cites the principle that "[t]he critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." *Id.* (citing Zurcher v. Stanford Daily, 436 U.S. 547, 556 (1978)).

[105] *See id.*

The Court goes on, however, to evaluate the action under the second inquiry of traditional standards of reasonableness,[106] and concludes that "[e]ven if the historical evidence . . . were thought to be equivocal, we would find that the balancing of the relative interests weighs decidedly in favor of allowing searches of a passenger's belongings."[107] The Court notes that passengers and drivers alike have a reduced expectation of privacy in the property they transport, and that a package search is less intrusive than a body search.[108] The Court contrasts this with "substantial" governmental interests, including the "appreciabl[e] impair[ment]"[109] of effective law enforcement. The Court contends that a "balancing of interests must be conducted," and lists several "practical realities" that must be taken into account when balancing the competing interests.[110] Finally, the Court characterizes the Wyoming Supreme Court's "passenger property" rule as unworkable in practice, and "perplexing."[111]

B. The Concurring Opinion

In his concurrence, Justice Breyer "agree[s] with the Court that when a police officer has probable cause to search a car . . . it is reasonable for that officer to search containers within the car."[112] He sees the bright-line container rule of *Ross* as necessary, but as authorizing only a "limited number" of additional searches, since "police officers with probable cause to search a car . . . would often have probable cause to search containers."[113] Also, in contrast to the majority opinion, Justice Breyer emphasizes the rule's limited application, clearly stating that: 1) the rule only applies to automobile searches; 2) the rule applies only to containers found within automobiles; and

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[106] Even though the historical evidence sufficiently supports the search of a passenger's belongings, Justice Scalia nonetheless continues to the second part of his Fourth Amendment analysis, the balancing of competing interests.

[107] *Id.* at 303.

[108] *See id.* While acknowledging the potential "annoying, frightening, and perhaps humiliating" reaction to "[e]ven a limited search of the outer clothing," the Court notes that "[s]uch traumatic consequences are not to be expected when the police examine an item of personal property found in a car." *Id.* Thus, the Court is able to dispose the two cases that the lower court found persuasive by framing the case as a "package search" as opposed to a "body search."

[109] *Id.* at 304. The Court describes the "risk that the evidence or contraband will be permanently lost," the potential that the passenger is "engaged in a common enterprise with the driver," and the possibility that a criminal could hide contraband in the passenger's belongings without the passenger's knowledge or permission. *Id.* at 304-05.

[110] *See id.* at 305.

[111] *Id.* at 306.

[112] *Id.* at 307 (Breyer, J., concurring).

[113] *Id.* (Breyer, J., concurring).

3) the rule does not extend to the search of a person in that automobile.[114] Justice Breyer then characterizes a woman's purse as a "special"[115] container, articulating his "tempt[ation] to say that a search of a purse involves an intrusion so similar to a search of one's person that the same rule should govern both."[116] He explains that he is bound by the Court's prior cases, but implies that if the purse were in some way attached to the woman's body, it would receive "increased protection."[117] Thus, had Houghton been holding her purse, Justice Breyer may have joined the dissenting opinion instead.[118]

C. The Dissenting Opinion

Justice Stevens begins his dissent by agreeing with the Wyoming Supreme Court's decision.[119] He distinguishes this case from past caselaw, and asserts that "[i]n the only automobile case confronting the search of a passenger defendant — *United States v. Di Re* — the Court held that the exception to the warrant requirement did not apply."[120] He then claims that the Court incorrectly "fashion[ed] a new rule,"[121] and that "the search of a passenger's purse or briefcase involves an intrusion on privacy that may be just as serious as was the intrusion in *Di Re*."[122] Justice Stevens next comments that the majority not only incorrectly relies on *Ross*, but it also misinterprets it. He agrees with the Court that *Ross* defined the scope of a warrantless car search, not by the "nature of the container," but by the "object of the search and the places in which there is probable cause to believe that it may be found."[123] However, he accuses the Court of fashioning a rule that "would apparently permit a warrantless search of a passenger's briefcase if there is probable cause

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[114] *See id.* (Breyer, J., concurring).

[115] *Id.* (Breyer, J., concurring).

[116] *Id.* (Breyer, J., concurring).

[117] *Id.* (Breyer, J., concurring).

[118] Justice Breyer ends with the statement that he joins the Court's opinion because "[i]n this case, the purse was separate from the person, and no one has claimed that, under the circumstances, the type of container makes a difference." *Id.* (Breyer, J., concurring).

[119] *See id.* at 309 (Stevens, J., dissenting).

[120] *Id.* (Stevens, J., dissenting) (citations omitted). In *Di Re*, which involved the search of a passenger's pocket and the "space between his shirt and underwear," the Court decided that passenger searches were unlawful. *Id.* (Stevens, J., dissenting) (citing United States v. Di Re, 332 U.S. 581 (1947)).

[121] *Id.* (Stevens, J., dissenting). "Today, instead of adhering to the settled distinction between drivers and passengers, the Court fashions a new rule that is based on a distinction between property contained in clothing worn by a passenger and property contained in a passenger's briefcase or purse." *Id.* (Stevens, J., dissenting).

[122] *Id.* at 310 (Stevens, J., dissenting).

[123] *Id.* (Stevens, J., dissenting) (citing United States v. Ross, 456 U.S. 798 (1982)).

to believe the taxidriver had a syringe somewhere in his vehicle."[124]

Justice Stevens goes on to reject the Court's presumption that passengers and drivers are often partners in crime.[125] He points to the Wyoming Supreme Court's conclusion that the officer in this case did not have probable cause to believe that Houghton's purse contained contraband.[126] Justice Stevens also asserts that "the State's legitimate interest in effective law enforcement does not outweigh the privacy concerns at issue."[127] While recognizing the "ostensible clarity of the Court's rule," Justice Stevens nevertheless concludes that this is "insufficient justification for its adoption."[128] He countered that if clarity was the Court's sole motivation, "a rule requiring a warrant or individualized probable cause to search passenger belongings is every bit as simple as the Court's rule."[129]

V. ANALYSIS OF *HOUGHTON*

A. Originalist Intent as Part of the Fourth Amendment Analysis

"[T]he doctrine of stare decisis serves profoundly important purposes in [the] legal system . . . ."[130] One aspect of stare decisis that has drawn dispute is the place of originalist intent in Fourth Amendment analysis. Justice Scalia places heavy weight on the significance of originalist intent by designating it as the first step in the Fourth Amendment test.[131] The dissent, on the other hand, explicitly rejects the majority's originalist intent inquiry: "To my knowledge, we have never restricted ourselves to a two-step Fourth Amendment approach wherein the privacy and governmental interests at stake

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[124] *Id.* (Stevens, J., dissenting). Justice Stevens points to the conclusion in *Ross* that "probable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab." *Id.* (Stevens, J., dissenting) (brackets omitted). He feels that the Court's "new rule" exceeds the limitation set by *Ross* because it does not afford higher protection to the privacy interests of passengers. *See id.* (Stevens, J., dissenting).

[125] *See id.* (Stevens, J., dissenting).

[126] *See id.* at 311 (Stevens, J., dissenting).

[127] *Id.* (Stevens, J., dissenting).

[128] *Id.* (Stevens, J., dissenting).

[129] *Id.* at 312 (Stevens, J., dissenting).

[130] California v. Acevedo, 500 U.S. 565, 579 (1981).

[131] *See Houghton*, 526 U.S. at 299. Justice Scalia's penchant for originalist intent was also apparent in his *Acevedo* concurrence: "In my view, the path out of this confusion should be sought by returning to the first principle that the 'reasonableness' requirement of the Fourth Amendment affords the protection that the common law afforded." *Acevedo*, 500 U.S. at 583 (Scalia, J., concurring).

must be considered only if 18th-century common law 'yields no answer.'"[132] The dissent appears to be correct on this point, as the Court did not mandate a two-step approach in *United States v. Di Re*, *United States v. Ross*, or *California v. Acevedo*. However, as the dissent points out, the majority does go on to evaluate the action by balancing individual and governmental interests.[133] Thus, Justice Scalia is able to formulate the test to include originalist intent, and then re-enforce his holding with a contemporary analysis.[134]

Furthermore, while the Court's prior holdings have not dictated the necessity of a two-part Fourth Amendment analysis, the Court in the past has nonetheless considered originalist intent. The *Carroll* Court wrote that "[t]he Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens."[135] In writing the opinion in *Ross*, Justice Stevens found it "noteworthy" that the early legislation relied on by the *Carroll* Court concerned merchandise shipped in containers of various kinds, just as it is today.[136] Using this parallel, Justice Stevens opined about what "Congress intended" based on "virtually the entire history of our country."[137] Justice Scalia dedicated his longest textual quote to citing this portion of Justice Stevens' *Ross* opinion. Additionally, the *Di Re* decision, upon which the *Houghton* dissent relies, also examines originalist intent. While at one point, the *Di Re* Court implied that the Congressional intent was not necessary to all Fourth Amendment analysis,[138] in examining the "different relation of the automobile," the Court did consider Congressional enforcement under the National Prohibition Act.[139]

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[132] *Houghton*, 526 U.S. at 312 n.3 (Stevens, J., dissenting). Thus, the dissent implies that even where the initial inquiry yields an answer, the Court may evaluate the action under reasonableness standards.

[133] *See id.* (Stevens, J., dissenting). The dissent acknowledges that "[i]n a later discussion, the Court does attempt to address the contemporary privacy and governmental interests at issue in cases of this nature." *Id.* (Stevens, J., dissenting).

[134] Perhaps if different conclusions are being drawn – e.g., a search permissible under common law is not permissible now – then the Court would need to decide exactly what place originalist intent should have in the analysis. Essentially, however, as that is not before the Court in this case, that is a decision for another day.

[135] Carroll v. United States, 267 U.S. 132, 149 (1925).

[136] *See* United States v. Ross, 456 U.S. 798, 820 n.26 (1982).

[137] *Id.*

[138] The Court declared that it "need not decide whether, without such Congressional authorization as was found controlling in the *Carroll* case, any automobile is subject to search without warrant on reasonable cause to believe it contains contraband." United States v. Di Re, 332 U.S. 581, 585-86 (1948).

[139] *Id.* at 586.

Finally, Justice Scalia's two-step approach was also addressed by Justice Breyer in his concurring opinion. Justice Breyer joined the Court's opinion "with the understanding that history is meant to inform, but not automatically to determine, the answer to a Fourth Amendment question."[140] Justice Breyer thus offers a solution to what weight originalist intent should have in Fourth Amendment analysis: it should be informative, but not decisive.[141]

B. The Passenger Distinction: The Court's Interpretation of Di Re

The majority and the dissent rest their opinions on different interpretations of *Di Re*. The majority interprets *Di Re* to mean that "probable cause to search a car [does] not justify a body search of a passenger."[142] The dissent disagrees, attributing its holding to "the settled distinction between drivers and passengers," rather than to a "distinction between property contained in clothing worn by a passenger and property contained in a passenger's briefcase or purse."[143] The proper interpretation is the one taken by the majority.

First, the plain language of both the holding and the formulation of the issue in *Di Re* indicate that the majority is correct. In forming the issue, the *Di Re* Court asked, "did [the right to search the car] confer an incidental right to search [the passenger]? . . . [W]e are asked to extend the assumed right of a car search to include the person of the occupants . . . ."[144] While the dissent cited the holding in *Di Re*, it failed to recognize the *Di Re* Court's explicit concern with a body search: "We are not convinced that a person, by mere presence in a suspected car, loses immunities from search *of his person* to which he would otherwise be entitled."[145] On the other hand, the understanding by the *Houghton* majority that "of his person" describes a body search, enables the majority to correctly distinguish *Di Re* from a package search.

Second, the dissent confuses the *Di Re* holding by blurring and misreading the Court's analysis. The *Di Re* Court's conclusion that it sees "no ground for expanding the ruling in the *Carroll* case to justify this arrest and search as incident to the search of a car"[146] clearly reveals that its analysis was

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[140] Wyoming v. Houghton, 526 U.S. 295, 307 (1999) (Breyer, J., concurring).

[141] The dissent, while accurate that the Court had not previously pronounced a two-step Fourth Amendment approach, nonetheless fails to give recognition to the importance of examining originalist intent.

[142] *Id.* at 303.

[143] *Id.* at 309-10 (Stevens, J., dissenting).

[144] *Di Re*, 332 U.S. at 586. The Court's holding in *Di Re* still controls the search of the person of the passenger. Absent probable cause that the object is on the passenger's person, a search of the person is not permissible.

[145] *Id.* at 587 (emphasis added).

[146] *Id.*

comprised of two parts: 1) justification for the arrest, and 2) justification for the search.

In discussing the arrest, the *Di Re* Court did not mean to imply a distinction between drivers and passengers as to their privacy rights, but rather was recognizing that the National Prohibition Act directed the arrest of the driver, not the passengers.[147] Thus, the *Di Re* Court commented on who could be arrested in light of the evidence, not who could be searched, as the dissent argues. The *Di Re* Court notes that a passenger is more likely to have knowledge of what is being transported when the item is liquor, rather than pieces of paper.[148] However, this merely demonstrates that the passenger's presence in the car does not dictate his arrest.

The dissent misreads the second part of the *Di Re* analysis by taking the reasoning pertaining to the arrest and applying it to the search. The dissent attempts to reason that because a passenger could not be arrested in light of evidence of illegal liquor transportation, a search of the passenger's purse would also be invalid.[149] In examining the search itself, the *Di Re* Court was very clear, however, in asserting that the extent of the search could not include the body of a passenger.[150] The majority was thus correct in its interpretation of a "distinction between property contained in clothing worn by a passenger and property contained in a passenger's briefcase or purse."[151]

C. Closed Containers: The Court's Interpretation of Ross

While *Carroll* pioneered the automobile exception, it was *Ross* that "took the critical step of saying that closed containers in cars could be searched

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[147] *See id.* at 586.

[148] *See id.* at 586-87.

[149] *See* Wyoming v. Houghton, 526 U.S. 295, 313 n.4 (1999) (Stevens, J., dissenting). Arguably, the Court may find disturbing the likelihood that there may not be probable cause to search the passenger's belongings. While interesting, this was not addressed by the dissent.

[150] *See Di Re*, 32 U.S. at 587. The Court reasoned:

> [W]e suppose the Government would not contend that if it had a valid search warrant for the car only it could search the occupants as an incident to its execution. How then could we say that the right to search a car without a warrant confers greater latitude to search occupants than a search by warrant would permit?

Id.

[151] *Houghton*, 526 U.S. at 303 n.1. In his concurring opinion, Justice Breyer noted that he was:

> tempted to say that a search of a purse involves an intrusion so similar to a search of one's person that the same rule should govern both. However, given this Court's prior cases, I cannot argue that the fact that the container was a purse automatically makes a legal difference . . . .

Id. at 308 (Breyer, J., concurring). It is clear from this that Justice Breyer agreed with the majority's interpretation of the distinction enunciated in *Di Re*.

without a warrant because of their presence within the automobile."[152] In delivering the *Ross* opinion for the Court, Justice Stevens was commended as providing the needed guidance by enunciating a readily understood and applied rule.[153] Ironically, the majority rests its opinion on the *Ross* decision,[154] but Justice Stevens' dissent refuses to acknowledge *Ross* as precedent.

The majority is correct in giving *Ross* stare decisis. First, the dissent attempts to miscast the holding of *Ross*. The dissent begins its analysis of *Ross* by characterizing the *Ross* Court as "concerned with the interest of the driver in the integrity of 'his automobile."[155] The reference to the automobile was a comment about the *Carroll* decision,[156] and does not squarely meet the concern of the *Ross* Court.[157] At the same time that the dissent attempts this legerdemain, the majority forthrightly recognizes that the "there was no passenger in *Ross*, and it was not claimed that the package in the trunk belonged to anyone other than the driver."[158] The majority noted that had a limitation been intended, it would have expressed either in the case, or through historical evidence.[159]

Second, while the dissent is correct that the scope of the warrantless search "is defined by the object of the search and the places in which there is probable cause to believe that it may be found," the dissent goes on to incorrectly conclude that *Ross* "thus disapproved of a possible container-based distinction between a man's pocket and a woman's pocketbook."[160] The dissent

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[152] *Id.* at 301 (citing California v. Acevedo, 500 U.S. 565, 572 (1981)).

[153] "It is important . . . that the applicable legal rules be clearly established. Justice Stevens' opinion for the Court now accomplishes much in this respect, and it should clarify a good bit of the confusion that has existed." United States v. Ross, 456 U.S. 789, 825 (1982) (Blackmun, J., concurring).

[154] *See Houghton*, 526 U.S. 300. "In *Ross*, . . . we upheld as reasonable the warrantless search of a paper bag and leather pouch found in the trunk of the defendant's car by officers who had probable cause to believe that the trunk contained drugs." *Id.*

[155] *Id.* at 310 (Stevens, J., dissenting) (citing *Ross*, 456 U.S. at 823).

[156] The Court wrote that "[a]n individual undoubtedly has a significant interest that the upholstery of his automobile will not be ripped or a hidden compartment within it opened." *Ross*, 456 U.S. at 823. The ripping open of the car's upholstery refers to the facts in *Carroll*. *See id.* at 818. The Court notes that under *Carroll*, "the authority of a search . . . does not itself require the prior approval of a magistrate." *Id.* at 823.

[157] Justice Stevens commented in *Acevedo* that "[the Court] explained repeatedly that *Ross* involved the scope of the . . . automobile exception." *Acevedo*, 500 U.S. at 592 (Stevens, J., dissenting) (citing *Ross*, 456 U.S. at 800, 809, 817, 825).

[158] *Houghton*, 526 U.S. at 301.

[159] *See id.* The Court noted "one would have expected that substantial limitation to be expressed. And, more importantly, one would have expected that limitation to be apparent in the historical evidence that formed the basis for *Ross*'s holding." *Id.*

[160] *Id.* at 310 (Stevens, J., dissenting).

overreaches by failing to recognize that the search of a man's pocket is not the search of a container, but of a person. As the majority writes, "if the dissent thinks that 'pockets' and 'clothing' do not count as part of the person, it must believe that the only searches of the person are strip searches."[161]

Third, the dissent remarks "the rule the Court fashions would apparently permit a warrantless search of a passenger's briefcase if there is probable cause to believe the taxidriver had a syringe somewhere in his vehicle."[162] This is not necessarily true, as the facts supporting the finding of probable cause in a case where there is a passenger familiar to the driver are unlikely to exist in the case of a taxi for hire. The *Ross* Court itself stated that "the Court in *Carroll* emphasized the importance of the requirement that officers have probable cause to believe that the vehicle contains contraband."[163] Furthermore, in its conclusion, the *Ross* Court analogized that "[j]ust as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase."[164] By the dissent's interpretation, all garages (or all vans) may be searched. However, while the nature of a garage is that it may contain a lawnmower, the *Ross* Court did not mean to imply that garages universally could be searched. Thus, to that extent, the probable cause requirement inherently recognizes that there is a limitation as to which containers can be searched. Finally, the Court was careful to say that the scope of a warrantless search based on probable cause is "no narrower – and no broader" than a warrant would permit.[165] Thus, in an attempt to predict the impact of the majority's holding, the dissent stretches it too far.

The majority, after presenting the *Ross* holding, buttressed its analysis by citing to two post-*Ross* decisions, *California v. Acevedo*[166] and *United States v. Johns*.[167] Both *Acevedo* and *Johns* affirmed *Ross*,[168] and the majority writes that "later cases describing *Ross* have characterized it as applying broadly to all containers within a car, without qualification as to ownership."[169] The Court thus signals that it is carefully following its past jurisprudence in reaching its decision in *Houghton*. *Houghton* further charts the automobile

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[161] *Id.* at 303 n.1.

[162] *Id.* at 310 (Stevens, J., dissenting).

[163] United States v. Ross, 456 U.S. 789, 807-08 (1982).

[164] *Id.* at 824.

[165] *Id.* at 823. For example, in the dissent's hypothetical, there is no reason to believe that a warrant would permit a search of the cab merely because there is probable cause to search the passenger's briefcase.

[166] 500 U.S. 565 (1991).

[167] 469 U.S. 478 (1985).

[168] *See supra* notes 62-69 and accompanying text.

[169] Wyoming v. Houghton, 526 U.S. 295, 301 (1999).

exception under federal law, but it will be up to individual states to determine whether state law will have a parallel analysis.

VI. IMPACT ON HAWAI'I

A. The Hawai'i Constitution

Hawai'i has elected to take a different course from that of federal law. The United States Supreme Court's interpretation of Federal Constitutional provisions is not binding authority on state courts when interpreting their own constitutions.[170] Protection from unreasonable searches and seizures may arise under state constitutions as an independent right. In such cases, state courts are therefore free to make independent legal determinations about the protection their constitutions afford to criminal defendants.

The Hawai'i Supreme Court has historically afforded a high level of privacy protection in its search and seizure cases pursuant to the Hawai'i Constitution. The search and seizure provision of the Hawai'i Constitution, which provides greater protection than its United States Constitution counterpart, reads:

> The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches, seizures and invasions of privacy shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications sought to be intercepted.[171]

More importantly, the Hawai'i Supreme Court has not hesitated to exercise its unreviewable authority to interpret and enforce the Hawai'i Constitution.[172]

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[170] *See* William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). Federal precedent is persuasive authority that should be afforded respectful consideration. *See, e.g.*, State v. DeFusco, 620 A.2d 746, 749 (Conn. 1993).

[171] HAW. CONST. art. I, §7 (1978). The words "invasion of privacy" were added to article I, section 7 (which was denominated article I, section 5 at the time) by the 1968 Constitutional Convention. Compare to the Fourth Amendment of the United States Constitution, which does not include the words "invasion of privacy." The 1968 Constitutional Committee Report indicates that the delegates sought to expand privacy protection with the amendment. *See* Jon M. Van Dyke, et al., *The Protection of Individual Rights Under Hawaii's Constitution*, 14 U. HAW. L. REV. 311, 346 (1992).

[172] *See* State v. Ching, 67 Haw. 107, 110-13, 678 P.2d 1088, 1092-93 (1984) (holding that under article I, section 7 of the Hawai'i Constitution, the warrantless search of the contents of an opaque and sealed two inch by one-half inch brass cylinder attached to keychain was broader than absolutely necessary); State v. Barnes, 58 Haw. 333, 338-39, 568 P.2d 1207, 1211-12 (1977) (reversing conviction arising out of warrantless seizure of opaque paper bag and search of its contents); State v. Kaluna, 55 Haw. 361, 363-64, 369-75, 520 P.2d 51, 55, 58-62 (1974) (holding as unreasonable under article I, section 7 of the Hawai'i Constitution: 1) the warrantless search of the contents of a folded, opaque tissue removed from arrestee's brassiere,

In doing so, the Hawai'i Supreme Court has effectively extended the protections of the Hawai'i Constitution beyond those of the United States Constitution.[173]

B. Jurisprudence in Hawai'i

As a result of antithetic objectives from the United States and the Hawai'i Supreme Courts, two extremes have emerged: the United States Supreme Court has fashioned an automobile exception that is highly inclusive, whereas the Hawai'i Supreme Court has refused to acknowledge the necessity of an automobile exception at all.

The roots of Hawai'i jurisprudence related to the automobile exception spring from federal soil. In 1980, the Hawai'i Supreme Court heard three cases concerning the search of containers from an automobile: *State v. Elliott*,[174] *State v. Rosborough*,[175] and *State v. Jenkins*.[176] In each of the three cases, the Hawai'i Supreme Court analyzed the search and seizure protection under the United States Constitution,[177] and adopted federal precedent. In *Elliott*,[178] the court adopted the test for a warrantless search from federal

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and 2) inventorying of arrestee's possessions); State v. Goodwin, 7 Haw. App. 261, 263-65, 752 P.2d 598, 601-02 (1988) (reversing defendant's conviction of carrying a deadly weapon discovered as result of lawful warrantless seizure of defendant's backpack incident to defendant's lawful arrest).

[173] The Hawai'i Supreme Court has repeatedly declared that "the right to be free of 'unreasonable' searches and seizures under article, I, section [7] of the Hawaii Constitution is enforceable by a rule of reason which requires that governmental intrusions into the personal privacy of citizens of this State be no greater in intensity than absolutely necessary under the circumstances." *Kaluna*, 55 Haw. at 369, 520 P.2d at 58-59.

[174] 61 Haw. 492, 605 P.2d 930 (1980).

[175] 62 Haw. 238, 615 P.2d 84 (1980).

[176] 62 Haw. 660, 619 P.2d 108 (1980).

[177] The court in *Jenkins* mentioned the Hawai'i Constitution, but did not distinguish it from the United States Constitution. *See id.* at 661 n.1, 619 P.2d at 110 n.1.

[178] Suspecting the defendant of engaging drug trafficking, and acting upon information acquired from an informant, the Maui police with the active participation of the informant arranged a "controlled" purchase of marijuana from the defendant. *See Elliott*, 61 Haw. at 493, 605 P.2d at 931. After receiving the pre-arranged signal that the sale had been consummated, the police saw the defendant carrying a white cloth bag similar in appearance to one the police had previously seen him with. *See id.* at 493, 605 P.2d at 932. When the defendant became aware of police presence, he threw the bag in the car and locked the door. *See id.* The police later unlocked the car and recovered the bag. *See id.* at 494, 605 P.2d at 932. The police thus had "specific" probable cause to search the container, not the automobile. *See supra* note 48.

caselaw.[179] In both *Rosborough*[180] and *Jenkins*,[181] the court relied on the since-vanquished *Chadwick-Sanders* rule.[182]

At the same time that the automobile exception underwent some of its most significant changes at the federal level, the jurisprudence related to the automobile exception in Hawai'i experienced its own shift. In *State v. Wong*,[183] the Hawai'i Supreme Court fundamentally altered its approach, and relied on Hawai'i precedent rather than federal precedent to reach its

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[179] The court required that "there must be a showing that at the time of the warrantless search and seizure there was probable cause to search; and that the police had reason to believe that because of the car's mobility or exposure, there was a foreseeable risk that it might be moved or that the evidence which it contained might be removed or destroyed before a warrant could be obtained." *Elliot*, 61 Haw. at 496, 605 P.2d at 933 (citing United States v. Connolly, 479 F.2d 930 (9th Cir. 1973), *cert. denied*, 414 U.S. 897 (1973)). While the court ultimately determined that both requirements were met, it is likely that if the *Houghton* fact pattern had occurred in Hawai'i, the warrantless search would not have been upheld under *Elliott*. First, because the Hawai'i Supreme Court, in the twenty years after *Elliott*, initiated a more protective interpretation permitted under the Hawai'i Constitution. *See infra* section VI.B. Second, because the officer in *Houghton* could have chosen to retain custody of Houghton's purse while obtaining a search warrant, the facts do not meet the exigent circumstances requirement. *See* Wyoming v. Houghton, 526 U.S. 295, 295 (1999).

[180] The Honolulu police officers had probable cause to arrest the appellee when he took possession of the footlocker and also had probable cause to seize the footlocker based on the information received from Los Angeles. *See Rosborough*, 62 Haw. at 241, 615 P.2d at 86. Similar to *Elliott*, the police had "specific" probable cause to search the container, not the automobile. *See supra* note 48.

[181] On January 15, 1979, police officers on duty in Waikiki smelled the odor of burning marijuana emanating from a van. *See Jenkins*, 62 Haw. at 661, 619 P.2d at 110. They approached the van, and observed a plastic bag containing marijuana on top of a knapsack on the floor of the van. *See id.* The officers, with the intent of "check[ing] out the knapsack," searched the van, and seized and opened the knapsack. *Id.* at 662, 619 P.2d at 110. *Jenkins* was the first Hawai'i case to address the extension of the automobile exception to the search of containers found within the automobile. *See id.* at 662, 619 P.2d at 111.

[182] In *Rosborough*, the court concluded that the warrantless search of a footlocker was an unreasonable invasion into defendant's reasonable expectation of privacy. *See Rosborough*, 62 Haw. at 241, 615 P.2d at 86. The court also noted that "[t]he State does not and cannot claim that any exigency existed at the time the footlocker was searched." *Id.* at 241-42, 615 P.2d at 86.

In *Jenkins*, the court concluded that the automobile exception to the warrant requirement under the constitution does not extend to a search of the knapsack. *Jenkins*, 62 Haw. at 665, 619 P.2d at 112. As it had in *Rosborough*, the court also ended with a note that "[n]o exigent circumstances existed then to conduct a warrantless search of the knapsack, and we hold such search to be unreasonable." *Id.*

[183] 68 Haw. 221, 708 P.2d 825 (1985). *Wong* involved an automobile, but its holding did not rest on the automobile exception. In addition, like the court in *Jenkins*, the court in *Wong* cited both the Hawai'i and United States Constitutions, but did not distinguish between them. *See id.* at 223, 708 P.2d at 828. The court in *State v. Wallace* would. *See infra* notes 187-92 and accompanying text.

holding.[184] While the court did cite *United States v. Ross*,[185] it strictly interpreted the *Ross* holding to conclude that it "need not reach the issue of *Ross*."[186] *Wong* thus signified an end to the shared jurisprudence, as the Hawai'i Supreme Court signaled that it would no longer leap to affirm federal caselaw, but would move cautiously in establishing Hawai'i precedent.

Taking the lead from *Wong*, in *State v. Wallace*,[187] the Hawai'i Supreme Court severed itself completely from federal caselaw, and moved decidedly from the Federal Constitution to interpretation of its own constitution.[188] In deciding *Wallace*, the Hawai'i Supreme Court elected not to rely on *Acevedo*, despite the availability of that precedent. Rather, the court cited its *Wong* decision for its interpretation of *Ross*.[189] The court then made the landmark step of taking the *Wong* analysis further, professing that it could "perceive no good reason, as a matter of state constitutional law, to leave the *Ross* proposition in limbo."[190] It consequently declared that "being 'free to give broader protection under the Hawaii Constitution than that given by the [F]ederal [C]onstitution, we hereby decline to follow *Ross*."[191] Tellingly, the court aligned itself with Justice Marshall's dissenting opinion in *Ross*, stating that "[t]he traditional rationales for the automobile exception plainly do not support extending it to the search of a container found inside a vehicle."[192] With its *Wallace* decision, the Hawai'i Supreme Court demonstrated not only a willingness to take a position separate from the United States Supreme Court, but specifically that it will keep the automobile exception within tight boundaries.

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[184] The court cited seven Hawai'i Supreme Court cases and zero federal cases to outline an individual's reasonable expectation of privacy.

[185] "*Ross* requires the police officer to have probable cause to search the entire vehicle before any search may be conducted of any container found therein." *Wong*, 68 Haw. at 225, 708 P.2d at 829.

[186] *Id.* The court stated that "there [was] no evidence that [the officer] had probable cause to search the entire vehicle." *Id.*

[187] 80 Hawai'i 382, 910 P.2d 695 (1996). Similar to *Wong*, *Wallace* also involved an automobile, but not the automobile exception.

[188] The Hawai'i Supreme Court based its *Wallace* holding on Hawai'i's Constitution, independent of the United States Constitution, *Carroll v. United States*, or any of the *Carroll* progeny. *See id.* at 400-04, 910 P.2d at 713-17.

[189] The court discussed *Ross* to support its discussion of the plain view doctrine, but not the automobile exception. *See id.* at 403, 404 n.18, 910 P.2d at 715, 717 n.18.

[190] *Id.* at 402 n.16, 910 P.2d at 715 n.16.

[191] *Id.* (citations omitted).

[192] *Id.*

C. Impact On Hawai'i

It appears that *Houghton* could dramatically impact caselaw in Hawai'i.[193] *Houghton* both clarifies and extends the automobile exception in a manner that cannot be simply ignored by Hawai'i courts. In reaffirming the *Ross* rationale, the United States Supreme Court clearly shows its support for the automobile exception. For Hawai'i courts to continue their current jurisprudence, they must consciously part from the clear position of the United States Supreme Court. While *Houghton* will certainly force Hawai'i courts to once again evaluate their treatment of the automobile exception, the Hawai'i Supreme Court has been both willing and prepared to develop a jurisprudence in contradiction to the United States Supreme Court. Given Hawai'i's constitutional grant of a higher degree of protection to its citizenry, it is likely that had the fact pattern of *Houghton* occurred in Hawai'i, there would have been a substantially different outcome.[194]

In contrast, the Wyoming Supreme Court in *Houghton* did not exercise the "broader power" that the Hawai'i Supreme Court clearly applied in *Wallace*. The Wyoming Supreme Court evaluated *Houghton* under the Federal Constitution, noting that "[a]lthough Houghton's claims rely on both federal and state constitutional mandate, she does not distinguish the protection afforded by the Wyoming Constitution from that of its federal counterpart."[195] In contrast, the Hawai'i Supreme Court acknowledges that "[o]ver the years (both before and after *Ross*), and as a matter of state constitutional law, the appellate courts of this state have impliedly applied and extended the law of closed containers in interpreting the parameters of article I, section 7 of the Hawai'i Constitution."[196] Unlike Wyoming, absent a radical paradigm shift, the Hawai'i Supreme Court can be expected to continue exercising its power

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[193] A number of courts have already followed *Houghton*. *See, e.g.*, McDaniel v. State, 990 S.W.2d 515 (Ark. 1999); People v. Hart, CO28605, 1999 Cal. App. LEXIS 685 (July 23, 1999); Commonwealth v. Gonsalves, 711 N.E.2d 108 (Mass. 1999); State v. Hirning, 592 N.W.2d 600 (S.D. 1999); State v. Pallone, No. 98-0896-CR, 1999 Wisc. App. LEXIS 479 (May 5, 1999).

[194] In addition to Hawai'i, there may be other states that would likewise reach a different conclusion from Wyoming. *See* Norma J. Briscoe, *The Right to be Free From Unreasonable Searches and the Warrantless Searches of Closed Containers in Automobiles*, 36 HOW. L. J. 215 (1993) (identifying six states that afford Fourth Amendment protection to the contents of closed containers in automobiles in limited circumstances).

[195] Houghton v. State, 956 P.2d 363, 366 n.2 (Wyo. 1998). Note that the Wyoming Constitution is "somewhat stronger than its federal counterpart, in that under the Wyoming Constitution it is mandatory that the search warrant be issued upon an affidavit." *Id.* (quoting Hall v. State, 911 P.2d 1364, 1368 (Wyo. 1996)).

[196] *Wallace*, 80 Hawai'i at 400, 910 P.2d at 713. For a detailed discussion on the status of state constitutions in automobile exception analysis, see Wesley D. Dupont, *Automobile Searches and Judicial Decisionmaking Under State Constitutions*: State v. Miller, 27 CONN. L. REV. 699 (1995).

to give "broader protection" than afforded by the federal constitution. Although it will result in distinct bodies of caselaw, the history of the automobile exception in Hawai'i indicates that Hawai'i courts will likely continue on their path of heightened privacy protection rather than engage in new treatment of the automobile exception. Therefore, one should anticipate Hawai'i courts not to follow *Houghton*, and instead continue their own bright-line in favor of individual privacy rights.

VII. CONCLUSION

As any exception to the warrant requirement infringes to some extent on the individual interests protected under the Fourth Amendment, the automobile exception would be expected to spark dispute. What is perhaps unexpected is the reluctance with which the Supreme Court has chosen to move forward with its holdings. Justice Scalia, in his concurring opinion in *Acevedo*, described the history of the automobile exception as "an inconsistent jurisprudence that has been with us for years."[197] The resolution to the dispute and inconsistencies can be found in the doctrine of stare decisis. Justice Scalia recognized that "[t]here can be no clarity in this area unless we make up our minds, and unless the principles we express comport with the actions we take."[198] Thus, unlike Justice Stevens, who appears to have retreated from his holding in *Ross*, Justice Scalia correctly allowed stare decisis to dictate his holding in *Houghton*. With Justice Scalia's holding, the United States Supreme Court is standing firm on the automobile exception that was pioneered over seventy years ago.

It is apparent that *Houghton* will have profound implications where the privacy of citizens traveling in automobiles is adjudged under federal law. *Houghton* is the necessary extension of an exception that must be permitted wide latitude if it is to be consistently and effectively applied. *Houghton* is also the result of a bright-line rule that Hawai'i has never fully adopted into its jurisprudence. More than any other decision discussing the automobile exception, *Houghton* demonstrates the "slippery slope" created by the exception. In this light, *Houghton* serves as a reminder to Hawai'i courts of why Hawai'i declines to foster what ultimately advances an erosion of the individual privacy rights protected by the Fourth Amendment.

Nichole K. Shimamoto[199]

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[197] California v. Acevedo, 500 U.S. 565, 583 (1981) (Scalia, J., concurring).

[198] *Id.*

[199] Class of 2001, William S. Richardson School of Law.

Finley v. Home Insurance Co.: Hawai'i's Answer to the Troubling Tripartite Problem

I. INTRODUCTION

When an insurer accepts a tendered claim and hires an attorney to defend its insured, a unique relationship, often termed the "tripartite relationship," emerges.[1] Deceptively simple, the relationship presents complex ethical issues for the defense attorney who seemingly must serve the divergent interests of two clients, the insurer and insured.[2] The extensive amount of litigation and commentary discussing this topic reflects the complexity of the problem.

The insurer, insured, and defense counsel generally share the common goal of minimizing, or altogether defeating liability.[3] This harmonious relationship ends, however, where coverage defenses exist and the insurer reserves its right to deny coverage.[4] An insurer preserves the ability to deny coverage while defending its insured by issuing a reservation of rights letter.[5] Because the insurer can relinquish its obligation to indemnify by proving the insured's

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[1] *See* Douglas Richmond, *Walking a Tightrope: The Tripartite Relationship Between Insurer, Insured, and Insurance Defense Counsel*, 73 NEB. L. REV. 265, 266 (1994).

[2] Defense counsel faces ethical considerations upon discovery that either the insured or insurer is engaging in sanctionable conduct that undermines the other's interests. *See* David J. Beck, *Legal Malpractice in Texas*, 50 BAYLOR L. REV. 551, 673 (1998). Also, defense counsel must choose between the insurer and insured's instructions when they disagree on issues regarding settlement, appeals, and the amount of resources dedicated to defending the insured. *See* Charles Silver & Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 DUKE L.J. 255, 266-67 (1995). This casenote primarily addresses the conflicts that manifest when an insurer agrees to defend its insured while reserving its right to deny coverage. For a discussion of conflict issues likely to develop when an attorney represents multiple defendants, the plaintiff seeks punitive damages, and when potential damages exceed policy limits, see generally Douglas Richmond, *Lost in the Eternal Triangle of Insurance Defense Ethics*, 9 GEO. J. LEGAL ETHICS 475 (1996) (discussing common conflicts of interest).

[3] *See* William T. Barker, *The Tripartite Relationship and Protection of the Insured: Is There a Problem?*, 21 No. 17 INS. LITIG. REP 533, 536 (1999). *See also* CHI of Alaska, Inc. v. Employers Reins. Corp., 884 P.2d 1113, 1115 (Alaska 1993). The court in *American Mutual Liability Insurance Co. v. Superior Court*, 113 Cal. Rptr. 561 (Cal. Ct. App. 1974), described the relationship as "a loose partnership, coalition, or alliance directed toward a common goal, sharing a common purpose." *Id.* at 571.

[4] *See* Keith A. Brown, *Conflicts of Interest Between Insurer and Insured: When Is Independent Counsel Necessary*, 22 J. LEGAL PROF. 211, 212 (1997) (noting that reservation of rights creates a potential conflict of interest between insurer and insured).

[5] *See* Richmond, *supra* note 2, at 486 (remarking that "[a] reservation of rights letter is simply an insurer's unilateral declaration that it is reserving its right to later deny coverage, despite its initial decision to defend").

claim falls outside the coverage under contract,[6] the insurer focuses on denying coverage, whereas the insured desires indemnity.[7] Mindful of this inherent conflict of interest, many courts require the insurer to pay for independent (*Cumis*) counsel,[8] selected by its insured, when electing to defend subject to a reservation of rights.[9]

In *Finley v. Home Insurance*,[10] however, the Hawai'i Supreme Court rejected the presumed necessity of "*Cumis* counsel."[11] The court held that in conflict situations, the insured is the sole client of the attorney and that the insurer must not interfere with the attorney's professional judgment in conducting the defense.[12] Additionally, the court outlined compliance guidelines for defense counsel and insurers.[13] The *Finley* court stated that the Hawai'i Rules of Professional Conduct ("HRPC"), equitable estoppel, and potential bad faith and legal malpractice claims provide adequate safeguards for insureds.[14]

This casenote discusses the tripartite relationship generally as well as the reasoning and uncertain impact of the *Finley* decision. Part II reviews the relationship between the insurer, insured and defense counsel, and the

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[6] An insurer can establish non-coverage by prevailing in a declaratory judgment action against its insured. *See generally* National Chiropractic Mut. Ins. Co. v. John Doe, 23 F. Supp. 2d 1109 (D. Alaska 1998) (addressing the appropriate timing of a declaratory judgment action in relation to the underlying tort case).

[7] *See* Rockwell Int'l Corp. v. Superior Court, 32 Cal. Rptr. 2d 153, 158 (Cal. Ct. App. 1994) (stating that a conflict exists when an insurer reserves its rights to deny coverage because "the insured's goal is coverage, which flies in the face of the insurer's desire to avoid its duty to indemnify").

[8] For purposes of this casenote, the term "independent counsel" refers to an attorney selected by the insured but compensated by the insurer. "Independent counsel" is frequently referred to as "*Cumis* counsel" after the seminal case *San Diego Navy Federal Credit Union v. Cumis Insurance Society, Inc.*, 162 Cal. App. 3d 358, 375 (Cal. Ct. App. 1984), which established an insured's entitlement to select co-counsel when a conflict arises out of the issuance of a reservation of rights. *See also infra* section II.B (discussing the *Cumis* doctrine in greater detail); Stephen S. Ashley, Cumis *Rejected*, 15 No. 6 BAD FAITH L. REP. 113, 113 (1999). Throughout this casenote, the term "retained counsel" refers to the attorney selected by the insurer to defend the insured. "Defense counsel" or "attorney" refers to counsel selected by either the insurer or insured; drawing a distinction is immaterial.

[9] *See infra* note 29, discussing the majority view. *See also* Todd R. Symth, *Duty of Insurer to Pay for Independent Counsel When Conflict of Interest Exists Between Insured and Insurer*, 50 A.L.R. 4th 932, 944-45 (1986) (listing, by state, courts requiring the insurer to pay for independent counsel when defending subject to a reservation of rights).

[10] 90 Hawai'i 25, 975 P.2d 1145 (1998).

[11] *See Finley*, 90 Hawai'i at 31, 975 P.2d at 1151 ("The insured does not have the right to select counsel to represent its interests solely due to an insurer's reservation of rights.").

[12] *See id.* at 33, 975 P.2d at 1153.

[13] *See id.* at 33, 36, 975 P.2d at 1153, 1156.

[14] *See id.* at 35, 975 P.2d at 1155.

jurisdictional split over adoption or rejection of the *Cumis* doctrine. Part III discusses *Finley*'s factual and procedural background and summarizes the Hawai'i Supreme Court's opinion. Part IV analyzes the reasoning of the decision, particularly, the court's use of HRPC Rule 1.7(b) to reach its conclusion. Part V discusses issues left unresolved by *Finley*. Finally, Part VI concludes that despite its analytical flaws, the court's rejection of the *Cumis* doctrine arguably constitutes the better solution for practical reasons.

II. BACKGROUND

The following section examines the sources and parameters of the tripartite relationship, namely the interests of the insured, insurer, and defense counsel and the duties flowing between them.[15] The discussion focuses on the jurisdictional split between courts in the majority that entitle an insured to independent counsel when the insurer reserves its right to deny coverage, as opposed to those in the minority which do not.

A. The Interests and Duties of the Insured, Insurer and Defense Counsel That Define the Tripartite Relationship

1. The insured

The insured buys insurance to shift risk of the unexpected to the insurer.[16] Upon tendering a claim to the insurer, the insured seeks a defense and total indemnification.[17] The insurer conditions these benefits on the insured's cooperation and respect for its contractual right to control the ensuing litigation.[18] Typically, the insurance policy requires the insured to supply the

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[15] This section does not purport to examine all issues relevant to the tripartite relationship, but merely surveys basic concepts integral to understanding the *Finley* decision and subsequent sections of this casenote.

[16] *See* William T. Barker, *Insurance Defense Ethics and the Liability Insurance Bargain*, 4 CONN. INS. L.J. 75, 78 (1997/1998). See *also* Silver & Syverud, *supra* note 2, at 266.

[17] *See* Rockwell Int'l Corp. v. Superior Court, 32 Cal. Rptr. 2d 153, 158 (Cal. Ct. App. 1994).

[18] *See* Ronald E. Mallen, *Looking to the Millennium: Will the Tripartite Relationship Survive?*, 66 DEF. COUNS. J. 481, 482 (remarking that "[t]he insurer has a contract entitling it to control the defense"); Richmond, *supra* note 1, at 269 ("The right to control the defense of litigation is part of the insurer's business, and it is certainly one of the services an insured bargains for . . . ."); Charles Silver, *Does Insurance Defense Counsel Represent the Company or the Insured?*, 72 TEX. L. REV. 1583, 1594 (1994) stating:

> Ordinarily, the company can select counsel to defend the insured, discharge appointed counsel and name a replacement without the insured's consent, bargain with appointed counsel over fees, monitor counsel and direct litigation strategy, require counsel to inform the company of settlement demands and procedural developments, direct counsel to

insurer with relevant information, testify at trial, and refrain from settling the case.[19]

2. The insurer

Insurance companies are in the business of making money. Their interests lie primarily in minimizing cost, which often translates to seeking dismissal of invalid claims, preventing collusion between claimants and insured, reducing settlement outlays, and taking other cost reduction measures.[20] The insurer's duties to its insured are numerous. First, the insurer must defend wherever the potential for indemnification liability exists.[21] An insurer's indemnification liability, however, is not construed as comprehensively as its duty to defend and will be imposed only if coverage is established.[22] In addition to these

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initiate settlement discussions, settle claims without an insured's consent and decline to settle claims over the insured's objection and file appeals.

Id. (citations omitted). *See also* United States Auto Assoc. v. Morris, 741 P.2d 246, 250 (Ariz. 1987) ("When an insurer performs its contractual obligation to defend, the policy requires the insured to cooperate with the insurer. The insured must aid the insurer in the defense.").

[19] *See* Barker, *supra* note 16, at 80. *See also Morris*, 741 P.2d at 250.

[20] *See* Barker, *supra* note 16, at 78. *See also* Silver, *supra* note 18, at 1595-96. To reduce costs, the insurer may attempt to avoid liability by proving breach of the insurance policy or establishing non-coverage. *See generally*, Cay Divers, Inc. v. Raven, 812 F.2d 866 (3d Cir. 1987) (discussing where the insurer, Lloyds of London, sought relief of its duty to indemnify on grounds that the insured, Cay Divers (Do-It-Fluid), breached the insurance contract by settling its claim); Parsons v. Continental Nat'l Am. Group, 550 P.2d 94 (Ariz. 1976) (discussing where the insurer attempted to deny coverage based on the policy's intentional act exclusion).

[21] *See* First Ins. Co. v. Continental Cas. Co., 466 F.2d 807, 810 (9th Cir. 1972); Gray v. Zurich Ins. Co., 65 Cal. 2d 263 (1966); First Ins. v. State, 66 Haw. 413, 417, 665 P.2d 648, 652 (1983) (citing Standard Oil Co. v. HIG, 65 Haw. 521, 654 P.2d 1345, 1349 (1982)). *See also* Richmond, *supra* note 1, at 267 (stating "[i]nsurers owe their insured a defense if the allegations of the subject lawsuit are even potentially within the scope of the policy").

The duty to defend arises out of the insurer's contractual relationship with the insured and is broader than its duty to indemnify. *See First Ins.*, 66 Haw. at 417, 665 P.2d at 652 (citing 7 C. J. APPLEMAN, INSURANCE LAW & PRACTICE § 4682, at 23 (Berdal 1979); Ritter v. United States Fidelity & Guar. Co., 573 F.2d 539, 542 (8th Cir. 1978)). This duty extends to the entire suit "even though other claims of the complaint fall outside the policy's coverage." *Id.* at 417, 665 P.2d at 652 (citing Crawford v. Ranger Ins. Co., 653 F.2d 1248, 1253 (9th Cir. 1981); St. Paul Fire & Marine Ins. Co. v. Sears, 603 F.2d 780, 786 (9th Cir. 1979); United States Fidelity & Guar. Co. v. Louis Roser Co., 585 F.2d 932, 936 (8th Cir. 1978); Babcock & Wilcox Co. v. Parsons Corp., 430 F.2d 531, 537 (8th Cir. 1970)).

[22] *See id.* at 418, 665 P.2d at 652 (stating "the duty to defend has broader aspects than the duty to indemnify"). *See also* Sharon K. Hall, *Confusion Over Conflicts of Interest: Is there a Bright Line for Insurance Defense Counsel?*, 41 DRAKE L. REV. 731, 733 (1992) (remarking that "[a]n insurer is obligated to defend the insured against any claim that may even remotely fall within coverage, while an insurer must indemnify an insured only if the insured's liability is established").

contractual duties, it is well-settled that the insurer must abide by the standards of good faith and fair dealing.[23]

3. *Defense counsel*

Law firms, like most businesses, seek profit maximization. To this end, defense counsels' interests lie in generating fees and avoiding malpractice suits.[24] The rules of professional conduct shape defense counsels' ethical responsibilities.[25] Although not unanimously accepted, many jurisdictions agree that the attorney owes these duties primarily to the insured.[26] Representation of the insured, however, is not unqualified. Though not a party to the insurance contract, defense counsel, as the insured's agent, must acknowledge the insurer's contractual rights in order to preserve coverage.[27]

The numerous duties running between the insured, insurer, and defense counsel create an enigmatic association. Personal interests naturally motivate each player to challenge the limitations of their respective duties. Nevertheless, the insured must comply with the provisions of the insurance contract; the insurer must defend and indemnify in good faith; and defense counsel must balance respect for the terms of the policy against staying within the bounds of ethical conduct as delineated by the professional rules. When an insurance company issues a reservation of rights further strain is laid upon this already tenuous relationship. The following section discusses the majority and minority approaches to resolution of the conflict that arises when an insurer defends subject to a reservation of rights.[28]

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[23] *See* Mallen, *supra* note 18, at 482. *See generally* Best Place, Inc. v. Penn America Ins. Co., 82 Hawai'i 120, 143, 920 P.2d 334, 357 (1996) (establishing the tort of bad faith within the context of first- and third-party insurance in Hawai'i).

[24] *Cf.* Stephen Pepper, *Applying the Fundamentals of Lawyers' Ethics to Insurance Defense Practice*, 4 CONN. INS. L.J. 27, 46 (1987/1998).

[25] *See* Debra A. Winiarski, *Walking the Fine Line: A Defense Counsel's Perspective*, 28 TORT & INS. L.J. 596, 597 ("The primacy of the lawyer's duties to the insured derives from the Model Rules of Professional Conduct."). *See also* HAWAII RULES OF PROFESSIONAL CONDUCT Scope 2 (1999) (stating "[t]he rules simply provide a framework for the ethical practice of law").

[26] *See* Winiarski, *supra* note 25, at 597 (stating "defense counsel's primary loyalty . . . is to the insured"). *But cf.* section V.B, *infra* discussing defense counsel's potential duties to the insurer.

[27] *See* Winiarski, *supra* note 25, at 597 (remarking that "the obligations owing to the insurer can be said to arise from the terms of the insurance contract itself" and "in protecting the insured's right to coverage, defense counsel should strive to fulfill the policy terms, which generally define the obligations owed to the insurer").

[28] Unless explicitly noted, the discussion in the following section is limited to resolution of coverage issue conflicts, primarily addressing the situation where an insurer issues a reservation of rights letter to preserve its right to establish non-liability, and consequently, to deny coverage.

B. Majority View

A majority of courts remedy the conflict attendant with defending subject to a reservation of rights by requiring the insurer to pay the reasonable expenses of independent counsel.[29] In reaching this conclusion, courts generally engage in the following analysis.[30]

The attorney retained by the insurer to defend the insured serves two clients, the insurer and insured. This premise is often referred to as the "dual client doctrine."[31] When the insurer elects to defend subject to a reservation of rights, the interests of retained counsel's clients become adverse.[32] The

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[29] *See* Federal Ins. Co. v. X-Rite, Inc., 748 F. Supp. 1223, 1228 (D. Mich. 1990) (stating "*Cumis* is representative of a growing body of case law which would give the insured an absolute right to choose counsel where a conflict exists"); Moeller v. Am. Guar. & Liab. Ins. Co., 707 So.2d 1062, 1069 (Miss. 1996) (noting that "other jurisdictions have generally held that in such a situation [defending under a reservation of rights], not only must the insured be given the opportunity to select his own counsel to defend the claim, the carrier must also pay the legal fees reasonably incurred in the defense"); Hall, *supra* note 22, at 736 (stating "[t]he majority view is that when a material coverage issue is present, the insured may select independent counsel at the insurer's expense to control the defense"); Smyth, *supra* note 9, at 944-45 (listing, by state, cases that require the insurer to pay for the insured's independent counsel due to conflict that arose from the issuance of a reservation of rights). *See also* Navy Fed. Credit Union v. Cumis Ins. Soc'y, Inc., 162 Cal. App. 3d 358, 373 n.9 (Cal. Ct. App. 1984) (listing jurisdictions supporting and opposing the *Cumis* doctrine). *See, e.g.*, Union Ins. Co. v. Knife Co., 902 F. Supp. 877, 880 (W.D. Ark. 1995) (stating "[d]ue to this [coverage] conflict of interest . . . the insurer must give up control of the litigation and retain an independent counsel for the insured"); CHI of Alaska v. Employers Reins. Corp., 844 P.2d 1113, 1121 (Alaska 1993) (concluding that "the insured should have the right to select independent counsel" subject to the "implied covenant of good faith and fair dealing"); Village of Lombard v. Intergovernmental Risk Mgmt. Agency, 681 N.E.2d 88, 94 (Ill. 1997) (holding that the insured can select independent counsel except where the insurer and insured contractually agree to limit scope of the defense and liability obligations); Brohawn v. Transamerica Ins. Co., 347 A.2d 842, 854 (Md. App. 1975) (requiring the insurer to inform the insured of the conflict and provide the insured with the option of accepting counsel selected by the insurer or selecting independent counsel whose reasonable expenses will be paid by the insurer).

[30] The general analysis is primarily patterned after the court's reasoning in *Cumis*, 162 Cal. App. 3d at 358.

[31] *See* Richmond, *supra* note 1, at 270 (noting that "[t]he dual client doctrine reflects a widespread recognition that insurance defense counsel are deemed to have two clients in any given case: the insurer and insured"). *See also* Hall, *supra* note 22, at 734 (noting that a "majority of courts and commentators conclude that the defense counsel has two clients, the insured and insurer"); Silver & Syverud, *supra* note 2, at 273 (remarking that "[m]ost jurisdictions endorse the two client view"). *See, e.g.*, *Cumis*, 162 Cal. App. 3d at 374 (stating that "[c]ounsel representing the insurer and the insured owes both a high duty of care" and "unswerving allegiance") (citations omitted).

[32] *See supra* note 4 and accompanying text.

insured will work toward preserving indemnity whereas the insurer focuses on establishing non-coverage.[33]

The conflicting interests of retained counsel's two clients makes ethical representation of both difficult if not impossible.[34] Courts identify the following potential problem areas: First, retained counsel may become aware of information damaging to a client through confidential communication with the other client.[35] Second, retained counsel potentially could manipulate the trial strategy to benefit the interests of one client to the detriment of the other.[36] For example, when seeking special verdicts, retained counsel will be responsible for framing jury questions, the answers to which, in many cases, will determine coverage/non-coverage.[37]

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[33] *See supra* note 7 and accompanying text.

[34] *See* Hall, *supra* note 22, at 733 (stating that the insured's and insurer's interests "may diverge under a variety of circumstances, leaving the defense counsel to walk an ethical tightrope").

[35] *See* Richmond, *supra* note 1, at 273 (discussing the conflict that arises when an attorney elicits deposition testimony that supports a coverage defense); Richmond, *supra* note 2, at 497 (illustrating the problem by noting that "[i]f the attorney shares the information with the insurer, the insured will be prejudiced" by loss of coverage; however, "withholding the information prejudices the insurer" because it will ultimately be held liable where coverage did not exist). *See also Cumis*, 162 Cal. App. 3d at 366 (noting that "the lawyer is forced to walk an ethical tightrope, and not communicate relevant information which is beneficial to one or the other of his clients"); CHI of Alaska v. Employers Reins. Corp., 844 P.2d 1113, 1118 (Alaska 1993) (expressing the court's concern that "the insurer may gain access to confidential or privileged information which it may later use to its advantage [when asserting a coverage defense]"); Parsons v. Continental Nat'l Am. Group, 550 P.2d 94, 99 (Ariz. 1976) (holding the insurer responsible for indemnification of the insured because retained counsel established non-coverage by using privileged and confidential information from the insured's confidential files).

[36] Though not a reservation of rights case, the court in *Nisson v. American Home Assurance Co.*, 917 P.2d 488 (Okla. 1996), specifically identified that trial strategy creates a significant conflict when the interests of the insured and insurer diverge. *See id.* at 490. The court concluded that such a conflict obligates the insurer to pay the reasonable fees of the insured's independent counsel. *See id.* at 490-91. In many instances, an insurer reserves its right to deny coverage when the insured may have acted intentionally (not covered) as opposed to negligently (covered) in injuring the plaintiff in the underlying suit. Courts fear that retained counsel may structure the defense to induce a finding of intentional conduct so that the insurer escapes liability for the judgment. *See, e.g.*, Union Ins. v. Knife Co., 902 F. Supp. 877, 880 (D. Ark. 1995) (holding that "[d]ue to this conflict of interest [reservation of rights based on the insured's possible intentional conduct] . . . the insurer must give up control of the litigation and retain an independent counsel for the insured"); Brohawn v. Transamerican Ins., 374 A.2d 842, 854 (Md. 1975) (holding that the conflict created by the intentional conduct exclusion entitled the insured to a choice between accepting retained counsel after disclosure or selecting independent counsel at the expense of the insurer).

[37] *See* San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y, Inc., 162 Cal. App. 3d 358, 365 (Cal. Ct. App. 1984). See *also CHI of Alaska*, 844 P.2d at 1118.

When faced with a decision that compromises the interests of one client over the other, courts in the majority presuppose that defense counsel will favor the insurer over the insured.[38] Acknowledging that "no man can serve two masters,"[39] the ethical prohibition against representation of two clients with "'conflicting, inconsistent, diverse or otherwise discordant' interests,"[40] and the insurer's duty to defend,[41] courts in the majority conclude that where a conflict of interest arises out of the insurer's reservation of rights to deny coverage, the insurer must pay for the reasonable costs of the insured's independent counsel.[42]

C. Minority View

Courts in the minority generally accept either the premise that counsel represents the insured exclusively upon being retained by the insurer,[43] or that

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[38] See *United States Fidelity & Guar. Co. v. Roser*, 585 F.2d 932, 938 n.5 (8th Cir. 1978), for the oft-cited exposition:

> Even the most optimistic view of human nature requires us to realize that an attorney employed by an insurance company will slant his efforts, perhaps unconsciously, in the interests of his real client the one who is paying his fee and from whom he hopes to receive future business the insurance company.

Id. *See also* Silver, *supra* note 18, at 1607 ("Because the company hires the lawyer, pays the bills, can fire the lawyer at will, and is a source of repeat business, counsel will naturally be inclined to favor the company over the insured.").

[39] State Farm Mut. Auto. Ins. Co. v. Traver, 980 S.W.2d 625, 634 (Tex. 1998).

[40] *Cumis*, 162 Cal. App. 3d at 374-75 (citing Ethical Canon 5-15). Other rules frequently considered in this context are Model Rules of Professional Conduct 1.7 (discussing conflicts of interest) and 1.8 (addressing third-party payors and other prohibited transactions). *See* Richmond, *supra* note 1, at 284-85 (stating that Model Rule 1.7 is the primary rule pertaining to conflicts of interest). *See also* Finley v. Home Ins. Co., 90 Hawai'i 25, 32-34, 975 P.2d 1145, 1152-54 (1998); American Ins. Assoc. v. Kentucky Bar Ass'n, 917 S.W.2d 568, 569 (Ky. 1996).

[41] A conflict of interest does not relinquish an insurer's comprehensive duty to defend. *See* Gray v. Zurich Ins. Co., 419 P.2d 168, 178 (Cal. 1966) (stating "we find no merit in the insurer's third contention that our holding will embroil it in a conflict of interest"); *Brohawn*, 347 A.2d at 852 (stating "[t]he contractual duty which the insurance company has assumed cannot be removed by the insurer's simply creating its own conflict of interest"). *See also supra* note 21 and accompanying text (discussing an insurer's duty to defend).

[42] *See supra* note 29 (listing courts that have endorsed the *Cumis* doctrine).

[43] This view is often referred to as the "single client doctrine." *See infra* note 163 and accompanying text. Despite the "dual client" doctrine's wide acceptance in the past, discussed *supra* note 31, more courts and commentators have recently adopted the "single client" view as the favored approach to evaluating defense counsel's role in the tripartite relationship. *See* Hall, *supra* note 22, at 747 (providing an "overview of minority jurisdictions"). *See also* Robert E. O'Malley, *Ethics Principles for the Insurer, the Insured, and Defense Counsel: The Eternal Triangle Reformed*, 66 TUL. L. REV. 511, 511 (1991) ("The dual client doctrine is a confusing and increasingly useless anachronism."); Pepper, *supra* note 24, at 50 (advocating the single client model as "more accurately reflect[ing] both the underlying substance of the relationship

counsel represents both until a conflict manifests, at which point retained counsel primarily or exclusively serves the insured.[44] Serving a single client substantially eliminates the problems attendant with dual representation in conflict situations because the attorney's ethical duties run only to the insured.[45] Moreover, the rules of professional conduct and ethical canons require retained counsel to preserve his or her independence.[46] These rules of ethics, coupled with imposition of an enhanced duty of good faith on insurers,[47] sufficiently protect the interests of the insured, thus making independent counsel unnecessary.[48] Courts in the minority reject the assumption that retained counsel will act unscrupulously.[49] Malpractice and bad faith remedies provide the insured with proper redress for injury attributable to retained counsel's misconduct.[50] The Hawai'i Supreme Court adopted this view in *Finley v. Home Insurance Co.*,[51] discussed below.

. . . and the ethical reality of a clear potential conflict of interest"). *But see* Barker, *supra* note 16, at 99 (concluding that the traditional two-client view "best effectuates the purposes of the insurance policy" except where equity requires denying the insurer control); Silver, *supra* note 18, at 1590-91 (arguing that the insurer can even be defense counsel's only client).

[44] This view falls under the "primary client" and "defeasible client" models. *See infra* note 164 and accompanying text.

[45] *See* Tank v. State Farm Fire & Cas. Co., 715 P.2d 1133, 1137 (Wash. 1986) (citing Van Dyke v. White, 349 P.2d 340 (1960)) (stating that "the standards of the legal profession require undeviating fidelity of the lawyer to his client" and that "[b]oth retained defense counsel and the insurer must understand that only the insured is the client").

[46] *See* Finley v. Home Ins. Co., 90 Hawai'i 25, 34, 975 P.2d 1145, 1154 (1998) ("Assuming that the arrangement between the attorney and the insurer does not violate the HRPC, the retained attorney is sufficiently 'independent' . . . .").

[47] *See* L & S Roofing v. St. Paul Fire & Marine Ins. Co., 521 So. 2d 1298, 1303 (Ala. 1987) (adopting the enhanced standard of good faith announced in *Tank*, 715 P.2d 1133, in cases where an insurer defends subject to a reservation of rights). The Hawai'i Supreme Court, in *Finley*, adopted the *Tank* standards, discussed in *infra* section III. *See infra* note 100 and accompanying text.

[48] *See, e.g., L & S Roofing*, 521 So. 2d 1298; Strength v. Alabama Dep't of Fin., 662 So. 2d 1283 (Ala. 1993); *Finley*, 90 Hawai'i 25, 975 P.2d 1145; *Tank*, 715 P.2d 1133.

[49] *See* Federal Ins. Co. v. X-Rite, Inc., 748 F. Supp. 1223, 1229 (Mich. 1990), stating:

> To hold that the insurer who, under reservation of rights, participates in selection of counsel, automatically breaches its duty of good faith is to indulge the conclusive presumption that counsel is unable to fully represent its client, the insured, without consciously or unconsciously compromising the insured's interest. The court is unable to conclude that Michigan law professes so little confidence in the integrity of the bar of this state.

Id. See also Finley, 90 Hawai'i at 34-37, 975 P.2d at 1154-57; Hall, *supra* note 22, at 736 (recognizing that "the minority view . . . relies on the presumed integrity of defense counsel to 'remain ethically neutral on the coverage dispute while presenting a quality defense for the insured'").

[50] *See supra* note 47.

[51] 90 Hawai'i 25, 975 P.2d 1145 (1998).

III. THE CASE: *FINLEY V. HOME INSURANCE CO.*

A. Factual and Procedural Background

In the underlying action the Plaintiffs-Appellants, John and Vanida Finley, filed suit against Aaron Properties and Aaron Properties Partners of Hilo ("Aaron Defendants") alleging claims related to wrongful termination.[52] The Aaron Defendants retained attorney Mark Bernstein to represent them in this action and tendered the Finleys' claim to Hawai'i Insurance Guaranty Association ("HIGA").[53] Although HIGA retained attorneys Alexander MacLaren and Michael Tom for the Aaron Defendants, it also reserved its right to disclaim coverage.[54]

Bernstein, retained by the Aaron Defendants, as well as MacLaren and Tom, retained by HIGA, participated in the defense against the Finleys.[55] HIGA reimbursed the Aaron Defendants for services rendered by Bernstein[56] between April 2, 1994 through August 17, 1994 and for attending a deposition.[57]

The parties eventually settled.[58] On March 14, 1996 the Finleys and Aaron Defendants entered into a written assignment of claims and mutual release of claims.[59] Pursuant to the agreement, the Aaron Defendants assigned to the Finleys all of its claims to un-reimbursed attorneys' fees, costs, and expert witness fees.[60] The Finleys accepted HIGA's $100,000 settlement offer, thereby releasing the insurer from further liability on the judgment.[61]

On April 12, 1996, the Finleys filed the instant action against HIGA alleging breach of the settlement agreement for failure to pay the $100,000, failure to pay the amount owed in unreimbursed attorneys' fees incurred by the Aaron Defendants in the wrongful termination action, and for bad faith.[62] The

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[52] *See Finley*, 90 Hawai'i at 27, 975 P.2d at 1147.

[53] *See id.* The Aaron Defendants were additional insureds under a Hawaiian Insurance & Guaranty Co. ("HIG") policy. Pursuant to Hawai'i Revised Statutes ("HRS") section 431:16-108, HIGA assumed claims issued by HIG. *See id.*

[54] *See id.*

[55] *See id.*

[56] *See id.* Bernstein appeared as co-counsel with MacLaren and Tom on August 17, 1994. *See id.*

[57] *See id.* MacLaren and Tom were unable to attend this deposition. *See id.*

[58] *See id.* at 28, 975 P.2d at 1148.

[59] *See id.* The release allegedly did not extend to potential liability for the unreimbursed fees owed for Bernstein's services. *See id.*

[60] *See id.*

[61] *See id.*

[62] *See id.*

Finleys and HIGA filed motions for partial summary judgment.[63] The circuit court granted summary judgment in favor of HIGA with respect to the bad faith[64] and reimbursement of attorneys' fees claims.[65] However, the circuit court denied the motions with regard to the breach of settlement claim[66] which subsequently became moot upon a written release and indemnity agreement dated August 19, 1996 whereby HIGA paid the Finleys $100,000 in accordance with the terms of the settlement agreement.[67] This agreement excluded the Finleys' claim to the unreimbursed attorney fees.[68]

The Finleys appealed the circuit court's entry of summary judgment in favor of HIGA on the entitlement to un-reimbursed attorneys' fees claim and urged the Hawai'i Intermediate Court of Appeals ("ICA") to adopt the *Cumis* doctrine.[69] The ICA agreed with the Finleys, adopted *Cumis*, and vacated the circuit court's judgment.[70] Subsequently, the Hawai'i Supreme Court granted certiorari framing the issues for determination as follows: "(1) whether a conflict of interest arises when an insurer defends its insured under a reservation of rights based on the nature of the insured's conduct and (2) the appropriate remedy for such a conflict of interest, whether actual or perceived."[71]

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[63] *See id.*

[64] *See id.* The circuit court granted summary judgment in favor of HIGA on the bad faith claim pursuant to HRS section 431:16-116 which "clearly and unambiguously provides that there shall be no liability on the part of HIGA for any action taken by HIGA in the performance of its powers and duties." *Id.*

[65] *See id.* The circuit court granted summary judgment on this claim upon concluding that the "*Cumis* doctrine is not recognized in Hawai'i." *Id.*

[66] *See id.* The circuit court found that a "genuine issue of material fact as to the terms of the settlement agreement between Plaintiffs Finley and Defendant HIGA" existed. *Id.*

[67] *See id.*

[68] *See id.*

[69] *See id.* at 29, 975 P.2d at 1149. HIGA filed a cross appeal on July 29, 1997 seeking review of the circuit court's reduction of its requested attorneys' fees and costs. *See id.* This issue will not be addressed.

[70] *See id.* The ICA specifically held that "where a conflict of interest arises between an insurer and an insured, because the insurer has reserved its right to assert noncoverage at a later date, the insured is required to pay for independent counsel for the insured." Finley v. Home Ins. Co., 1998 WL 547093 *2 (Hawai'i App. 1998). The Hawai'i Supreme Court reversed and depublished the ICA's opinion. *See Finley*, 90 Hawai'i at 27, 975 P.2d at 1147.

[71] *Finley*, 90 Hawai'i at 27, 975 P.2d at 1147. Associate Justice Paula Nakayama, writing the unanimous decision, noted that this case presented issues of first impression in Hawai'i. *See id.* The Hawai'i Supreme Court rarely has the opportunity to address insurance law issues because most insurance companies remove their cases to federal court based on diversity of citizenship. *See* Ashley, *supra* note 8, at 113.

B. Summary of the Opinion

1. Background

The *Finley* court began its opinion by surveying issues relevant to the "tripartite relationship."[72] The court acknowledged that the interests of the insured and insurer diverge when the latter reserves its right to deny coverage based on allegations that the insured's conduct could establish non-coverage.[73] The *Finley* court termed this conflict as a "perceived problem," and observed that many courts require provision of independent counsel based on the assumption that retained counsel will inevitably slant her efforts in favor of the insurer's interests.[74] The court cited section 2860 of the California Civil Code in its entirety to demonstrate the "complexity of the issues that arise with adoption of the *Cumis* counsel requirement."[75]

2. Rejection of the Cumis doctrine

The *Finley* court rejected the *Cumis* doctrine, and specifically held that "[t]he insured does not have the right to select counsel to represent its interests solely due to an insurer's reservation of rights."[76] After weighing the competing arguments, the court concluded that it would be best to "refrain

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[72] *See Finley*, 90 Hawai'i at 29-31, 975 P.2d at 1149-51.

[73] *See id.* at 30, 975 P.2d at 1150.

[74] *See id.* The court cited *United States Fidelity & Guaranty Co. v. Roser*, 585 F.2d 932 (8th Cir. 1978). See *supra* note 38, for discussion of this proposition.

[75] *Finley*, 90 Hawai'i at 31, 975 P.2d at 1151 n.8. The California statute codifies a slightly narrower version of the *Cumis* doctrine. Compare CAL. CIV. CODE § 2860(b) (West 1998) which states:

> For purposes of this section, a conflict of interest does not exist as to allegations or facts in the litigation for which the insurer denies coverage; however, when an insurer reserves its rights on a given issue and the outcomes of that coverage issue can be controlled by counsel first retained by the insurer for the defense of the claim, a conflict of interest may exist[,]

with *San Diego Navy Federal Credit Union v. Cumis Insurance Society, Inc.*, 162 Cal. App. 3d 358, 361 (Cal. Ct. App. 1984) (entitling the insured to independent co-counsel when an insurer reserves its right to deny coverage). *See supra* notes 9, 29. *See also* McGee v. Superior Court, 176 Cal. App. 3d 221, 226 (Cal. Ct. App. 1985) (noting that "notwithstanding the use of overly broad language," *Cumis* is limited to instances where "the insurer's reservation of rights on the ground of noncoverage [is] based on the nature of the insured's conduct, which as developed at trial [may] affect the determination as to coverage").

[76] *Finley*, 90 Hawai'i at 31, 975 P.2d at 1151.

from interfering with the insurer's contractual right to select counsel and leave the resolution of the conflict to the integrity of retained defense counsel."[77]

The court first addressed the nature of the relationship between retained counsel and the insurer concluding that "[u]nder the HRPC, the sole client of the retained attorney is the insured."[78] Examining HRPC Rule 1.7(b)[79] and Comment 10,[80] the court reasoned as follows: because Rule 1.7(b)(1) could never be met if retained counsel served two clients who desired different outcomes in the litigation (as in reservation of rights cases), and because Comment 10 allows representation of the insured by "special counsel"[81] provided that counsel's "professional independence" is preserved, "[c]learly, [Rule 1.7] does not contemplate dual representation."[82] Consequently, the court rejected the Finleys' argument that MacLaren and Tom represented both HIGA and the Aaron Defendants.[83]

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[77] *Id.* at 31-32, 975 P.2d at 1151-52. Although the court appears to espouse the "dual client doctrine," its use of the qualifiers "under the HRPC" and "when a conflict arises" makes uncertain the insurer's status in non-conflict situations. *See infra* section V.A discussing this ambiguity.

[78] *Finley*, 90 Hawai'i at 32, 975 P.2d at 1152.

[79] HRPC Rule 1.7(b) states in relevant part:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
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> (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

HAWAII RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1999).

[80] Comment 10 to Rule 1.7, in relevant part, provides:

> A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence.

HAWAII RULES OF PROFESSIONAL CONDUCT Rule 1.7 cmt. 10 (1999) (internal citations omitted).

[81] The *Finley* court equated "special" with "independent," but then interpreted "independent counsel" to mean retained counsel with sufficient independence rather than counsel selected by the insured. *See Finley*, 90 Hawai'i at 33, 975 P.2d at 1153 ("Comment 10 expressly allows the representation of an insured by special (i.e. independent) counsel paid for by the insurer . . . ."). *See infra* note 144 and accompanying text.

[82] *Finley*, 90 Hawai'i at 33, 975 P.2d at 1153.

[83] *See id.* It seems illogical that the court based this conclusion on the HRPC rather than scrutinizing the circumstances and actual relationship between retained counsel and HIGA. *See infra* section IV.A for further discussion.

Although recognizing the existence of a conflict between the insured and insurer, the *Finley* court noted that Rule 1.7 only bars conflicts that "will materially limit" retained counsel's representation of the insured.[84] The court professed confidence in Hawai'i attorneys' ability to dutifully represent the insured despite that the insurer pays their fees.[85]

Moreover, the court required retained counsel to stay within the ethical boundaries of the HRPC, which mandates that she:

> (1) consult with the client as to the "means by which the objective [of representation] are to be pursued"; (2) not allow the insurer to interfere with [her] "independence of professional judgment or with the client-lawyer relationship"; and (3) not allow the insurer "to direct or regulate the lawyer's professional judgment in rendering such legal services."[86]

Although insurers retain the right to select counsel, the court explicitly stated that the insurer's contractual right to control the litigation does not abrogate a retained counsel's duty to exercise her professional judgment independent of external pressure.[87] The court apparently believed that these safeguards and the availability of alternative remedies sufficiently deter material limitation and adequately protect the insured's interests.[88] Subsequently, the *Finley* court rejected adoption of a "blanket rule" requiring provision of independent counsel where an insurer accepts tender of a defense while retaining the right to deny coverage.[89]

3. Insured's options when the insurer defends subject to a reservation of rights

After concluding that HRPC Rule 1.7(b) does not bar retained counsel from representing the insured despite the conflict of interest created by a reservation

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[84] *See id.* at 34, 975 P.2d at 1154. *See* section IV.B *infra* discussing the court's substitution of the word "will" for "may" in its analysis.

[85] *See id.* at 33, 975 P.2d at 1153. The court cited an excerpt from *Federal Insurance Co. v. X-Rite, Inc.*, 784 F. Supp. 1223, 1229 (Mich. 1990), discussed *supra* note 49.

[86] *Finley*, 90 Hawai'i at 33, 975 P.2d at 1153.

[87] *See id.* at 34, 975 P.2d at 1154. The insurance contract does not define a lawyer's ethical responsibilities to his client regardless of the rights and duties of the parties under the contract. *See id.*

[88] *See id.* at 33, 975 P.2d at 1153. The court stated:

> Because of the safeguards inherent in the HRPC, as well as alternate remedies existing in the case of misconduct, we disagree with the Finleys and with the ICA that HRPC Rule 1.7 bars an attorney retained by the insurer from representing the insured under these circumstances without the informed consent of the insured.

Id.

[89] *See id.*

of rights, the *Finley* court addressed the insured's options.[90] When the insurer issues a reservation of rights letter, the insured may reject the insurer-provided defense.[91] Rejection, however, shifts the financial burden of defending to the insured.[92]

4. The insured's alternative remedies and compliance guidelines for defense counsel and insurers

In support of its conclusion that defending subject to a reservation of rights does not justify provision of independent counsel for the insured, the *Finley* court pointed to the availability of three alternative remedies: "(1) an action against the attorney for professional malpractice; (2) an action against the insurer for bad faith conduct; and (3) estoppel of the insurer to deny indemnification," that deter and adequately compensate the insured for misconduct on the part of retained counsel or the insurer.[93] Citing *CHI of Alaska v. Employers Reinsurance Corp.*,[94] the court warned retained counsel of probable malpractice exposure should she: provide a token defense;[95] violate her loyalty to the client by favoring the insurer over the insured, or share confidential communications that can be asserted by the insurer to deny coverage.[96] With respect to an insurer's potential bad faith liability, the court adopted an "enhanced standard" of good faith[97] applicable to insurers

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[90] *See id.* at 34-35, 975 P.2d 1154-55.

[91] *See id.* at 35, 975 P.2d at 1155. That the common law and HRPC Rule 1.8(f) prohibit a lawyer from accepting compensation for representation of a client by a third-party without the client's consent supports this conclusion. *See id.* (referencing Rhodes v. Chicago Ins. Co., 719 F.2d 116, 120 (5th Cir. 1983), and HRPC Rule 1.8 (f)). *See also* Delmonte v. State Farm Fire & Cas. Co., 90 Hawai'i 39, 53, 975 P.2d 1159, 1173 (1999) (noting that State Farm could not "mandate that the Delmontes accept Komeiji's [retained counsel's] representation").

[92] *See Finley*, 90 Hawai'i at 35, 975 P.2d at 1155. Importantly, despite rejection of the tendered defense, the insurer may be held accountable for indemnifying the portions of the judgment rendered against its insured that are covered by the policy. *See id.*

[93] *Id.*

[94] 844 P.2d 1113 (Alaska 1993).

[95] *See Finley*, 90 Hawai'i at 36, 975 P.2d at 1156 (noting that HRPC Rule 1.1 prohibits provision of a token defense). The court in *CHI of Alaska* expressed concern that an insurer who knows that it ultimately will not be responsible for the judgment may be inclined to "only go through the motion of defending." *CHI of Alaska*, 844 P.2d at 1116.

[96] *See Finley*, 90 Hawai'i at 36, 975 P.2d at 1156.

[97] *See id.* The court noted that *Best Place, Inc. v. Penn America Insurance Co.*, 82 Hawai'i 120, 920 P.2d 334 (1996), established an independent tort action for breach of the duty of good faith in first- and third-party insurance contracts in Hawai'i. *See Finley*, 90 Hawai'i at 36, 975 P.2d at 1156. *See also supra* note 23.

defending under a reservation of rights.[98] As delineated by the *Tank v. State Farm Fire & Casualty Co.* court,[99] to meet this enhanced standard:

> First, the company must thoroughly investigate the cause of the insured's accident and the nature and severity of the plaintiff's injuries. Second, it must retain competent defense counsel for the insured .... Third, the company has the responsibility for fully informing the insured not only of the reservation-of-rights defense itself, but of all developments relevant to his policy coverage and the progress of his lawsuit .... Finally, an insurance company must refrain from engaging in any action which would demonstrate a greater concern for the insurer's monetary interest than for the insured's financial risk.[100]

In what appears to be a final warning, the *Finley* court discussed the availability of estoppel for the insured who has been unjustly prejudiced by the insurer.[101] An improperly conducted defense may estop the insurer from denying its insured indemnification coverage.[102] To invoke the doctrine of equitable estoppel, the insured must "show that 'he or she has detrimentally relied on the representation or conduct of the person sought to be estopped, and that such reliance was reasonable.'"[103] A court, however, may dispense with this requirement in order to prevent manifest injustice.[104]

IV. ANALYSIS

The *Finley* court's holding that an insurer need not provide its insured with independent counsel when defending subject to a reservation of rights rests largely on questionable applications of HRPC Rule 1.7(b).[105] First, the court's utilization of Rule 1.7(b) and its commentary to determine the client status of

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[98] *See Finley*, 90 Hawai'i at 36, 975 P.2d at 1156 (citing Tank v. State Farm Fire & Cas. Co., 715 P.2d 1133 (Wash. 1986), for the proposition that "the potential conflicts of interest between insurer and insured inherent in this type [reservation of rights] of defense mandate ... an enhanced obligation to its insured as part of its duty of good faith").

[99] 715 P.2d 1133 (Wash. 1986).

[100] *Finley*, 90 Hawai'i at 36-37, 975 P.2d at 1156-57 (citing *Tank*, 715 P.2d at 1133).

[101] *See id.* at 37, 975 P.2d at 1157.

[102] *See id. See also* AIG Hawai'i Ins. Co. v. Smith, 78 Hawai'i 174, 180, 891 P.2d 261, 267, *reconsideration denied*, 78 Hawai'i 421, 895 P.2d 172 (1995).

[103] *Finley*, 90 Hawai'i at 37, 975 P.2d at 1157 (citing *Smith*, 78 Hawai'i at 179, 891 P.2d at 266).

[104] *See id.* (citing *Smith*, 78 Hawai'i at 179, 891 P.2d at 266).

[105] *See id.* at 33, 975 P.2d at 1153. The court analyzed Rule 1.7(b) to conclude that "retained counsel solely represents the insured when a conflict arises between the interests of the insurer and the insured." *Id.* at 32, 975 P.2d at 1152. Although the ICA held that Rule 1.7(b) barred retained counsel from continued representation upon discovery of a conflict without the insured's informed consent, the *Finley* court interpreted Rule 1.7(b) not to require informed consent. *See id.* at 34, 975 P.2d at 1154.

HIGA, and that of all insurers in relation to retained counsel, was an exercise in flawed logic.[106] Second, the court seems to undermine the precautionary nature of Rule 1.7(b) by substituting prohibition of representation that "*may be*" materially limited[107] with prohibition of only those situations where the insured's representation "*will be*" materially limited.[108] As will be discussed, there are numerous sources of potential limitation[109] which suggest that representation in the absence of the insured's informed consent violates Rule 1.7(b).[110]

A. HRPC Rule 1.7(b) Does Not Define the Attorney-Client Relationship

The Finleys argued that MacLaren and Tom (retained counsel) represented both HIGA (insurer) and the Aaron Defendants (insured).[111] The court, however, rejected their contention, stating that "the rule implied by the HRPC . . . is that retained counsel solely represents the insured when a conflict arises between the interests of the insurer and the insured."[112] Reduced to its basic form, the court reasoned that Comment 10 allows for representation of the insured by special counsel (whose professional independence is preserved) in

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[106] Rule 1.7 appears to speak to what a lawyer should and should not do when representation of a client may be threatened by externalities. *See* HAWAII RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1999). It is curious why the court found this rule determinative of the relationship between HIGA and retained counsel when the HRPC specifically indicate that "for the purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these rules determine whether a client-lawyer relationship exists." HAWAII RULES OF PROFESSIONAL CONDUCT Scope 3 (1999).

[107] Rule 1.7(b) prohibits representation of a client if representation "*may be* materially limited . . . ." HAWAII RULES PROFESSIONAL CONDUCT RULE 1.7(b) (1999) (emphasis added). *See also supra* note 79.

[108] *See Finley*, 90 Hawai'i at 34, 975 P.2d at 1155 (stating that "[a]lthough it is incontrovertible that the insurer and the insured have divergent economic interests in the outcome of the litigation, HRPC Rule 1.7 bars the attorney's representation only if this conflict *will* 'materially limit' the lawyer's representation of the insured") (emphasis added).

[109] This casenote suggests that the insurance contract itself, as well as retained counsel's personal interests may materially limit representation of the insured. *See infra* section IV.C.

[110] It is noted and discussed *infra* section VI that many of these problems exist regardless of whether independent counsel or retained counsel represents the insured. See *infra* note 224, arguing that independent counsel and retained counsel differ only in that the insured selects the former while the insurer selects the latter. For this reason, though dispensing with the requirement that the insured consent to representation may conflict with Rule 1.7(b), arguably, *Finley*'s holding is superior to the *Cumis* alternative for practical reasons.

[111] *See Finley*, 90 Hawai'i at 32, 975 P.2d at 1152.

[112] *Id.* The court reached this conclusion despite awareness that substantive law external to the rules of professional conduct determine whether a client-lawyer relationship exist, and noted that "the record on appeal [did] not contain any information on the specific arrangement between HIGA and counsel retained by HIGA." *Id.*

the insurer-insured conflict of interest context.[113] In a dual-client setting, where defense counsel represents both the insurer and insured despite a conflict of interest, no attorney can meet the Rule 1.7(b)(1) requirement because no attorney could "reasonably believe that the representation will not be adversely affected."[114] Therefore, because Comment 10 indicates that representation of the insured is possible despite a conflict, Rule 1.7(b) "clearly . . . does not contemplate dual representation."[115]

The court's analysis of the interplay between Rule 1.7(b) and Comment 10 is entirely correct. The rule "does not contemplate" dual representation of the insured and the insurer when their divergent interests create a conflict of interest.[116] It is important to recognize, however, that the reasoned implication the court derives from the rule and comment is not that the rule prohibits counsel from engaging in dual representation, but that the insurer, regardless of the actual circumstances, is not a client when a conflict is evident. That is, the court seems to use these rules not to determine if there is an improper conflict, but rather as a means of artificially defining the relationship between MacLaren/Tom and HIGA.[117] According to the court, because Rule 1.7(b) "does not contemplate" dual representation in a conflict situation, MacLaren and Tom did not represent HIGA just as all retained counsels do not represent insurers.[118]

Concluding that Rule 1.7(b) prohibits dual representation, however, has no bearing on whether an attorney-client relationship existed between MacLaren/Tom and HIGA or whether an attorney-client relationship exists between retained counsel and insurers generally. This conclusion follows only if one infers that prohibiting a person from doing something completely eliminates the possibility that the person did the prohibited act. As the court seems to

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[113] *See id.* (stating that "Comment 10 expressly allows the representation of an insured by special . . . counsel paid for by the insurer, with the caveat that the arrangement must 'assure the special counsel's professional independence'").

[114] *Id.* at 32-33, 975 P.2d at 1152-53 ("If both the insured and insurer were clients of the attorney and a conflict existed, such that each desired a different outcome in the litigation, it would be impossible for the attorney to adequately represent the interests of both, and the requirements of HRPC Rule 1.7(b) (1) could not be met."). *Cf. supra* note 79.

[115] *Finley*, 90 Hawai'i at 33, 975 P.2d at 1153. The court specifically remarked, "[c]learly, this does not contemplate dual representation of both the insurer and the insured by a single attorney where a conflict of interest between the two exists." *Id.*

[116] *Id.* In fact, a majority of courts base their decision to require the insurer to pay the reasonable expenses of independent counsel in recognition that dual representation is prohibited. *See* discussion *supra* section II.B.

[117] The court made clear that it reached this conclusion by stating, "[w]e therefore reject the Finley's implied assertion that retained counsel had two clients, HIGA and the Aaron Defendants." *Finley*, 90 Hawai'i at 33, 975 P.2d at 1153.

[118] *See id.* The court also held that "[u]nder the HRPC, the sole client of the retained attorney is the insured." *Id.* at 32, 975 P.2d at 1152.

acknowledge, factors external to the rules of professional conduct should determine whether an attorney-client relationship exists.[119] The court's analysis supports the conclusion that compliance with Rule 1.7(b) requires retained counsel to solely represent the insured upon discovery of a conflict. It is illogical to manipulate this analysis to foreclose the existence or non-existence of a valid attorney-client relationship between MacLaren/Tom and HIGA, or that of any insurer and retained counsel either prior to or after the manifestation of a conflict.[120] To do so would be the equivalent of concluding that a man suspected of murder cannot have murdered (or be a murderer) because the law prohibits him from murdering. Determining whether the man is a murderer turns on facts external to the law just as determining whether a lawyer-client relationship exists between the insurer and retained counsel turns on factual circumstances external to the HRPC.

B. Rule 1.7(b) Requires Client Consent When Representation "May Be" Materially Limited

In addition to dual representation, the Finleys also argued that HIGA's reservation of its right to deny coverage created a conflict entitling the Aaron Defendants to the reasonable expenses of employing independent counsel (Bernstein).[121] The *Finley* court disagreed stating:

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[119] *See id.* The court noted that the professional rules give no guidance to determining whether retained counsel represents the insured, insurer, or both. *See id.* In fact, the HRPC Scope specifically states "for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these rules determine whether a client-lawyer relationship exists." HAWAII RULES OF PROFESSIONAL CONDUCT Scope 3 (1999). The court seems to acknowledge that an express agreement between the parties could be determinative by citing to an American Bar Association opinion for the proposition that "absent an express agreement specifying the identity of the lawyer's client or clients, however, a lawyer hired by an insurer to defend its insured may be held to have a client-lawyer relationship with the insured alone or with both the insured and insurer." *Finley*, 90 Hawai'i at 32, 975 P.2d at 1142. The court also noted that the record did not contain any information pertinent to HIGA's relationship with MacLaren and Tom. *See id.*; *cf.* Silver, *supra* note 18, at 1604 (arguing that the retainer agreement should be determinative of whether a dual client relationship exists); Silver & Syverud, *supra* note 2, at 280 (arguing that "[a]n attorney acquires a company as a client when the company solicits legal services from the attorney and the attorney agrees to provide them; an attorney client relationship springs into existence the moment agreement is reached").

[120] Because the court's analysis does not support its holding and because the court uses the qualifying language "when a conflict arises" despite its broad language, it is unclear whether the holding prohibits retained counsel from representing the insurer while a conflict is not apparent. The client status of the insurer may be significant for numerous reasons. *See infra* section V.A.

[121] *See Finley*, 90 Hawai'i at 31, 975 P.2d at 1151.

> Although it is incontrovertible that the insurer and the insured have divergent economic interests in the outcome of the litigation, HRPC Rule 1.7 bars the attorney's representation only if this conflict *will* "materially [limit]" the lawyer's representation of the insured . . . we disagree with the Finleys and with the ICA that HRPC Rule 1.7 bars an attorney retained by the insurer from representing the insured under these circumstances without the informed consent of the insured.[122]

Rule 1.7(b) mandates client consent when the *possibility* of material limitation exists.[123] Again, note that the rule prohibits representation that "may be" materially limited.[124] The court's blatant substitution of "will" for "may" undermines the precautionary nature of the rule. By re-wording the rule to bar representation when "conflict *will* 'materially limit' the lawyer's representation of the insured" as opposed to the rule's actual prohibition of representation that "may be materially limited," the court significantly lowers the standard of proscribed conduct.[125] Though it is not certain that the insured's representation *will be* materially limited, the *possibility* of material limitation flourishes when an insurer's interests directly conflict that of its insured.[126]

C. *Representation of the Insured by Retained Counsel May Be Materially Limited by Numerous Factors*

The court recognized that an insurer's reservation of rights evidences a significant conflict of interest between the insurer and insured.[127] The insurance contract, which allows the insurer to control certain aspects of the defense,[128]

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[122] *Id.* at 34, 975 P.2d at 1154 (emphasis added).

[123] *See* Pepper, *supra* note 24, at 32 (remarking "[w]hat is required is that there 'may be' such a limitation in insurance defense . . . it is a given that there is a [sic] clearly a foreseeable risk of such limitation"); *cf.* HAWAII RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1999).

[124] *See* HAWAII RULES OF PROFESSIONAL CONDUCT Rule 1.7(b) (1999).

[125] *See Finley*, 90 Hawai'i at 34, 975 P.2d at 1154 (emphasis added).

[126] *See* discussion *infra* section IV.C.

[127] *See Finley*, 90 Hawai'i at 34, 975 P.2d at 1154 (stating that "it is incontrovertible that the insurer and the insured have divergent economic interests in the outcome of the litigation").

[128] *See supra* note 18 (discussing the insured's obligation to respect the insurer's contractual right to control the defense). It is noted that the court prohibits the insurer from taking action which demonstrates a greater concern for its own monetary interests over the insured's financial risk. *See Finley*, 90 Hawai'i at 36-37, 975 P.2d at 1156-57. The fact that the court found it necessary to establish this rule, however, reveals suspicion that an insurer *may* take such action. It is also noted that because the court proscribed much of the conduct suspected of materially limiting the insured's representation, rejecting a blanket rule requiring independent counsel, though analytically flawed, constitutes the better result. *See infra* note 220 and accompanying text.

as well as retained counsel's own interests[129] jeopardize the insured's representation. These factors suggest that Rule 1.7(b) requires either obtaining the insured's informed consent or provision of independent counsel.

The court acknowledged that the insurer contracts for the right to control the insured's defense.[130] Allowing the insurer unfettered control, however, would inevitably make representation in conflict situations by any attorney (whether selected by the insured or insurer) impossible.[131] The court appeared to recognize and address this problem by stating, "[w]hatever the rights and duties of the insurer and the insured under the insurance contract, that contract does not define the ethical responsibilities of the lawyer to his client."[132] Additionally, to protect the insured, the court enumerated compliance guidelines.[133] However, because it remains unclear whether and to what degree the insurer retains its right to control the defense,[134] retained counsel possesses a significant degree of discretion in exercising her "independent professional judgment."[135] Whether well-intentioned or not, retained counsel may feel it incumbent on herself to abide by the insurer's instructions to preserve the insured's coverage.[136] Because it is likely that the insurer will try to use its contractual right to manipulate the defense to its own advantage, retained counsel's effort to preserve the insured's coverage creates at the very least, the possibility of "material limitation."

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[129] *See supra* note 38 (discussing the likelihood that given the opportunity, retained counsel will favor the insurer to further her own personal interests). The court's detailed outline of action constituting malpractice seems to indicate that attorney misconduct may jeopardize the insured's representation.

[130] *See Finley*, 90 Hawai'i at 33, 975 P.2d at 1153 (stating that "we do recognize that, under the insurance contract at issue herein, HIG retained the right to settle claims against the insured"). The court also "acknowledge[d] the contractual right of an insurer to select counsel." *Id.* at 35, 975 P.2d at 1155.

[131] Arguably, neither retained counsel nor independent counsel could reasonably believe that representation of the insured would not be adversely affected. Therefore, Rule 1.7(b)(1) would bar representation. *See* HAWAII RULES OF PROFESSIONAL CONDUCT Rule 1.7(b)(1) (1999).

[132] *Finley*, 90 Hawai'i at 34, 975 P.2d at 1154 (citations omitted).

[133] *See supra* notes 86, 95, 96 and accompanying text.

[134] *See infra* section V.B (examining the uncertainty regarding the duties owed by retained counsel to the insurer).

[135] The decisions that retained counsel makes in exercise of her "independent professional judgment" are discretionary, and will probably be reviewed ex post facto if challenged in a subsequent malpractice suit. *See, e.g.*, Delmonte v. State Farm Fire & Cas. Co., 90 Hawai'i 39, 52, 975 P.2d 1159, 1172 (1999) (noting that the plaintiffs' claims against retained counsel for malpractice "must be determined by the circuit court upon a complete record . . ."). This places retained counsel in a precarious position. *See infra* section V.B. *See also infra* note 210 and accompanying text.

[136] Admittedly, both retained counsel and independent counsel face this problem. *See infra* note 224. However, arguably, independent counsel will be less likely to abuse her discretion to benefit the insurer if hired by the insured. *See infra* note 140.

Moreover, retained counsel's personal interests exacerbate the problem. Despite the *Finley* court's professed confidence in the integrity of Hawai'i's Bar, its in-depth discussion and lengthy description of conduct that constitutes malpractice evidences an awareness that retained counsel possesses the incentive to act in a manner that will adversely affect the insured.[137] The court concluded that:

> Assuming that the arrangement between the attorney and the insurer does not violate the HRPC, the retained attorney is sufficiently "independent" that we will not adopt a blanket rule based on the assumption that the attorney will slant his or her representation to the detriment of the insured.[138]

This statement reveals the court's refusal to acknowledge the possibility that retained counsel may, for self-serving reasons, jeopardize the insured's defense. Although the court's confidence is well-deserved by the Hawai'i bar in general, it seems unreasonable to wholly deny the possibility that a given hypothetical attorney may act upon the desire to cultivate or maintain a favorable business relationship with the insurer. [139] Again, Rule 1.7(b) bars representation without informed consent where representation "may be" materially affected by the lawyer's interests. The potential and incentive for retained counsel to act improperly is evident.[140] Arguably, the rules pertaining to conflict of interests seek to protect unsophisticated clients from representation under these exact circumstances.[141]

D. Comment 10 to Rule 1.7 Suggests Adoption of Cumis

Comment 10 appears to specifically advocate the provision of independent counsel. It states in relevant part:

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[137] *See Finley*, 90 Hawai'i at 34, 975 P.2d at 1154. *See also supra* note 86 and accompanying text.

[138] *Finley*, 90 Hawai'i at 34, 975 P.2d at 1154.

[139] *See* Silver, *supra* note 18, at 1607 (noting that "defense lawyers concede this point" and that "[i]t would be unreasonable to deny that defense counsel's loyalty often lies with the company, not the insured"). *See also supra* note 38 (discussing an attorney's incentives to favor the insurer).

[140] Allowing the insured to select counsel decreases the likelihood of attorney misconduct favoring the insurer. Because the insurer does not possess the ability to provide counsel with volume work, there is less incentive for independent counsel to favor the insurer over the insured. *Cf. supra* note 38.

[141] Here, both the lawyer's personal interests as well as the lawyer's responsibility to the insurer (a third person) may materially limit representation of the insured. *See generally* HAWAII RULES OF PROFESSIONAL CONDUCT Preamble (1999) (discussing a lawyer's responsibilities).

> A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and, the insurer is required to provide special counsel for the insured, the arrangement should assure the *special* counsel's professional independence.[142]

According to the comment, manifestation of a conflict requires the insurer to provide its insured with "special counsel."[143] The *Finley* court equated "special" with "independent,"[144] but then interpreted "independent counsel" to mean retained counsel with sufficient independence[145] rather than counsel selected by the insured.[146]

It seems highly unlikely that Comment 10 uses the adjective "special" to refer to retained counsel because retained counsel routinely represents the insured; there is nothing "special," different, or unique about an insurer-hired attorney.[147] Entitlement to independent counsel, on the other hand, is "special" in the sense that absent a conflict, the insured would not have a right to personally select an independent attorney.[148] Moreover, accepting that "special counsel" and "independent counsel" are one in the same, "independent counsel," as it is commonly used, refers to an attorney selected by the insured, the reasonable expenses of whom are paid by the insurer when a conflict of interest arises.[149] Read accurately, Comment 10 indicates: (1) that the insured

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[142] HAWAII RULES OF PROFESSIONAL CONDUCT Rule 1.7 cmt. 10 (1999) (internal citations omitted) (emphasis added).

[143] *Id.*

[144] *See* Finley v. Home Ins. Co., 90 Hawai'i 25, 33, 975 P.2d 1145, 1153 (1998) (stating "Comment 10 expressly allows the representation of an insured by special *(i.e. independent)* counsel paid for by the insurer") (emphasis added).

[145] *See id.* at 34, 975 P.2d at 1154 (stating "[a]ssuming that the arrangement between the attorney and the insurer does not violate the HRPC, *the retained attorney is sufficiently 'independent'* . . .") (emphasis added).

[146] This definition of "independent counsel" is consonant with the term's use in this casenote. *See supra* note 8.

[147] The court seems to believe that the additional requirement of assuring retained counsel's professional independence makes retained counsel "special."

[148] *See supra* note 29 (discussing the majority view).

[149] *See* Beck, *supra* note 2, at 678-79, (noting that "the right to independent counsel means an attorney of the insured's selection"). *See also* Cardin v. Pacific Employers Ins. Co., 745 F. Supp. 330, 335 n.5 (D. Md. 1990) (stating "[t]he term 'independent counsel' has been used by the parties to refer to an attorney selected by Cardin rather than the insurer. In this opinion, the court uses the term 'independent counsel' in the same way"); CHI of Alaska v. Employers Reins. Group, 844 P.2d 1113, 1120 (Alaska 1993) (citing many sources in support of the proposition that "most cases which recognize the right to independent counsel express the view that the insured has the right to select independent counsel"); San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y, Inc., 162 Cal. App. 3d 358, 375 (Cal. Ct. App. 1985) (holding that "the insurer must pay the reasonable cost for hiring independent counsel by the insured").

is entitled to select counsel and (2) that this insured-selected "special" counsel must make certain that the insurer refrains from interfering with her professional independence.[150]

For the above reasons, the court's manipulation of Rule 1.7(b) and Comment 10 to reject the *Cumis* doctrine appears transparent. First, the rule and comment can not be used to determine whether an attorney-client relationship exists, or existed in the past.[151] Second, Rule 1.7(b) prohibits representation that "may be" as opposed to "will be" materially limited.[152] Third, as discussed, the insurance contract and retained counsel's personal interests could materially limit the insured's representation.[153] Finally, arguably, Comment 10 itself directly mandates provision of independent counsel with the added precaution that the insurer assure said counsel's professional independence.[154]

V. IMPACT

The *Finley* opinion leaves unanswered significant questions regarding the client status of insurers when conflicts of interest are not apparent. As discussion of *Delmonte v. State Farm Fire & Casualty Co.*[155] will demonstrate, the opinion also does not clarify whether, and to what degree, insurers retain the right to control the defense of its insured. Part A of this section discusses the former inquiry and the importance of resolving the client status of insurers while Part B comments on the uncertainty of the existence of a duty requiring retained counsel to abide by the insurer's direction of the defense.

A. Does Retained Counsel Represent the Insurer When a Conflict of Interest Between the Insurer and Insured is Not Apparent?

An attorney owes his client, to the exclusion of others, a duty of loyalty.[156] Clients enjoy rights not extended to non-clients.[157] Thus, it is imperative for

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[150] This is entirely consistent with the majority view. *See supra* section II.B and *supra* note 29.

[151] *See* discussion *supra* section IV.A.

[152] *See* discussion *supra* section IV.B.

[153] *See* discussion *supra* section IV.C.

[154] *See* discussion *supra* section IV.D.

[155] 90 Hawai'i 39, 975 P.2d 1159 (1999).

[156] *See* HAWAII RULES OF PROFESSIONAL CONDUCT Rule 1.7 cmt. 1 (1999). *See also* San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y, Inc., 162 Cal. App. 3d 358, 374 (Cal. Ct. App. 1985) (stating "[c]ounsel representing . . . owes both [clients] a high duty of care and unswerving allegiance") (internal citations omitted).

[157] *See* Silver, *supra* note 18, at 1586 ("As a client, a company has as much right as any other client to instruct the lawyer who is handling the joint defense . . . . As a nonclient, a

attorneys to properly identify who they represent. The *Finley* court, nevertheless, did not resolve whether the insurer is a client of the counsel it retains when a conflict of interest between it and its insured is not apparent.

The Hawai'i Supreme Court clearly stated: "Under the HRPC, the sole client of the retained attorney is the insured."[158] However, because HRPC Rule 1.7(b)[159] deals exclusively with conflict of interest situations, whether insurers maintain client status in the absence of a conflict remains unresolved.

Frequently, courts adopt a model that represents the relationship between the insurer and insured as the premise for their determination of whether the conflict of interest mandates provision of independent counsel. The "dual client" model postulates that the attorney, upon retention by the insurer, serves two clients, the insurer and insured.[160] Thus, when a conflict becomes apparent, retained counsel cannot ethically represent both.[161]

However, courts that reject the *Cumis* doctrine,[162] such as the *Finley* Court, generally subscribe to one of the following views: The "single client" model proposes that retained counsel represents the insured exclusively, regardless of whether a conflict exists.[163] Alternatively, many jurisdictions subscribe to the "primary client" model.[164] According to this model, retained counsel engages in dual representation of both the insurer and the insured until recognition of a conflict, upon which, retained counsel "owes 'undivided allegiance' to the insured and cannot harm the insured to benefit the company."[165] The "defeasible client" model is a slight variation of the "primary client" model. Under this view, the emergence of a conflict is said to "defease" the insurer of client status completely.[166]

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company's right to control counsel is less clear.").

[158] Finley v. Home Ins. Co., 90 Hawai'i 25, 32, 975 P.2d 1145, 1152 (1998).

[159] The court refers to Rule 1.7(b) and Comment 10 of the HRPC to conclude that "[u]nder the HRPC, the sole client of the retained attorney is the insured." *Id.* at 32-33, 975 P.2d at 1152-53. *See* discussion *supra* section IV.A.

[160] *See supra* note 31 and accompanying text.

[161] This is the majority view discussed *supra* section II.B.

[162] *See supra* section II.C (discussing the minority view).

[163] *See generally* Pepper, *supra* note 24, 50-59 ("IV. The Single Client Model"). Support for the "single client" model is growing. *See* O'Malley, *supra* note 43, at 512. *See, e.g.*, Continental Cas. v. Pullman, 929 F.2d 103, 108 (2d Cir. 1991); Cardin v. Pacific Employers Ins. Co., 745 F. Supp. 330, 337 (D. Md. 1990); First Am. Carriers v. Kroger, 787 S.W.2d 669, 671 (Ark. 1990). *See also* Winiarski, *supra* note 25, at 597.

[164] *See* Pepper, *supra* note 24, at 68 ("Many jurisdictions, perhaps the majority, characterize both the insured and the company as clients of the defense lawyer in the absence of a specific conflict of interest."). *See, e.g.*, Longo v. American Policyholders' Ins. Co., 436 A.2d 577, 580 (N.J. Super. Ct. 1981); Lieberman v. Employers Ins., 419 A.2d 417, 424 (N.J. 1980).

[165] Pepper, *supra* note 24, at 68. It appears that according to the "primary client model," when a conflict arises, the insurer technically is still considered a client.

[166] *See id.* at 70 (discussing the "defeasible client model").

Both the "single client" and the "primary/defeasible client" models assert that retained counsel represents the insured when a conflict of interest exists.[167] The key difference between the models, however, is that under the "single client" view, the insurer is not a client of retained counsel prior to the manifestation of the conflict. Thus, adoption of one of the above models would definitively resolve the insurer's client (or non-client) status in situations where a conflict of interest is not apparent.

It is unclear whether the Hawai'i Supreme Court adopted either the "single client," "primary client," or "defeasible client" model. The court states "[t]he rule implied by the HRPC . . . is that retained counsel solely represents the insured when a conflict arises between the interests of the insurer and the insured."[168] Because all models agree that the attorney's ethical duties run to the insured when conflict arises,[169] the court's holding does not definitively support any one view in particular.

Additionally, the court states that its "holding that the sole client of the attorney is the insured reflects the modern view."[170] However, reference to the "modern view," like the court's previous statements, fails to dispositively resolve the insurer's non-conflict status. Based on the citations provided as examples of the "modern view,"[171] it is unclear whether the court intends to endorse the "single client," "primary client" or "defeasible client" model.[172]

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[167] Under the "primary client" model, the insurer may retain client status in form, but substantively the attorney owes "undivided allegiance" to the insured. *See supra* note 165 and accompanying text.

[168] Finley v. Home Ins. Co., 90 Hawai'i 25, 32, 975 P.2d 1145, 1152 (1998).

[169] *See supra* notes 163, 165, 166 and accompanying text.

[170] *Finley*, 90 Hawai'i at 33, 75 P.2d at 1153. It is troubling that the court dropped the qualifier "when a conflict arises" as stated earlier in the opinion. *See id.* at 32, 975 P.2d at 1152 (stating "[t]he rule implied by the HRPC, which we expressly approve herein, is that retained counsel solely represents the insured when a conflict arises between the interests of the insurer and the insured"). The absence of the qualifier suggests that the insurer is never a client, even in non-conflict situations.

[171] *See id.* The court cited *State Farm & Casualty Co. v. Mabry*, 497 S.E.2d 844 (Va. 1998), as an example of the "modern view." *See Finley*, 90 Hawai'i at 33, 975 P.2d at 1153. The court also referenced Richmond, *supra* note 1, for the proposition that "[d]efense counsel must treat the insured as the client. Recognizing the insured as the attorney's sole client is consistent with recent judicial decisions." *Finley*, 90 Hawai'i at 33, 975 P.2d at 1153. The cases cited by the Richmond article include *Continental Casualty Co. v. Pullman*, 929 F.2d 103, 108 (2d Cir. 1991); In re *A.H. Robins Co.*, 880 F.2d 694, 751 (4th Cir. 1989), *cert. denied*, 493 U.S. 959 (1989); *First American Carriers v. Kroger Co.*, 787 S.W.2d 669, 671 (Ark. 1990); and *Atlanta International Insurance Co. v. Bell*, 475 N.W.2d 294, 297-99 (Mich. 1991). *See* Richmond, *supra* note 1, at 295 n.143.

[172] In *Mabry*, it is unclear whether retained counsel represented both the insurer and insured prior to the issuance of the reservation of rights letter. The Hawai'i Supreme Court quoted from *Mabry*: "The attorney employed by the insurer to defend the insured 'is bound by the same high standards which govern all attorneys, and owes the insured the same duty as if he were privately

Thus, arguably, *Finley*'s holding that retained counsel represents the insured solely is limited to representation encumbered by a conflict of interest.

The status of the insurer in non-conflict situations is a significant matter that should be resolved.[173] Client status is especially significant in malpractice suits against retained counsel.[174] Moreover, insurer-initiated malpractice suits are becoming more frequent.[175] Retained counsel should not whole-heartedly rely on *Finley* for the proposition that he or she exclusively represents the insured in every instance, and thus, are immune from insurer-initiated suits.[176] Even if the insurer lacks standing due to its non-client status, some courts assign liability under the theory of equitable subrogation.[177]

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retained by the insured.'" *Finley*, 90 Hawai'i at 33, 975 P.2d at 1153 (quoting *Mabry*, 497 S.E.2d at 847). This statement was used by the *Mabry* court to reason that State Farm, "could [not have] assert[ed] its position in conjunction with providing a defense to its insured" and therefore was not estopped from pursuing a declaratory judgment to prove non-coverage of the insured's claim. *Mabry*, 497 S.E.2d at 847. The phrase quoted by *Finley* from *Bell* appears to endorse the "primary client model." *See Bell*, 475 N.W.2d at 299 (stating "courts have consistently held that the defense attorney's primary duty of loyalty lies with the insured, and not the insurer"). *Pullman* and *Kroger*, however, seem to advocate the single-client doctrine. The *Pullman* court stated:

> Even though trial counsel is selected by and looks to an insurer for compensation, and although he keeps the insurer "informed about the progress of the case, we do not find those factors to be conclusive. 'An attorney's allegiance is to his client [the insured], not the person who happens to by paying for his services.'"

Pullman, 929 F.2d at 108 (citations omitted). *See also Kroger*, 787 S.W.2d at 671 (quoting with approval the A.B.A. Comm. on Ethics and Prof. Resp., Informal Op. 147 (1981), proposition that "when a liability insurer retains a lawyer to defend an insured, the insured is the lawyer's client"). *A.H. Robins* appears to be a mistaken cite.

[173] *See* Silver, *supra* note 18, at 1591 ("There are many purposes for which one may want to know whether an insured or an insurance company is the lawyer's client."). The article lists as examples, attorney-client privileged communications, confidentiality, and conflicts of interest. *See id.*

[174] *See, e.g.*, *Bell*, 475 N.W.2d at 295 (Mich. 1991), Feliberty v. Damon, N.E.2d 261, 261 (N.Y. 1988); American Centennial Ins. Co. v. Canal Ins. Co., 843 S.W.2d 480, 482 (Tex. 1992).

[175] *See* Richmond, *supra* note 2, at 484. *See also* Richmond, *supra* note 1, at 292 (remarking that "the last several years have seen a dramatic increase in legal malpractice suits; the dual client doctrine makes insurance defense counsel particularly susceptible to malpractice claims"). *See generally* Shaun Baldwin & Lisa Bree, *Malpractice Claims by Primary Excess Insurers: Is the Honeymoon Over?*, 62 DEF. COUNS. J. 18 (1995) (discussing insurer initiated malpractice suits).

[176] *See supra* section V.A discussing the uncertainty regarding whether *Finley*'s holding extends to non-conflict situations.

[177] *See* Richmond, *supra* note 2, at 484 (stating "while an insurer may not have an attorney-client relationship with defense counsel such that a lack of privity bars a direct action, the insurer might successfully proceed under an equitable subrogation theory"). *See also Bell*, 475 N.W.2d at 297 (holding that "the case is most efficiently and justly resolved by the principle of equitable subrogation"); *Canal Ins.*, 843 S.W.2d at 484 (holding "that an excess carrier may bring an equitable subrogation action against the primary carrier [and defense counsel]").

Additionally, conferral of client status on the insurer will necessarily affect retained counsel's role in the defense of the insured. As a client, the insurer will have "more direct influence over the litigation and its expenses and more direct access to information about the matter."[178]

The court's holding leaves open the possibility that the insurer could retain these rights when a conflict of interest is not apparent. In fact, the insurer's right to control the defense appears unresolved even in situations where a conflict is apparent. The following section discusses the difficulty that retained counsel encounters as the result of this uncertainty.

B. To What Degree Can an Insurer Control the Defense of its Insured?

Finley provides guidelines outlining retained counsels' and insurers' duties to the insured.[179] The court threatened that non-compliance with these rules could result in malpractice for defense attorneys and bad faith liability or estoppel to deny indemnification for insurers.[180] The opinion, however, does not address whether, and to what degree, the insurer can control the defense as a non-client.[181] After *Finley*, insurers certainly cannot "direct or regulate"[182] nor "interfere"[183] with retained counsel's judgment. Nevertheless, commentators point out that despite the insurer's non-client status and these restrictions, retained counsel should recognize that "[she] has obligations to the insurer,"[184]

Subrogation "involves the substitution of one person in the place of another with reference to a lawful claim or right." *Bell*, 475 N.W.2d at 298 (citing 73 AM. JUR. 2D, *Subrogation*, § 1).

[178] Pepper, *supra* note 24, at 34; *see also supra* note 157.

[179] *See supra* notes 86, 94, 100 and accompanying text.

[180] *See supra* section III.B.4.

[181] The opinion, however, clearly affords insurers the right to select counsel. *See Finley*, 90 Hawai'i at 31-32, 975 P.2d at 1151-52 (stating "we are convinced that the best result is to refrain from interfering with the insurer's contractual right to select counsel"). "By retaining the ability to select counsel of their choice, insurers are better able to economically and effectively defend claims, participate in strategic decisions and seize settlement opportunities." Richmond, *supra* note 1, at 269.

[182] *Finley*, 90 Hawai'i at 33, 975 P.2d at 1153.

[183] *Id.*

[184] Winiarski, *supra* note 25, at 599. Winiarski also states:

> [D]efense counsel should strive to fulfill all of the claims-handling requirements of the policy. . . . [C]ounsel should keep the carrier informed as the suit progresses on a periodic basis and when significant developments occur. Defense counsel's reports should include a description of the procedural status of the suit, the significant factual developments, the defense strategy, the liability and damage analysis, and the settlement possibilities and recommendations. . . . Counsel must keep both the insured and the insurer informed of any settlement demands. . . . Where the insurer's coverage or monitoring counsel, the insured's personal counsel, or counsel for an excess carrier are involved in a suit, defense counsel also needs to keep those lawyers informed as the suit progresses.

Id. at 599-600.

and not treat the insurer "with the disdainful indifference reserved for a client's adversary."[185]

The recent case Hawai'i Supreme Court case *Delmonte v. State Farm Fire & Casualty*[186] illustrates the precarious position that retained counsel is put in as a result of this uncertainty. In *Delmonte*, the Zandees sued the insureds, the Delmontes, for "intentional, negligent or other representations" made in the sale of a residence.[187] The Delmontes hired Gary Dubin,[188] who filed the answer to the Zandees' complaint.[189] Subsequently, the Delmontes tendered the complaint to State Farm requesting a defense and the right to personally select counsel.[190] State Farm denied the request and retained John Komeiji of the law firm Watanabe, Ing & Kawashima[191] to represent the Delmontes in the Zandee litigation.[192]

After unsuccessfully attempting to settle the case for approximately $118,000, trial resulted in a $691,514 judgment against the Delmontes.[193] Retained counsel filed a Notice of Appeal on the Delmontes' behalf, despite advising State Farm that success was unlikely.[194] State Farm notified the Delmontes that it would no longer participate in the suit and retained counsel subsequently withdrew.[195]

Unable to pay the bond required to stay the execution of the judgment pending appeal, the Delmontes entered into a settlement agreement in excess of $764,500.[196] Nearly two years later, the Delmontes filed suit against State Farm and Watanabe alleging misconduct.[197]

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[185] *See* Mallen, *supra* note 18, at 481 ("Even when the insurer is regarded as only a third-party payor, it needs fundamental information in a timely manner to fulfill its obligations . . . ."). *But see In re* Petition of Youngblood, 895 S.W.2d 322, 328 (Tenn. 1995) (stating that the insurer "cannot control the details of the attorney's performance, dictate the strategy or tactics employed, or limit the attorney's professional discretion"); O'Malley, *supra* note 43, at 512.

[186] 90 Hawai'i 39, 975 P.2d 1159 (1999).

[187] *See Delmonte*, 90 Hawai'i at 42, 975 P.2d at 1162.

[188] Gary Dubin, retained by the Delmontes, will be referred to as "independent counsel."

[189] *See Delmonte*, 90 Hawai'i at 43, 975 P.2d at 1163.

[190] *See id.*

[191] Komeiji and the law firm Watanabe, Ing & Kawashima, ("Watanabe"), will be referred to as "retained counsel."

[192] *See id.* at 43, 975 P.2d at 1163.

[193] *See id.* at 44-45, 975 P.2d at 1164-65.

[194] *See id.* at 45, 975 P.2d at 1165. Watanabe's letter advising against appeal was questioned by the court. *See infra* notes 203-04 and accompanying text.

[195] *See Delmonte*, 90 Hawai'i at 46, 975 P.2d at 1166.

[196] *See id.*

[197] *See id.*

Komeiji's role in the Zandee litigation aptly demonstrates the "difficult position"[198] that retained counsel faces when the insured and insurer attempt to exert control of the defense. Although the Hawai'i Supreme Court did not rule on the Delmonte's malpractice claim, it did question certain aspects of the defense provided.[199] First, the court briefly noted Komeiji's denial of the Delmontes' requests for "specific assistance in preparing for his deposition and trial testimony."[200] The Delmontes wrote to Komeiji asking that he provide "a write up on what [he] believe[d] [his] trial strategy w[ould] be . . . specifying the key issues" and also requested "trial memos on each such issue two weeks before the trial so that [Delmonte] c[ould] review said issue."[201] After consulting with State Farm, Komeiji responded that "pursuant to the policy," State Farm would direct the defense and stated that he did not receive authorization to do the work requested.[202] The court also discussed State Farm's directions and Komeiji's opinion letter: State Farm directed Komeiji not to include research or detail in the preparation of an opinion letter discussing appeal of the Delmontes' adverse judgment.[203] Subsequently, Komeiji concluded that success appeared unlikely.[204]

Watanabe's representation of the Delmontes, though questioned by the court in these respects, certainly was not grossly skewed in favor of serving State Farm's interests.[205] In fact, it seems that retained counsel made a good faith effort to handle the Delmontes' defense in a professional manner.[206]

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[198] *Id.* at 49, 975 P.2d at 1169 (stating, "while Watanabe was under an ethical duty to engage in competent representation of the Delmontes, State Farm's apparent reluctance to under-write necessary expenses put the law firm in a difficult position").

[199] *See id.* at 51-52, 975 P.2d at 1171-72 (stating, "[w]e express no opinion on the merits of the Delmontes' claims against Watanabe"). The court held that State Farm did not have the duty to prosecute an appeal of the Zandee action and was not estopped from denying coverage. *See id.* at 49-50, 975 P.2d at 1169-70.

[200] *Id.* at 52, 975 P.2d at 1172.

[201] *Id.* at 45, 975 P.2d at 1165.

[202] *See id.*

[203] *See id.*

[204] *See id.* at 49, 975 P.2d at 1169. Notably, Dubin wrote to Komeiji and State Farm in support of appealing the Delmontes' case. *See id.* at 45, 975 P.2d at 1165.

[205] Komeiji, as requested by the Delmontes, successfully opposed the Zandee's attempt to amend their complaint to have coverage denied. The amendment would have relieved State Farm of its indemnification duty. *See id.* at 44, 975 P.2d at 1164. Additionally, Watanabe filed a Notice of Appeal despite concluding that an appeal would not likely be successful and subsequently withdrawing. *See id.* at 45, 975 P.2d at 1165.

[206] That Komeiji consulted State Farm based on recognition that the policy affords the insurer the right to control the defense before denying the Delmontes' requests for various services and documents reflects his effort to represent the Delmontes in good faith. *See id.* Also, regarding the opinion letter, the court noted that State Farm's reluctance to under-write thorough preparation would normally expose it to bad faith liability and put Watanabe in a "difficult position." *Id.* at 49, 975 P.2d at 1169. Later in the opinion, the court pointed out that,

Watanabe's conduct demonstrates retained counsel's uncertainty regarding the degree of control the insurer may exert over the defense, and to what degree retained counsel must abide by the insurer's, over the insured's, instructions.

Finley, though advising retained counsel "not [to] allow the insurer to direct or regulate [his or her] professional judgment," does not adequately address situations such as Watanabe's.[207] Although the court was "convinced that the best result is to . . . leave the resolution of the conflict to the integrity of retained defense counsel,"[208] it offered little guidance as to the proper exercise of his or her "professional judgment."[209] Thus, by failing to clarify whether, and to what degree an insurer may control the insured's defense, the court leaves even well-intentioned counsel to "walk an ethical tightrope."[210]

"[a]lthough State Farm paid for the representation, Watanabe was subject to a professional duty to attend to the interests of its clients, the Delmontes, and not allow State Farm's financial underwriting of the expenses to infringe upon its duty of competent representation." *Id.* at 51, 975 P.2d at 1171. This seems to imply that retained counsel must, at least initially, absorb the cost of those services deemed necessary by the attorney but denied by the insurer.

[207] Finley v. Home Ins. Co., 90 Hawai'i 25, 33, 975 P.2d 1145, 1153 (1998) (internal quotations omitted).

[208] *Id.* at 31-32, 975 P.2d at 1151-52.

[209] The *Finley* court, throughout its opinion, mandates retained counsel to follow the HRPC and provides compliance guidelines. *See id.* at 34, 35, 975 P.2d at 1154. *See also supra* notes 86, 95, 96 outlining retained counsel's duties and proscribed conduct. However, when faced with Watanabe's predicament, both the HRPC and court provide retained counsel with little guidance. The only applicable standards, perhaps, are that retained counsel must "provide competent, ethical representation to the insured" and "[can]not allow the insurer to direct or regulate [her] professional judgment." *Finley*, 90 Hawai'i 25, 33, 34, 975 P.2d 1145, 1153, 1154. *Delmonte*, however, demonstrates the above standard's lack of clarity. Arguably, Watanabe, in its independent and professional judgment, decided to deny the Delmontes' request that certain work be done in an effort to preserve coverage under the insurance policy which required their cooperation. Yet, the court questioned Watanabe's decision. *See supra* note 200 and accompanying text. Thus, it seems the court requires more than mere preservation of "independent professional judgment;" it demands proper exercise of said judgment.

[210] Commentators often refer to defense counsel's precarious position as "walking the fine line" or "walking a tightrope." *See* Winiarski, *supra* note 25, at 596 (titled "Walking the Fine Line: A Defense Counsel's Perspective"); Richmond, *supra* note 1, at 475 (titled "Walking a Tightrope: The Tripartite Relationship Between Insurer, Insured, and Insurance Defense Counsel"); O'Malley, *supra* note 43, at 516 (commenting that the insured/insurer conflict of interest gives rise to an "elaborate minuet" that "is nerve-racking for defense counsel"). *Cf. supra* note 135.

VI. CONCLUSION

In *Finley v. Home Insurance Co.*,[211] the Hawai'i Supreme Court rejected the *Cumis* doctrine,[212] holding that "[t]he insured does not have the right to select counsel to represent its interests solely due to an insurer's reservation of rights."[213] In support of its conclusion, the court stated that "[a]dequate safeguards are in place already to protect the insured in the case of misconduct."[214]

This casenote, in addition to identifying issues left unresolved by the opinion,[215] challenges the analytical foundation of *Finley*'s holding, specifically, the court's reliance on HRPC Rule 1.7(b) and Comment 10 to define the attorney-client relationship between retained counsel and the insurer,[216] the court's rewording of the rule to prohibit representation that "will" as opposed to "may" be materially limited,[217] and the court's failure to acknowledge the possibility of material limitation.[218]

Challenging the court's reasoning, however, is not intended to suggest that *Finley*'s rejection of the *Cumis* doctrine constitutes a bad result.[219] In fact, the *Finley* court's solution appears advantageous in that it avoids many of the negative consequences attendant with the adoption of *Cumis* while adequately protecting the insured against attorney and insurer misconduct. [220]

Adoption of the *Cumis* doctrine, though arguably "correct"[221] in an analytical sense, engenders undesirable consequences in practice. Private

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[211] 90 Hawai'i 25, 975 P.2d 1145 (1998).

[212] *See supra* note 8 and section II.B discussing *San Diego Navy Federal Credit Union v. Cumis Insurance Society*, 162 Cal. App. 3d 358 (Cal. Ct. App. 1984), and the majority view.

[213] *Finley*, 90 Hawai'i at 31, 975 P.2d at 1151. The Hawai'i Supreme Court's decision overturned the ICA's adoption of the *Cumis* doctrine. *See id.* at 34, 975 P.2d at 1154.

[214] *Id.* at 32, 975 P.2d at 1152 (referring to the HRPC).

[215] *See supra* sections V.A and V.B referring to the uncertainty over the insurer's non-conflict status as client and the degree to which the insurer can control the insured's defense when a conflict is apparent.

[216] *See supra* section IV.A.

[217] *See supra* section IV.B.

[218] *See supra* section IV.C.

[219] *Cf.* Barker, *supra* note 3, at 534-35 (stating "[d]efense of litigation is not an art form, intended to satisfy the aesthetic standards of the lawyer"). This suggests that the inability to reconcile defense counsel's duties with the rules of professional conduct is not "wrong."

[220] *See* Roy Hughes, *Adoption of* Cumis *In [sic] Unwarranted*, HAW. B.J. 6 (Feb. 1999) (arguing for the rejection of the *Cumis* doctrine based on these reasons and the fact that "Hawaii enjoys a unique cultural and legal background" and a "small unified bar" that "w[ould] be ill served and undermined by Cumis"). *Cf.* Jerry Hiatt, *The Rejection of* Cumis: *Where Do We Go From Here?*, HAW. B.J. 7 (Feb. 1999).

[221] *See supra* section II.B discussing the majority view. *Cf. supra* section IV.C challenging *Finley*'s conclusion that HRPC Rule 1.7(b) does not require the insured's informed consent.

attorneys often "abuse the position of '*Cumis* counsel'" which in turn "contributes to growing defense costs for insurance companies."[222] Increased cost to insurers inevitably brings about increases in insurance premiums which burden society as a whole.[223] *Finley* circumvents these problems.

Furthermore, commentators question the necessity of independent counsel. First, there exists no evidence to suggest that "the insurance defense bar . . . [cannot] zealously defend insureds [where the insured and insurer's interests fail to fully coincide]."[224] Second, malpractice and bad faith liability not only adequately deter attorney and insurer misconduct, but provide the insured with sufficient redress in the unlikely event of injury.[225] Insurers, repeatedly chastised and penalized by courts in the past, have altered their ways thus "all but eliminat[ing] cases in which insureds have even colorable claims of injury resulting from insurer mismanagement of the defense."[226] *Finley* wisely refrains from "adopt[ing] a blanket rule based on the [undue] assumption [of attorney misbehavior]"[227] when the HRPC and other mechanisms sufficiently protect the insured.[228]

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[222] Hall, *supra* note 22, at 758. *See also* Richmond, *supra* note 1, at 275 (listing as responsible for *Cumis*' "extremely adverse consequences," unethical attorney's manufacturing of false conflicts of interest, charging of excessive fees, and independent counsels' comparative lack of experience and skill).

[223] *See* Silver & Syverud, *supra* note 18, at 268 ("A proliferation of lawyers on the defense side substantially increases the expense of lawsuits, and this in turn is reflected in liability insurance premiums.").

[224] Richmond, *supra* note 2, at 491. Technically, the only difference between independent counsel (*Cumis*) and retained counsel (*Finley*) is that the insurer selects the former. *Cf. supra* note 8. The rules of professional conduct govern both attorneys. Both retained counsel and independent counsel serve the insured's interests exclusively and both have the incentive to curry favor with the insurer. *See* Silver, *supra* note 18, at 1607. Despite these similarities, *Delmonte* indicates that material differences possibly exist. Notably, Dubin (independent counsel) strongly urged appeal of the Delmontes' adverse judgment while Watanabe (retained counsel) advised State Farm against the likelihood of success on appeal. *See supra* note 204 and accompanying text.

[225] *See* Finley v. Home Ins. Co., 90 Hawai'i 25, 32, 975 P.2d 1145, 1152 (1998) (stating "[a]dequate safeguards are in place already to protect the insured in the case of misconduct"). *See also* Barker, *supra* note 3, at 539 (commenting that "modern bad faith law provides powerful incentives for insurers to properly protect the interests of insureds and provides powerful remedies to insureds whose interests are injured by insurer abuse or mishandling"). Moreover, "defense lawyers now understand the need for loyalty to the insured, and insurers know they will not be permitted to profit from disloyalty." *Id.* at 537.

[226] Barker, *supra* note 3, at 538.

[227] *Finley*, 90 Hawai'i at 34, 975 P.2d at 1154.

[228] *See id.* at 32, 975 P.2d at 1152.

The above discussion demonstrates that resolution of the tripartite relationship is far from simple.[229] In fact, at least one court has recognized that "no decision [neither the majority nor minority view] or authority . . . furnishes a completely satisfactory answer."[230] Thus, despite its analytical flaws, the *Finley* court's rejection of the *Cumis* doctrine arguably constitutes the better answer to the extremely "vexing"[231] tripartite problem.[232]

Allison M. Mizuo[233]

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[229] *See* Hartford Accident & Indem. Co. v. Foster, 528 So.2d 255, 273 (Miss. 1998) (remarking that "the ethical dilemma thus imposed upon the carrier employed defense attorney [by the tripartite relationship] would tax Socrates"). *See also Finley*, 90 Hawai'i at 31, 975 P.2d at 1151 (stating "[r]easonable minds can and do differ on the best resolution of the conflict inherent in the tripartite relationship among the insurer, the insured, and insurance defense counsel").

[230] *Foster*, 528 So.2d at 273.

[231] *See* Silver, *supra* note 18, at 1587 (describing the tripartite relationship as "deeply and unavoidably vexing").

[232] *See* Ashley, *supra* note 8, at 116 ("In this writer's opinion, the Hawaii Supreme Court's opinion in *Finley* is far superior to the reasoning employed in *Cumis* . . . .").

[233] William S. Richardson School of Law, Class of 2001. The author wishes to thank Emily Whitmore-Badger, Kaleen Hasegawa, and the University of Hawai'i 1999-2000 Law Review for their help and support.

Employment Discrimination Because of One's Arrest and Court Record in Hawai'i

I. INTRODUCTION

Imagine a young nine-year old girl giggling and playing in the city park. She plays at this park frequently and knows the park's employee, James Johnson. One day, he tells her to be sure to return her jump rope to him when she is finished playing with it. Being an obedient child, she dutifully walks to the maintenance shed to return the rope. Johnson then shuts and locks the door and repeatedly rapes, assaults, and sexually abuses the young girl for more than two hours.[1] Should the employer of this custodial employee have known of his propensity toward violence and of his prior convictions of rape and assault? Most states answer this question in the affirmative, with legislation that allows employers to inquire into the criminal conviction records of potential employees.[2] However, in Hawai'i, the answer may be otherwise.[3]

The employment discrimination statute in Hawai'i prohibits employers from inquiring into an applicant's arrest and court record unless there is a bona fide occupational qualification ("BFOQ"), and the employer's inquiry into the arrest and court record must occur after making a conditional job offer.[4] Although no case law exists to show exactly what a BFOQ would be, it is doubtful that an applicant's prior record showing rape and assault would be

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[1] *See* Haddock v. City of New York, 553 N.E.2d 987, 988 (N.Y. 1990). The City of New York, the defendant, argued that Johnson's job as a utility worker did not primarily involve working unsupervised around children and that his violent crime convictions occurred nearly thirty years before the City hired him. *See id.* at 992. The court held the City of New York liable for Johnson's criminal acts despite New York's "strong public policy favoring rehabilitation of ex-convicts." *Id.*

[2] After a concerted effort to research states that do have statutes limiting employers' rights to inquire into criminal convictions, I have discovered that only Hawai'i, Wisconsin, New York, Massachusetts, Connecticut, Minnesota, Michigan, California, Ohio, and Illinois have those kinds of statutes. *See* discussion *infra* section III. Other states do not address this issue in their state statutes, and thus allow employers to inquire into criminal backgrounds.

[3] Based on Hawai'i Revised Statutes ("HRS") section 378-2.5, Hawai'i courts might conclude that the City was not liable for Johnson's violent acts. Further details about the statute are discussed *infra* in this section and in section II. Johnson's prior crimes occurred 30 years before the city hired him. *See Haddock*, 553 N.E.2d at 987. HRS section 378-2.5 prohibits inquiry into conviction records beyond 10 years. *See* HAW. REV. STAT. § 378-2.5 (1998). Thus, it is possible that Hawai'i courts would decide that the city did not have the responsibility of inquiring into Johnson's criminal record.

[4] *See* HAW. REV. STAT. § 378-2.5 (1998).

sufficiently related to a custodial position, such that the employer could discriminate against the potential employee because of his criminal record.[5]

Generally, the goal behind laws prohibiting employment discrimination based on an applicant's arrest and court record is to protect people with criminal records from being forever punished for past crimes by limiting the availability of gainful employment.[6] This type of legislation seeks to decrease recidivism and to credit the rehabilitative process of our judicial system with actual transformation of participants into contributing members of society.[7] Hawai'i is one of a minority of states that forbids employment discrimination based on one's arrest or conviction record.[8]

Prior to 1998, it was unlawful for most employers in Hawai'i to discriminate against those with arrest and court records.[9] The Hawai'i Civil Rights Commission ("HCRC") provides no guidance on how to define "arrest record or court record," the meaning of a BFOQ, and how broadly employers are prohibited from "inquiring" into one's criminal record.[10] For example, is a background search into public records containing information about an applicant's criminal record the kind of "inquiry" that the Hawai'i employment discrimination statute prohibits?

In 1998, employers fought to repeal this legislation, but their efforts were unsuccessful.[11] The Hawai'i Legislature instead adopted Act 175, which

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[5] *See supra* note 3.

[6] *See* H.R. STAND. COMM. REP. No. 673, 19th Leg., Reg. Sess. (1998), *reprinted in* 1998 HAW. HOUSE J. 1300-01.

[7] *See* County of Milwaukee v. Labor & Indus. Review Comm'n, 407 N.W.2d 908, 914-15 (Wis. 1987).

[8] Wisconsin, New York, Connecticut, Massachusetts, Minnesota, Michigan, and California have laws prohibiting employment discrimination based on conviction and/or arrest records. *See* discussion *infra* section III.

[9] *See* HAW. REV. STAT. § 378-3 (1999) (stating that the government, the State Department of Education, private schools, and financial institutions insured by a federal agency acting as employers can inquire into criminal convictions).

[10] The law prohibiting employment discrimination based on applicants' arrest and court record was originally enacted in 1973, yet the Hawai'i Civil Rights Commission ("HCRC") did not adopt nor even propose any regulations concerning this law until 1997. *See infra* section II.

[11] The original intent of House Bill 3528 in the 1998 legislative session was to abolish the arrest and court record provision from Hawai'i's employment discrimination statute. *See* H.R. STAND. COMM. REP. No. 276, 19th Leg., Reg. Sess. (1998), *reprinted in* 1998 HAW. HOUSE J. 1140. Eighteen people testified in support of the bill. *See Hearings on H.B. 3528 (H.D. 1)*, 19th Leg., Reg. Sess. (1998) (testimony of James H. Takushi, Director, State of Hawai'i Dep't of Human Resources Development; Herman Aizawa, Superintendent of Education, Education Dep't; Mark S. Hubbard, Director of Human Resources, Grove Farm Company, Inc.; Joyce Hedani, Managing Director for Employee Relations, Liberty House; Walter Benavitz, Labor Relations Manager, Del Monte; Jared H. Jossem, Attorney, Special Education Center of Hawai'i; John Muaina, Jr., Vice President Human Resources, Polynesian Cultural Center;

allows employers to inquire into convictions records as long as: (1) there is a rational relationship to the job; and (2) the inquiry occurs after the employer offers the applicant a conditional job offer.[12] The public reaction to this type of legislation is mixed. In general, employers dislike the constraints of Hawai'i Revised Statutes ("HRS") section 378-2.5.[13] However, supporters of people with arrest and court records feel it provides a fair limitation.[14]

Section II of this recent development first discusses the history of the law prohibiting discrimination based on arrest and court records in Hawai'i. Next, it focuses on the concerns of Hawai'i employers, their compliance with the law, the viewpoints of supporters of HRS section 378-2.5, and other suggestions proposed to encourage employers to hire more people with arrest and court records. Section III initially explains how other jurisdictions approache this issue. Subsequently, it explains how the law elsewhere may provide valuable guidance to interpret Hawai'i's statute. Section IV concludes that prohibiting employers from making choices based on one's arrest and court record creates a barrier for employers to efficiently conduct business.

II. BACKGROUND

A. History of Arrest and Court Record Discrimination in Hawai'i

In 1973, the Hawai'i Legislature enacted legislation banning discrimination based upon one's arrest and court record discrimination.[15] Although HRS section 378 has since been amended, the portions of the statute concerning arrest and court records remained relatively untouched until 1998. "Arrest and court record," as defined in HRS section 378-1, includes "any information about an individual having been questioned, apprehended, taken into custody or detention, held for investigation, charged with an offense, served a summons, arrested with or without a warrant, tried, or convicted pursuant to

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Legislative Information Services of Hawai'i; Jan Berman, President, Retail Merchants of Hawai'i; Society for Human Resource Management ("SHRM"); Perry Confalone, Chair of the Human Resources Committee, The Chamber of Commerce of Hawai'i; Kathleen Masunaga, Executive Director, Hawai'i Restaurant Association; Murray Towill, President, Hawai'i Hotel Association; Sue Tetmeyer, President, Employer's Help-Line, Inc.; Vicki von Stroheim-Seay, Area Manager, Staffing Parters; Wendy Rose, Staffing Manager, Staffing Parters; and Melvin DeCosta, Chief of Security, Kahala Mall; Mary Pattee, President, Remedy Intelligent Staffing).

[12] *See* Act 175, § 1, 19th Leg., Reg. Sess. (1998), *reprinted in* 1998 Haw. Sess. Laws 651-52 (codified at HAW. REV. STAT. § 378-2.5 (1998)).

[13] *See* discussion *infra* section III.

[14] *See id.*

[15] *See* Act 54, 7th Leg., Reg. Sess. (1973), *reprinted in* 1973 Haw. Sess. Laws 66-68 (codified at HAW. REV. STAT. § 378 (1973)).

any law enforcement or military authority."[16] It is unlawful for employers to refuse to hire, terminate, or otherwise discriminate based on one's arrest and court record.[17] Employers with one or more employees must comply with this law, except for the federal government,[18] the department of education, private schools,[19] financial institutions,[20] and health care facilities.[21] The legislation also grants statutory exemptions to other employers that deal with children, private investigators, apartment or condominium owners, the judiciary, and correctional facilities and employees with police powers.[22] Employers who

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[16] HAW. REV. STAT. § 378-1 (1995).

[17] *See* HAW. REV. STAT. § 378-2 (1995).

[18] HRS section 378-1 defines "employer" as "the State or any of its political subdivisions and any agent of such person having one or more employees, but shall not include the United States." HAW. REV. STAT. § 378-1 (1995).

[19] HRS section 378-3(8) allows the department of education and private schools to consider "criminal convictions in determining whether a prospective employee is suitable to working in close proximity to children." HAW. REV. STAT. § 378-3(8) (1999).

[20] HRS section 378-3(9) provides for "any financial institution in which deposits are insured by a federal agency having jurisdiction over the financial institution" to refuse to employ or discharge anyone "convicted of any criminal offense involving dishonesty or a breach of trust, unless it has the prior written consent of the federal agency having jurisdiction over the financial institution to hire or retain the person." HAW. REV. STAT. § 378-3(9) (1999).

[21] HRS section 378-3(12) permits a "health care facility" to consider "the record of a criminal conviction where the criminal offense is a relevant factor in determining the bona fide occupational qualifications for a position where an employee or prospective employee who has received an offer for employment is working in close proximity to patients." HAW. REV. STAT. § 378-3(12) (1999).

[22] HRS section 134-7(c) prohibits convicted felons from owning, possessing, or controlling firearms. *See* HAW. REV. STAT. § 134-7(c) (1999). HRS section 333-F22 requires operators of adult foster homes and developmental disabilities to inquire whether prospective employees have been convicted of any crimes other than a minor traffic violation involving a fine of $50 or less. *See* HAW. REV. STAT. § 333-F22 (1999). HRS section 346-19.6 compels operators of child care institutions, child placing organizations, and foster homes to determine whether an employee was convicted of a crime other than a minor traffic violation involving a fine of $50 or less. *See* HAW. REV. STAT. § 346-19.6 (1999). HRS section 346-154 mandates the Department of Human Services to deny an application of a license to operate a child care facility if the operator or any prospective employee has been convicted of a crime other than a minor traffic violation involving a fine of $50 or less. *See* HAW. REV. STAT. § 346-154 (1999). HRS section 325-5.5 prohibits employment of staff members of Hawai'i Youth Correctional Facilities from being convicted of any crime other than a minor traffic violation involving $50 or less. *See* HAW. REV. STAT. § 352-5.5 (1999). HRS section 353C-5 allows the State to deny employment to applicants of correctional facilities and employees with police powers who are convicted of a crime other than a minor traffic violation involving a $50 fine or less. *See* HAW. REV. STAT. § 353C-5 (1999). HRS section 453-6 prohibits anyone convicted of a crime from being licensed as a private detective or assisting a private detective. *See* HAW. REV. STAT. § 463-6 (1999). HRS section 514A-82.1 allows the association of apartment owners or the manager of a condominium projects to deny employment to an applicant with a conviction record if that employee will have access to entry of the units or access to association

wish to discriminate based on an applicant's criminal record must prove that this hiring discrimination bears a "rational relationship" to the job.[23]

Since the passage of the statute, little guidance exists in interpreting this legislation. In fact, only one reported case has construed Hawai'i's arrest and court record employment discrimination statute.[24] Furthermore, the regulations that the HCRC normally promulgates have not yet been adopted.[25]

In the one case on point, the U.S. Court of Appeals for the Ninth Circuit, in *Kinoshita v. Canadian Pacific Airlines, Ltd.*, clearly stated that an employee cannot necessarily invoke the statute's protection due to the mere fact that the employee has an arrest or court record when the adverse employment action occurs.[26] In *Kinoshita*, the plaintiffs were terminated from their jobs as passenger agents for Canadian Pacific Airlines when DEA agents arrested them for conspiracy to promote cocaine.[27] The court held that the termination did not violate HRS section 378-2 because the "discharges were not based on the 'mere fact' of the plaintiffs' arrest and court record, but instead were due to the perception that plaintiffs were involved in drug-related activity."[28]

In late 1997, approximately twenty-four years after the legislature enacted the law, the HCRC finally proposed regulations, which for the *first* time set forth standards and provided guidance on determining whether a discriminatory practice regarding an applicant's arrest and court record constitutes unlawful disparate treatment.[29] Although never adopted by HCRC,

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funds. *See* HAW. REV. STAT. § 514A-82.1 (1999). HRS section 571-33 allows the judge to inquire into conviction records when determining the appropriate temporary detention home for children or minors. *See* HAW. REV. STAT. § 571-33 (1999). HRS section 571-34 allows the judiciary to deny employment persons convicted of a crime other than a minor traffic violation involving a fine of $50 or less. *See* HAW. REV. STAT. § 571-34 (1999). HRS section 846-43 permits the board of education and private schools to refuse employment to persons convicted of a crime other than a minor traffic offense involving a fine of $50 or less if the job will place the applicant in close proximity to children. *See* HAW. REV. STAT. § 846-43 (1999).

[23] HRS section 378-3(13) allows an employer to consider a criminal record "that bears a rational relationship to the duties and responsibilities of the position, pursuant to section 378-2.5, with regard to prospective or continued employment." HAW. REV. STAT. § 378-3(13) (1999).

[24] *See* Kinoshita v. Canadian Pac. Airlines, Ltd., 803 F.2d 471 (9th Cir. 1986).

[25] *See* Michael Barrier, *Lawsuits Gone Wild*, NATION'S BUS., Feb. 1, 1998, at 14. One reason for the small number of reported cases based on arrest and court record discrimination is that the administrative process, through HCRC, effectively handles the adverse action. Another reason is that employers often settle in employment law cases to avoid facing unpredictable juries that may award high damages. *See id.*

[26] *See Kinoshita*, 803 F.2d at 475.

[27] *See id.* at 472-73.

[28] *Id.* at 475.

[29] *See* HAW. ADMIN. R., tit. 12, subtit. 7, ch. 46, subch. 10 (to be codified at 1912-46-201-211) proposed by the HCRC (Dec. 10, 1997). Even though these rules were never adopted, the 1998 legislative session adopted some of the Civil Rights Commission's proposals in HRS

the proposed regulations may be instructive in interpreting HRS section 378-2.5 in the absence of approved regulations.[30] In the proposed regulations, the HCRC addressed important issues such as what constitutes a "bona fide occupational qualification" and what is an "inquiry."[31] Significantly, an

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section 378-2.5 (1998), such as allowing inquiry into the criminal record after a conditional job offer has been made if there is a potential bona fide occupational qualification ("BFOQ") related to the job. *See* HAW. REV. STAT. § 378-2.5 (1998).

[30] Some practitioners disagreed with how useful the HCRC's proposal would be because they found parts of it confusing. "[T]he HCRC's proposed definition of potential BFOQ is virtually indecipherable and unduly burdensome." David F.E. Banks, *Arrest and Court Record Bias – The New Proposed Rules*, HAWAI'I LAB. LETTER, Jan. 1998, at 6.

[31] Proposed Hawai'i Administrative Rule section 12-46-202 defines "BFOQ" as:

> a job qualification for which an employer or other covered entity has the burden of proving that:
>
> (1) The essence of the business would be undermined if all persons with a conviction record for a specified offense are not excluded;
>
> (2) All or substantially all individuals with a conviction record for a specified offense would be unable to perform the functions and responsibilities of prospective or continued employment in the position; and
>
> (3) There is not acceptable alternative with less discriminatory impact.
>
> HAW. ADMIN. R., tit. 12, subtit. 7, ch 46, subch. 10 (to be codified § 12-46-202) (Proposed Dec. 10, 1997).

"Inquire" is defined as:

> (1) In general:
>
> (A) Asking an applicant or employee about their arrest record, court record, or conviction record, arrest, charge, or conviction for an offense, or any offense that the individual may have committed;
>
> (B) Requiring or requesting an applicant or employee to fill out a form which contains questions about whether the individual has an arrest record, court record, or conviction record, or has committed, been arrested for, charged with, or convicted of any offense;
>
> (C) Obtaining or reviewing arrest records, court records, or conviction records, including military court, police records or reports, criminal justice data files, or criminal history records containing information about an individual's arrest record, court record, or conviction record;
>
> (D) Obtaining or reviewing computer databases or other records maintained by persons or non-governmental entities, or newspaper, magazine, and television reports containing information about an individual's arrest record court record, or conviction record;
>
> (E) Contacting persons about an individual's arrest record, court record, or conviction record, or asking about information contained in such records, or about information related to such records;
>
> (F) Having a third party do any of the above activities; or
>
> (G) Establishing a workplace rule which requires all applicants or employees to report arrests or charges, unless an inquiry is allowed under this subchapter, or convictions, unless there is a statutory exemption, or potential BFOQ.
>
> (2) Inquire does not include situations where an employer or other covered entity is not seeking information contained in an arrest record, court record, or conviction record but becomes aware of such information through contemporaneous newspaper, magazine, or television reports, or an unsolicited disclosure by an applicant, employee, or person. An

application form cannot ask the prospective employee whether he or she has an arrest record, court record, or conviction record unless "the inquiry is pursuant to a statutory exemption and seeks information about a conviction for a specific offense within the exemption."[32] The HCRC makes it clear that the employer has the burden of proving a BFOQ based on the employer's business requirements and the totality of the circumstances.[33]

In 1998, during the legislative session following the HCRC's proposals, Representative Joseph M. Souki introduced House Bill ("H.B.") 3528, to abolish the prohibition against employment discrimination based on arrest and court record.[34] The proposed repeal gave deference to employers to make informed employment decisions without government restrictions.[35] Ironically, H.B. 3528 changed through the legislative process and the bill that eventually passed was worded contrary to the proposal's original intent. Instead of repealing the prior legislation, the final H.B. 3528 placed further restrictions on employers to make an inquiry only after a job offer has been made and to limit the search to the past ten years.[36] With the passage of this bill, it appears that the legislature's main emphasis is to provide employment opportunities

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> employer or covered entity may not use a contemporaneous report or unsolicited disclosure relating to an arrest record, court record, or conviction record to seek additional information or for any other purpose, unless there is a statutory exemption, potential BFOQ, or an inquiry is allowed under this subchapter.

Id.

[32] HAW. ADMIN. R., tit. 12, subtit. 7, ch. 46, subch. 10 (to be codified at § 12-46-208(b)) (proposed Dec. 10, 1997).

[33] *See id.*

[34] H.R. STAND. COMM. REP. No. 276, 19th Leg., Reg. Sess. (1998), *reprinted in* 1998 HAW. HOUSE J. 95, 1140.

[35] *See id.*

[36] *See* HAW. REV. STAT. § 378-2.5 (1998). The House Committee on Judiciary passed the bill with its original intent, providing that employers were not to be allowed to inquire into arrest records that did not result in convictions, but left it open for employers to inquire into conviction records. H.R. STAND. COMM. REP. No. 673, 19th Leg., Reg. Sess. (1998), *reprinted in* 1998 HAW. HOUSE J. 1300-01. Subsequently, the Senate Committee of Human Resources proposed to allow employers to inquire about conviction records after a conditional offer of employment and to limit the inquiry to the past five years. SEN. STAND. COMM. REP. No. 2959, 19th Leg., Reg. Sess. (1998), *reprinted in* 1998 SEN. J. 1207-08). Next, the Senate Judiciary gutted the bill and replaced it with a bill protecting former employers who gave good faith reference checks to prospective employers. SEN. STAND. COMM. REP. No. 3282, 19th Leg., Reg. Sess. (1998), *reprinted in* 1998 SEN. J. 1131-32. *See also* S.B. 3088. During conference committee, the legislature reinstated the bill to read that employers are prohibited from discriminating against persons with arrest and court records and that after a conditional job offer has been made, employers can inquire into conviction records for the past 10 years if a rational relationship exists between the job and the conviction record. CONF. COMM. REP. No. 79, 19th Leg., Reg. Sess. (1998), *reprinted in* 1998 HAW SEN. J. 776. *See also* Act 175, § 1, 19th Leg., Reg. Sess. (1998), *reprinted in* 1998 Haw. Sess. Laws 651-52 (codified at HAW. REV. STAT. § 378-2.5 (1998)).

for individuals with conviction records and reduce the likelihood that they will return to public assistance or a life of crime.[37] The Legislature's secondary concern is protecting employers from litigation when trying to provide a safe environment for customers and employees.[38]

B. Public Perception of the Statute

The interests of prospective employees with arrest and court records and employers are obviously in conflict where such legislation is concerned. Employers are concerned with liability and the safety of other employees and customers. Persons with prior criminal records are apprehensive about finding gainful employment despite having already paid their debt to society for past wrongs. John Ishihara, Chief Counsel for the Hawai'i Civil Rights Commission, acknowledged the conflicting goals of HRS section 378-2.5: "On one hand they [criminals] have paid their debt to society and should be able to get jobs. If they can't, what's left for them might be more crime. . . . On the other hand, employers do have legitimate public safety concerns."[39]

Workplace violence is among employers' top concerns.[40] Claims brought against employers for workplace violence "have resulted in millions of dollars in settlements and judgments, bad publicity, and increased insurance premiums for employers."[41] In America, murder ranks third in the overall causes of on-the-job death,[42] and is the number one cause of on-the-job death for

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[37] *See* SEN. STAND. COMM. REP. No. 2959, 19th Leg., Reg. Sess. (1998), *reprinted in* 1998 SEN. J. 1207-08.

[38] *See* H.R. STAND. COMM. REP. No. 673, 19th Leg., Reg. Sess. (1998), *reprinted in* 1998 HAW. HOUSE J. 1300-01.

[39] Susan Kreifels, *New Rules Add Teeth to Convict-Hiring Law*, HONOLULU STAR BULL., Jan. 9, 1998, at A8 (quoting John Ishihara).

[40] *See Anger, Potential Violence Rises Among Co-Workers*, HONOLULU STAR BULL., Sept. 6, 1999, at A1. Frank Kenna, president of The Marlin Co., comments that workplace violence is a serious problem for managers and that supervisors must be able to identify and handle potentially violent behavior. *See id.* The Marlin Co. publishes motivational, educational and safety materials for companies. *See id. See also* Stephen Beaver, *Beyond the Exclusivity Rule: Employer's Liability For Workplace Violence*, 81 MARQ. L. REV. 103 (1997) (discussing employer liability for workplace violence, the exclusivity rule under worker's compensation, and common law theories of employer liability).

[41] Robert L. Levin, *Workplace Violence: Navigating through the Minefield of Legal Liability*, 11 LAB. LAW. 171, 175 (1995).

[42] *See* Centers for Disease Control, National Inst. For Occupational Safety & Health: Fatal Injuries to Workers in the United States, 1980-1989: A Decade of Surveillance 8 (1993). The mass murder at the Xerox building is the most well-known incident of workplace violence occurring in Hawai'i. *See Recent Instances of Workplace Violence Nation & World in the News: Workplace Violence*, ST. LOUIS POST-DISPATCH, Nov. 11, 1999, at A16. Byran Uyesugi was a long-time employee of Xerox who was convicted of walking into his office building and gunning down seven other employees apparently under the false impression that Xerox was

women.[43] Co-workers and former co-workers commit fourteen percent of all workplace violence and account for nearly 1500 violent assaults each year.[44] During 1996, seventy-five people were murdered by co-workers or former co-workers nationwide.[45]

While murder may be an extreme example of workplace violence, assault on the job is another concern. In Hawai'i, between the months of January and June of 1998, aggravated assault accounted for 681 out of a total of 1,479 violent crimes reported to police in a Hawai'i survey.[46] Although figures are not readily available for aggravated assaults in the workplace, one in every six employees reported being so upset by a co-worker in the past year that he or she felt like resorting to violence.[47]

Theft is another prevalent concern of employers. Between January and June 1998, 2,648 adults were arrested for larceny-theft in Hawai'i.[48] In fact, theft is the most serious prevalent re-arrest charge in Hawai'i.[49] The Parole and Recidivism Report, published by the Hawai'i Criminal Justice Data Center, reports that 36 out of 217 persons that were rearrested, or 16.6%, were rearrested because of theft.[50]

A related concern to workplace violence and theft is ex-offender recidivism and how those with conviction records often return to a life of crime. In fact, many employees who commit acts of violence at work have a history of violence.[51] For example, employers worry about applicants like Wallace Silva,

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going to terminate him. *See* Traci Watson, *"Quiet" Honolulu Shooting Suspect Owned 17 Weapons*, USA TODAY, Nov. 3, 1999 at 7a (noting that Xerox employed Uyesugi since 1984); Deborah Orr, *We Must Face the Truth of Violence in America*, THE INDEP., Nov. 5, 1999 (discussing violent incidences in the United States). *See also Hawaii Gunman Who Killed 7 Xerox Co-Workers Gets Life Term*, LOS ANGELES TIMES, Aug. 9, 2000, at A14 (stating that the court convicted Uyesugi and sentenced him to life without parole).

[43] *See Struggling to Understand Causes of Workplace Violence*, CHICAGO TRIB., Dec. 17, 1993, at 1.

[44] *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE: SPECIAL REPORT – RECIDIVISM OF PRISONERS RELEASED IN 1983, 1 (1997).

[45] *See* Guy A. Toscano & Janice A. Windau, *Profile of Fatal Work Injuries in 1996*, COMPENSATION & WORKING CONDITIONS, 37, 38 (1998).

[46] *See* ATTORNEY GENERAL, CRIME PREVENTION AND JUSTICE ASSISTANCE DIVISION: STATE OF HAWAI'I SEMI-ANNUAL CRIME SUMMARY (Jan. 1999) [hereinafter SEMI-ANNUAL CRIME SURVEY].

[47] *See Anger, Potential Violence Rises Among Co-Workers*, *supra* note 40.

[48] *See* SEMI-ANNUAL CRIME SURVEY, *supra* note 46.

[49] *See* ATTORNEY GENERAL, HAWAII CRIMINAL JUSTICE DATA CENTER: PAROLE AND RECIDIVISM, 15-16 (Aug. 1989).

[50] *See id.*

[51] Janet L. Robinson, *10 Facts Every Employer and Employee Should Know About Workplace Violence. It May Save Your Life!* (visited Oct. 10, 1999) <http://smartbiz.com/sbs/columns/robin1.htm>. The perpetrators of workplace violence have the following characteristics in common:

a convict who, while on probation, was arrested for bank robbery.[52] Prior to that arrest, Silva had a criminal history of robberies, rape, theft, and firearm offenses.[53] A person's criminal history can be a good indicator of an individual's likelihood to commit future crimes.[54] The Bureau of Justice Statistics tracked the recidivism rate of 16,000 prisoners released in 1983.[55] Within three years, sixty-two percent had been re-arrested and forty-six percent had been re-convicted.[56] Of the prisoners released who were violent felons, fifty-nine percent had been re-arrested and thirty-six percent were re-convicted within the same period.[57]

The recidivism rates in Hawai'i are just as startling. Of the 366 prisoners paroled in 1984 and 1985, 217 parolees, or 59.3%, were rearrested, and most within one year.[58] Furthermore, mandating employers to hire persons with criminal records does not seem to be the most effective way to prevent recidivism since many criminals were employed at the time of arrest.[59] A study in Canada revealed that 42.1% of persons with criminal records were gainfully employed at the time of their subsequent offense.[60]

Some employers argue that it is not their duty to rehabilitate criminals, asserting instead that the government should take responsibility for this social

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(1) a history of violence, fascination with the military, or being a survivalist; 2) white males; 3) over the age of 35 years; 4) a loner or an extremist; 5) carries a grudge; 6) have difficulty accepting authority or reality; 7) a history of violence toward women; and 8) may have substance abuse problems and/or mental-health problems.

Id.

[52] *See* Rod Ohira, *Robbery Suspect Has Long Record*, HONOLULU STAR BULL., June 25, 1997, at A3.

[53] *See id.*

[54] *See* Dermot Sullivan, *Employee Violence, Negligent Hiring, and Criminal Record Checks: New York's Need to Reevaluate its Priorities to Promote Public Safety*, 72 ST. JOHN'S L. REV. 581, 584 (1998).

[55] *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS: SPECIAL REPORT – RECIDIVISM OF PRISONERS RELEASED IN 1983, 1 (1997).

[56] *See id.*

[57] *See id.* at 5, tbl. 8. The United States Department of Justice, Bureau of Justice Statistics asserts that re-arrest record are a more accurate gauge than either re-conviction or re-incarceration records. The reasoning is that "not all offenders are prosecuted or go to trial." *Id.* at 2

[58] *See* ATTORNEY GENERAL, HAWAI'I CRIMINAL JUSTICE DATA CENTER, *supra* note 49, at 12.

[59] *See* EDWARD ZAMBLE & VERNON L. QUINSEY, THE CRIMINAL RECIDIVISM PROCESS 37 (1997) (stating that 42.1% of the studied offenders were employed at least part-time at the time of re-arrest).

[60] The subjects of this study were 311 male inmates in the Ontario region of the Correctional Service of Canada. The participating inmates committed their new offense within one year of their previous offense. *See id.* at 15-16.

issue.[61] According to Hawai'i's 1989 Parole and Recidivism report, only 5 of 366 parolees who sought work remained unemployed.[62] Thus, most of the parolees who attempted to find work gained employment.

It has been suggested that instead of focusing on employers' duty to facilitate the rehabilitation process by providing gainful employment to persons with criminal records, the state should focus on education.[63] The Parole and Recidivism report clearly states that the level of education for a parolee significantly influences re-arrest rates.[64] The more educated the parolee, the less likely it is that he or she will commit subsequent crimes.[65] In addition, the state recognized that one's level of education might be related to one's employment opportunities.[66] Parolees without adequate education may encounter difficulty in finding good jobs.[67] The Parole and Recidivism report even suggests that education should be provided for the prisoner while incarcerated *and* while out on parole.[68]

Legislation prohibiting inquiries into applicants' arrest and court records adds to the anti-business climate in Hawai'i.[69] To prevent workplace violence, commentators suggest a background check on applicants.[70] In researching someone's personal history, employers are advised to check, among other things, the applicant's criminal history.[71] How can employers effectively prevent workplace violence when they are caught in the middle? They must weigh the potential lawsuits by prospective employees if they choose not to hire an applicant with an arrest and court record with the possibility of lawsuits

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[61] *See* Craig Gima, *Business Owners Seek Change in Hiring Bill*, HONOLULU STAR-BULL., Apr. 3, 1998, at A4 (quoting Richard Botti).

[62] *See* ATTORNEY GENERAL, HAWAII CRIMINAL JUSTICE DATA CENTER, *supra* note 49, at 25.

[63] *See Hearings on H.B. 3528 (H.D. 1)*, 19th Leg., Reg. Sess. (1998) (testimony of Joyce Hedani, Managing Director for Employee Relations, Liberty House.)

[64] *See* ATTORNEY GENERAL, HAWAII CRIMINAL JUSTICE DATA CENTER, *supra* note 49, at 31.

[65] *See id.* ("Parolees who graduated from high school were less likely to be rearrested than those who did not graduate . . . .").

[66] *See id.*

[67] *See id.* at 32.

[68] *See id.*

[69] *See Hearings on H.B. 3528 (H.D. 1)*, 19th Leg., Reg. Sess. (1998) (testimony of Mary Pattee, President/Owner, Remedy Intelligent Staffing).

[70] *See* Robinson, *supra* note 51. *See also* Rosanne Lienhard, *Negligent Retention of Employees: An Expanding Doctrine*, DEF. COUNS. J., 389, 394 (July 1996); Tom Farr, *Quality HR Program Starts With Hiring*, TRIANGLE BUS. J., Dec. 11, 1998, at 17; Ian McCann, *Background Checks Can Be Risky Business*, BALTIMORE BUS. J., July 31, 1998, at 17.

[71] *See* Robinson, *supra* note 51.

by customers or other employees if they negligently hire someone with an arrest and court record.[72]

Hawai'i courts recognize the doctrine of negligent hiring.[73] Under a negligent hiring claim, the employer owes a duty of care to those foreseeably endangered by the conduct of his employees with respect to risks or hazards whose likelihood made the conduct unreasonably dangerous.[74] "A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless . . . in the employment of improper person or instrumentalities in work involving risk of harm to others . . . ."[75] The test for foreseeability in a negligent hiring case is "whether the risk of harm from the dangerous employee to a person such as the plaintiff was reasonably foreseeable as a result of employment."[76]

Those who support the underlying policy of the arrest and court record anti-discrimination statute argue that although the legislation is generally unpopular, only a few employers are actually affected by it.[77] The HCRC stated that only three percent of complaints brought before the commission allege arrest and court record discrimination.[78] Furthermore, HCRC asserts that the law recognizes that: "1) it is unfair to discriminate against those arrested and not convicted, where arrest alone is of limited legal significance; and 2) that rehabilitation and transition back into the workforce by ex-offenders is beneficial to society."[79]

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[72] *See* Kreifels, *supra* note 39, at A8 (quoting Anna Elento-Sneed, labor and employment attorney at Carlsmith Ball Wichman Case & Ichiki).

[73] Negligent hiring is distinguishable from the doctrine of *respondeat superior*. Under *respondeat superior*, the employer "stands in the shoes" of its employees and the employee must have been acting within the scope of employment or in furtherance of the employer's interest for the employer to be responsible. *See* Lienhard, *supra* note 70, at 389. It requires that the proximate cause of the plaintiff's injury be an act committed by a employee acting within the scope of his or her employment. *See id.* at 390. The doctrine of negligent hiring, however, is based on the fellow servant rule, requiring the employer to use reasonable care in the selection of its employees, limited to not endangering "fellow employees." *Id.* at 389. Liability may exist even if the direct cause of injury to the plaintiff is a negligent or intentional act of an employee acting outside the course and scope of his employment. *See id.* at 390. *See also* Janssen v. American Hawai'i Cruises, Inc., 69 Haw. 31, 34, 731 P.2d. 163, 165 (1987) (holding the employer not liable for negligent hiring after one employee sexually attacked another).

[74] *See Janssen*, 69 Haw. at 34, 731 P.2d at 165.

[75] *Id.* (quoting RESTATEMENT (SECOND) OF AGENCY § 213 (1958)).

[76] *Janssen*, 69 Haw. at 34, 731 P.2d at 166 (quoting Di Cosala v. Kay, 91 N.J. 159, 450 A.2d 508 (N.J. 1982)).

[77] *See* Gima, *supra* note 61, at A4 (quoting William Hoshijo, Executive Director of the Hawai'i Civil Rights Commission).

[78] *See id.*

[79] *Hearings on H.B. 3528 (H.D. 1)*, 19th Leg., Reg. Sess. (1998) (testimony of Claudio Suyat, Chairperson, Hawai'i Civil Rights Commission).

The HCRC recognizes that employers often ignore the discrimination law against persons with arrest and court records.[80] The HCRC is concerned that if that protection was eliminated, most employers would not even consider applicants with criminal records for employment.[81] Before the passage of HRS section 378-2.5, those with conviction records already encountered difficulty when finding employment. "Judith," a parolee, admits that even though she has been an upstanding citizen, her conviction record makes her search for gainful employment difficult.[82]

Even with the passage of HRS section 378-2.5, "Judith" may still have difficulty finding a job because it is often difficult to catch employers breaking this law. Employers sometimes provide pretextual excuses for not hiring, such as "a more qualified applicant" was ultimately hired, instead of informing the rejected applicant that they are not hiring him or her because of his or her criminal record.[83] Even more troublesome are employers that blatantly ignore the law by either inquiring whether the prospective employee has a criminal record on the application or by conducting a criminal background check without notifying the interviewee.[84] In an informal survey taken of twenty employers in Hawai'i, only four of the employers complied with the law by not inquiring about prospective employees' criminal records on their applications.[85] In addition, one employer who complied with the law by not asking the interviewee whether he or she had any prior convictions on the application, still violated the law by performing a criminal background check before making a job offer.[86]

How can Hawai'i find a proper balance between the needs of employers and those of rehabilitated criminals? Some propose requiring employers to inquire about prospective employees' criminal records, with the goal of furthering public safety.[87] However, given the fruitless efforts of those advocating a repeal of employment discrimination based on arrest and court records, this option seems unlikely in the near future.

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[80] *See id.*

[81] *See id.*

[82] *See* Susan Kreifels, *To Job Seekers, A Record Is A Scarlet letter – 'C' for Criminal*, HONOLULU-STAR BULL., Jan. 9, 1998 at A8.

[83] Kreifels, *supra* note 39 (quoting Gerald Reardon, Executive Director of the John Howard Association).

[84] Interview with "Anonymous", Human Resources Director of a hotel, in Honolulu, HI (Aug. 30, 1999).

[85] Again, this is only an informal study to illustrate the pervasiveness of noncompliance with this statute. The employers surveyed were in the retail, restaurant, and hotel industries and their identities are purposefully kept anonymous to avoid liability on their behalf. The applications were collected by August 30, 1999.

[86] *See* Anonymous Interview, *supra* note 84.

[87] *See* Sullivan, *supra* note 53, at 601.

Another proposal is to limit employer liability in negligent hiring lawsuits.[88] By doing so, employers would not be burdened with litigation costs and possible financial penalties if a court finds that the employer breached its duty when hiring someone with a criminal record. This suggestion also satisfies the state's concerns of encouraging gainful employment and ultimately decreasing recidivism rates.

Additionally, others propose that the state should "appeal to the community spirit and good citizenship" in order to encourage employers to hire individuals with arrest and court records, instead of threatening businesses with lawsuits.[89] For example, one proposition is the creation of a job clearinghouse encouraging voluntary employer participation.[90] Another suggestion is to provide a tax incentive for employers hiring recently released felons.[91] However, until the state adopts other legislation, employers are left with uncertainty in interpreting HRS section 378.[92]

III. ANALYSIS

A. Other Jurisdictions' Approach to Employment Discrimination Based on Criminal Records

Given the uncertainty of how Hawai'i law will be applied, it may be instructive to consider a variety of legislation from other jurisdictions.

1. Title VII

While federal law provides some protection for persons with arrest and conviction records, safeguards against discrimination are limited. Title VII of the Civil Rights Act of 1964 applies only to employers with fifteen or more employees.[93] Further, the act prohibits employment discrimination based on race, color, religion, sex, or national origin.[94] It does *not* directly prohibit any employment discrimination based on a person's arrest and conviction records.

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[88] *See id.* at 602.

[89] *See Hearings on H.B. 3528 (H.D. 1)*, 19th Leg., Reg. Sess. (1998) (testimony on behalf of SHRM).

[90] *See id.*

[91] *See* H.R. STAND. COMM. REP. No. 244, 20th Leg., Reg. Sess. (1998). The Hawai'i House of Representatives committee on Public Safety and Military Affairs believed that a tax incentive would reduce recidivism by helping felons find gainful employment. *See id.*

[92] HCRC never passed regulations interpreting HRS section 378 and there has only been one reported case interpreting that statute in regards to arrest and court record discrimination. *See* discussion *supra* section II.A.

[93] *See* 42 U.S.C. § 2000e(b) (1999).

[94] *See id.* § 2000e-2(a) (1).

However, courts have interpreted Title VII as providing protection only for *minorities* with criminal records when it can be shown that inquiry into the records adversely impacts minorities.[95] Thus, a Caucasian male would not be protected by this federal law.

Under Title VII, a showing of the employer's intent to discriminate is not necessary to constitute a discriminatory employment practice.[96] Statistical evidence is often used to illustrate that inquiries into prior arrest records deny a disproportionate number of African-Americans an equal opportunity for employment.[97] In fact, it has even been interpreted that if it can be reasonably inferred that an inquiry into one's arrest record will have a "chilling effect" on minorities' willingness to apply for employment, then an unlawful employment action exists.[98]

Accordingly, Hawaiian or part-Hawaiian persons with criminal records may have a cognizable claim against employers who discriminate against persons with arrest and/or court records under Title VII. According to the Parole and Recidivism report, Hawaiians or part-Hawaiians comprise a significant portion of parolees.[99] Thus, if an employer discriminates against persons with arrest and conviction records, Hawaiians or part-Hawaiians may experience a disparate impact and thus have a valid case against that employer under Title VII.[100]

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[95] *See* Jeffrey D. Myers, County of Milwaukee v. LIRC: *Levels of Abstraction and Employment Discrimination Because of Arrest or Conviction Record*, 1988 WIS. L. REV. 891, 897 (1988); Comment, *Employers' Use of Criminal Records Under Title VII*, 29 CATH. U. L. REV. 597, 598 (1980). *See, e.g.*, Gregory v. Litton Sys., 472 F.2d 631 (9th Cir. 1972) (minority prospective employees are not required to list previous arrests); Green v. Missouri Pac. R.R. Co., 523 F.2d 1290, 1296-99 (8th Cir. 1975) (unlawful to discriminate because of a conviction record).

[96] *See* Annotation, *Consideration of Arrest Record as Unlawful Employment Practice volative of Title VII of Civil Rights Act of 1964*, 33 A.L.R. Fed. 263 § 2(a) (1997).

[97] *See, e.g.*, Vogler v. McCarty, Inc., 451 F.2d 1236 (5th Cir. 1971).

[98] *See, e.g.*, EEOC Decision No. 72-1005, CCH EEOC Decisions ¶6350 (1972).

[99] ATTORNEY GENERAL, HAWAII CRIMINAL JUSTICE DATA CENTER: PAROLE AND RECIDIVISM, *supra* note 49, at 4. Of the 366 parolees released from prison in 1984-1985, 171, or 46.7%, were Hawaiian or part-Hawaiian. *See id.*

[100] The Equal Employment Opportunities Commission ("EEOC") distinguishes between arrest record discrimination and discrimination based on convictions. EEOC asserts that Title VII precludes employers from asking applicants about arrest records. *See* Fair Employment Practices Manual; EEOC Guide to Pre-Employment Inquiries, Lab. Rel. Rep. (BNA) No. 695 at 443:67 (1995). EEOC's rationale is that arrests are not an accurate indicator of guilt and that some minority groups are arrested at a disproportionately high rate. *See id.* In contrast, employers are not prevented from inquiring into convictions under the federal law. *See* Terry S. Boone, *Selected Topics on Employment and Labor Law: Violence in the Workplace and the New Right to Carry Gun Law – What Employers Need to Know*, 37 S. TEX. L. REV. 873, 885 (1996).

Employers can claim "business necessity"[101] as a defense to Title VII actions, but courts generally hold that the defense of business necessity does not justify an inquiry into arrest records without considering conviction records.[102] Therefore, an employer's inquiry into a prospective employee's *arrest* record in order to protect itself from theft is not a justified "business necessity."[103] Conversely, an inquiry into a *conviction* record may be protected under the business necessity exception.[104]

Hawai'i is one of a minority of states to adopt a more stringent fair employment practice act ("FEPA"), with regard to arrest and criminal records.[105] How do state laws differ from Title VII? Two obvious differences between the federal employment discrimination act and the various state laws are (1) state laws do not set a minimum number of employees for mandatory compliance, and (2) state laws protect everyone with arrest and/or conviction records while the federal law only protects minorities with arrest and conviction records.

2. Wisconsin

A 1977 amendment to Wisconsin's Fair Employment Act made it unlawful for employers to discriminate based upon arrest or conviction records.[106] Under the statute, employers are only allowed to discriminate because of conviction records if the circumstances of the charge *substantially relate* to the job or licensed activity or the person is not bondable.[107]

3. New York

In New York, prohibitions against employment discrimination against those with conviction records are found in two places, its FEPA and its corrections

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[101] The test for a business necessity defense is:

> whether there exists an overriding legitimate business purpose so that the practice is necessary to the safe and efficient operation of the business. It has been stated that the business purpose must be sufficiently compelling to override any racial impact; that the challenged practice must effectively carry out the business purpose that it is alleged to serve; and that there must be available no alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact.

Annotation, *supra* note 96, § 7(b).

[102] *See id.* § 7(a).

[103] *See id.*

[104] *See id.*

[105] Other states that have implemented stricter laws are Wisconsin, New York, Connecticut, Massachusetts, Minnesota, Michigan, and California.

[106] *See* WIS. STAT. § 111.31 (1998).

[107] *See id.* § 111.335.

law. The New York FEPA makes it unlawful for employers to discriminate against potential employees with arrests or convictions.[108] Unlike Wisconsin and Hawai'i, the New York statute is also codified in the state corrections law where it similarly prohibits employment discrimination based on a conviction record, not arrest record.[109] New York prohibits employers from discriminating against applicants with criminal records unless:

> (1) there is a *direct relationship* between one or more of the previous criminal offenses and the specific license or employment sought; or (2) the issuance of the license or the granting of the employment would involve an *unreasonable risk* to property or to the safety or welfare of specific individuals or the general public.[110]

Additionally, the statute provides a list of factors for courts to consider in applying the "direct relationship" test in determining whether the direct relationship is "sufficiently attenuated" to warrant the issuance of the license or employment.[111] Employers must consider: the public policy of New York to encourage licensing and employment of all persons previously convicted; specific duties necessarily related to the employment; the relation of the conviction to the applicant's ability to perform his responsibilities; amount of elapsed time since conviction; the seriousness of the offense; any efforts toward rehabilitation; the interest of the employer of protecting property; and the safety and welfare of individuals or the general public.[112] These specific factors are helpful not only to employers trying to determine whether they may lawfully discriminate, but also to administrative courts and the appellate courts reviewing administrative judges' exercise of discretion.[113] New York further requires employers to consider a certificate of good conduct issued to the applicant, which creates the presumption of rehabilitation in regard to the offense or offenses specified therein.[114]

4. Massachusetts

Massachusetts' labor laws make it unlawful for an employer to request any information about: (1) an arrest without conviction; (2) a first conviction for misdemeanors such as simple assault or minor traffic violations; and (3) any conviction of a misdemeanor that occurred five or more years before the

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[108] *See* N.Y. EXEC. LAW § 296 (15-16) (1999).

[109] *See* N.Y. CORRECT. LAW §§ 750-755 (1999).

[110] *Id.* § 752 (emphasis added).

[111] *See id.* § 753.

[112] *See id.* § 753(1); *see also* Bonacorsa v. Van Lindt, 523 N.E.2d 806, 809 (N.Y. 1988); Marra v. City of White Plains, 96 A.D.2d 17, 23 (N.Y. App. Div. 1983).

[113] *See* Myers, *supra* note 95, at 897.

[114] *See* N.Y. CORRECT. LAW § 753(2) (1999).

application date.[115] The Massachusetts discrimination statute is similar to that of Hawai'i in that there is a time limit for the employer's inquiry into past convictions and inquiry into all arrest records are illegal.[116]

5. Connecticut

The Connecticut Human Rights statute prohibits employers from denying employment based solely on prior convictions unless the following are taken into consideration: (1) the nature of the crime as related to the job; (2) rehabilitation information; and (3) amount of elapsed time since the conviction.[117] The difference between Connecticut's statute and those of Hawai'i, Wisconsin, and New York, is that Connecticut's only applies to public sector employment and licensing while the other three states prohibit discrimination in the private as well as public sector.[118]

6. Minnesota

Minnesota's criminal rehabilitation statute similarly applies only to public sector employment and licensing regulations.[119] In Minnesota, no person is disqualified from public employment unless his or her conviction directly relates to the position of employment sought or the occupation for which a license is sought.[120] Like New York, Minnesota's statute provides a list of factors for employers to consider when determining the direct relationship. These include the nature and seriousness of the crime, the relationship of the crime to the position and ability to perform the job.[121] Even if a direct relationship exists, a prospective employee may nevertheless be qualified for the job if he or she can supply proof of rehabilitation.[122] Minnesota further

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[115] *See* MASS. GEN. LAWS ANN. ch. 151B, § 4(9) (West 1999).

[116] *See* Commonwealth v. McDuffee, 386 N.E.2d 754, 759 (Mass. App. Ct. 1979), *rev'd on other grounds*, 398 N.E.2d 463 (Mass. 1979). An application for an insurance broker's license has been held not to constitute an "application for employment." *Id.*

[117] *See* CONN. GEN. STAT. § 46a-80(b) (1999).

[118] *See id.* The statute provides in relevant part:

> a person shall not be disqualified from employment by the state of Connecticut or any of its agencies, nor shall a person be disqualified to practice, pursue or engage in any occupation, trade, vocation, profession or business for which a license, permit, certificate or registration is required to be issued by the state of Connecticut or any of its agencies solely because of a prior conviction of a crime.

Id. § 46a-80(a).

[119] *See* MINN. STAT. § 364.03 (1998).

[120] *See id.*

[121] *See id.*

[122] *See id.* According to the statute, sufficient evidence of rehabilitation may be established by producing:

restricts discrimination in public employment by making it unlawful for arrest records not followed by convictions and misdemeanor convictions not followed by a jail sentence to be disseminated by the state.[123] If the applicant is denied because of a conviction, the employer must notify the applicant in writing and of the reasons for disqualification.[124]

7. Michigan and California

Both the Michigan[125] and California[126] statutes apply to all employers, both public and private. However it is unlawful to discriminate based only on arrests not resulting in convictions.[127] Thus, employers in Michigan and California may deliberately discriminate against prospective employees based upon conviction records.

8. Ohio

Although Ohio does not have a statute prohibiting employers from discriminating based upon an arrest or court records, the state provides other protections for those with arrest and conviction records. In Ohio, an applicant need not disclose any arrest or conviction record for minor misdemeanor violations when asked in an application for employment or license about prior convictions.[128]

(a) A copy of the local, state, or federal release order; and
(b) Evidence showing that at least one year has elapsed since release from any local, state, or federal correctional institution without subsequent conviction of a crime; and evidence showing compliance with all terms and conditions of probation or parole; or
(c) A copy of the relevant department of corrections discharge order or other documents showing completion of probation or parole supervision.

Id.

Additionally, the licensing and hiring authority must consider:
(1) The nature and seriousness of the crime(s);
(2) Relative circumstances relative to the crime(s);
(3) Person's age at the time of the commission of the crime;
(4) Amount of time elapsed since crime(s) were committed; and
(5) Other competent evidence of rehabilitation and present fitness presented.

Id.

[123] *See* MINN. STAT. § 364.04 (1998).
[124] *See id.* § 364.05.
[125] *See* MICH. COMP. LAWS ANN. § 37.2205a (West 1999).
[126] *See* CAL. LABOR CODE § 432.7(a) (West 1999).
[127] *See id.*; MICH. COMP. LAWS ANN. § 37.2205a (West 1999).
[128] OHIO REV. CODE ANN. § 2925.11(D) (West 1999).

9. Illinois

Another approach to legislation prohibiting inquiry into arrest or criminal records, as adopted by Illinois, is to forbid inquiry into criminal records ordered expunged, sealed, or impounded under a state law as a basis for hiring, refusal to hire, promotion, or other personnel actions.[129] However, in that state, employers are clearly permitted to discriminate based on information indicating a person actually engaged in the conduct for which he or she was arrested.[130]

B. Using the New York, Minnesota, and Wisconsin Statutes as Useful Guidance

Since HCRC has yet to adopt rules and regulations interpreting the HRS section 378, practitioners can look to the HCRC 1997 proposed regulations and other jurisdictions' interpretation of their statutes for assistance. Upon passing HRS section 378-3, the Hawai'i legislature adopted the "rational relationship" test to determine whether the employer is prohibited from considering a criminal conviction record.[131] Although no other jurisdiction adopts the exact same test, New York's, Minnesota's, and Wisconsin's statutes bear similarities and may be instructive.

1. New York

The New York statutes enforce the "direct relationship" test[132] and alternatively the "unreasonable risk" test.[133] The statutes also provide a concise list of eight factors to consider when determining whether an employer may lawfully discriminate based on an applicant's conviction record.[134] Hawai'i's "rational relationship" test appears similar to New York's "direct relationship" test because both a "direct" relationship and a "rational" relationship imply a low standard.[135] Thus, reference to New York's eight factors may be helpful in determining acceptable employer conduct until local courts and the HCRC provides more meaningful direction.

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[129] *See* 775 ILL. COMP. STAT. ANN. 5/2-103 (West 1999).

[130] *See id.*

[131] *See* HAW. REV. STAT. § 378-3 (1999). Employers are not prohibited or precluded "from considering a record of criminal conviction that bears a rational relationship to the duties and responsibilities of the position." *Id.*

[132] *See* discussion *supra* section III.A.3.

[133] *See id.*

[134] *See* N.Y. CORRECT. LAW § 753 (1999).

[135] Wisconsin applies the "substantial relationship" test, discussed *supra* section III.B.3.

New York courts emphasize the presumption of rehabilitation created by a certificate of good conduct or certificate of relief from disabilities.[136] The certificate does not automatically entitle applicants to the job; employers may still deny the application, but only if they do so after considering the eight factors in New York Corrections Law section 753.[137] If employers invoke the "direct relationship" exclusion, then they *must* evaluate the proscribed eight factors.[138] However, when employers invoke the "unreasonable risk" exclusion, they need not consider the factors once an unreasonable risk is found.[139]

In applying the anti-discrimination statutes, the Court of Appeals of New York held in *Bonacorsa v. Van Lindt*, that the convictions for false declaration to a Federal Grand Jury and for obstruction of justice do not indicate that the direct relationship is "sufficiently attenuated" to secure employment.[140] In this central case, the court held when the "appearance or fact of impropriety" is important, the employer or licensing agency may lawfully discriminate against the applicant because of his convictions.[141]

In New York, an attorney's felony conviction conclusively indicates his or her unfitness to practice law.[142] This "unfitness" bears a "direct relationship" to the professional occupation of a lawyer and courts will uphold a denial of

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[136] *See* Bonacorsa v. Van Lindt, 523 N.E.2d 806 (N.Y. 1988).

[137] *See id.* The eight factors employers must consider are: the public policy of New York to encourage licensing and employment of all persons previously convicted; specific duties necessarily related to the employment; the relation of the conviction to the applicant's ability to perform his responsibilities; amount of elapsed time since the occurrence of the criminal offense; the seriousness of the offense, any efforts toward rehabilitation; the interest of the employer of protecting property; and the safety and welfare of individuals or the general public. *See* N.Y. CORRECT. LAW § 753 (1999).

[138] *See Bonacorsa*, 523 N.E.2d at 809.

[139] *See id.*

[140] *See id.* at 811. Bonacorsa was licensed as an owner-trainer-driver of harness race horses for over 20 years. *See id.* He lied in front of the grand jury, falsely testifying that his wife owned a certain racehorse, when in fact the defendant in question had actual ownership. *See id.* at 808. He also solicited another person to testify falsely. *See id.* Consequently, he was convicted of false declaration to a federal grand jury and obstruction of justice. *See id.* After serving his sentence and receiving a certificate of good conduct, his application to regain his license was denied. *See id.* The court concluded that the hearing officer sufficiently considered the eight factors and found that since horse racing is the only sport in which betting is legal, denying Bonacorsa's license protected the "appearance or the fact of impropriety" in the sport. *Id.* at 811.

[141] *See id.*

[142] *See In re* Glucksman, 57 A.D.2d 205, 207-08 (N.Y. App. Div. 1977). Glucksman was a practicing attorney in New York when he was convicted of two felonies: (1) conspiracy to extort and (2) attempted extortion. *See id.* at 206. Upon application for reinstatement into the bar, Glucksman's name was struck from the roll of attorneys. *See id.* In New York, a felony conviction of an attorney results in *ipso facto* disbarment. *See id.*

reinstatement into the Bar.[143] Likewise, in the medical context, a court upheld the denial of a medical license to a doctor because of his recent conviction for knowingly receiving hardcore child pornography.[144] The court applied the eight-factor test and concluded that the doctor posed an unreasonable risk to the public.[145]

New York distinguishes between how a single conviction versus multiple convictions affects whether the employer may lawfully discriminate because of the convictions. In *Soto-Lopez v. New York City Civil Service Commission*,[146] the District Court for the Southern District of New York held that a manslaughter conviction alone was not directly related to a caretaker position nor did it pose an unreasonable risk to persons or property.[147] However, the court further held that the *combined* criminal convictions of possession of narcotics with intent to sell and manslaughter gave rise to an unreasonable risk to the public when considering the caretaker job.[148]

To provide another example, the Supreme Court of New York, Appellate Division, held that a bribery conviction was not "directly related" to the position as a bus driver nor was it an "unreasonable risk" to the general public.[149] However, the same court held differently in a case involving a drunk driving conviction and an application to become a firefighter.[150] Here, the

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[143] *See id.* at 7.

[144] *See In re* Bevacqua v. Sobol, 176 A.D.2d 1, 4 (N.Y. App. Div. 1992). One year before Bevacqua applied for his medical license in New York, he plead guilty to knowingly receiving hardcore child pornography. *See id.* at 2. The New York State Board for Medicine denied Bevacqua's application for failure to satisfy the moral character requirement of the medical license. *See id.*

[145] *See id.* at 4.

[146] 713 F. Supp. 677 (S.D.N.Y. 1989).

[147] *See id.* at 678. In 1973, Soto-Lopez was initially convicted of manslaughter. *See id.* He applied for a job as a caretaker in a housing project, but the Civil Service Commission rejected his application. *See id.* Eleven years later he was convicted of possession of narcotics with intent to sell and for possession of a controlled substance. *See id.* When he reapplied for the caretaker position, Soto-Lopez failed to list his convictions and the employer again refused to hire him. *See id.*

[148] *See id.* at 679.

[149] *See In re* Meth v. Manhattan and Bronx Surface Transit Operating Auth., 134 A.D.2d 431, 432 (N.Y. App. Div. 1987). After Meth was convicted of bribery, he sought employment as a bus driver with Manhattan and Bronx Surface Transit Operating Authority ("MBSTOA"). *See id.* at 431. Although Meth presented his certificate of relief from disabilities, MBSTOA's manager failed to hire Meth because of his conviction. *See id.* MBSTOA presented no evidence of consideration of the eight factors to rebut the presumption of rehabilitation that the certificate of relief from disabilities creates. *See id.* at 431-32.

[150] *See In re* Application of Ronald Grafer v. New York City Civil Serv. Comm'n, 181 A.D.2d 614 (N.Y. App. Div. 1992). Grafer was convicted of drunk driving and the Civil Service Commission rejected his application for the position of a firefighter. *See id.* at 614.

court held that the drunk driving conviction involved an "unreasonable risk" to public safety and property.[151]

Employers in New York must consider the eight factors listed in the statute before denying an applicant based on his or her conviction record.[152] In *In re City of New York v. City Civil Service Commission*, the New York Supreme Court held that, in light of the plaintiff's excellent performance record in previous work and her status as a model parolee, a manslaughter conviction coupled with prior prostitution and drug convictions were not "directly related" to the employment position of an eligibility specialist.[153] The court also held that the plaintiff's employment would not create an "unreasonable risk" to the general public.[154]

Hawai'i only adopts one test, the rational relationship test,[155] while New York implements two tests, the direct relationship test and the unreasonable risk test.[156] If Hawai'i courts find New York's tests to be persuasive in interpreting the rational relationship test, then actual analysis of employment discrimination because of convictions in Hawai'i would depend on whether the Hawai'i courts prefer the direct relationship test, the unreasonable risk test, or a combination of both. If Hawai'i courts are partial to New York's direct relationship test, then employers will find the eight factors to be the most useful tool in determining what is lawful conduct, in addition to New York's case law interpreting that test. However, if Hawai'i courts prefer only the unreasonable risk test, Hawai'i employers will only have New York's case law interpreting that test as guidance. If Hawai'i courts find *both* the direct relationship test and the unreasonable risk test to be persuasive, then Hawai'i courts may simply mirror New York's courts in interpreting this anti-discrimination law. Or, Hawai'i courts may find the New York framework unpersuasive and look to Minnesota's legislation for guidance. For example,

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[151] *See id.*

[152] *See, e.g., In re* City of New York v. City Civil Serv. Comm'n, 532 N.Y.S.2d 626 (N.Y. 1988).

[153] *See id.* at 633. Throughout the years 1962-1971, Gariti was convicted multiple times of prostitution and drug possession. *See id.* at 628. In 1972, she went through detoxification and subsequently excelled in college and eventually was promoted to assistant supervisor of the Human Resource Administration. *See id.* In 1982, allegedly acting in self-defense, she killed a woman who threatened her with a knife. *See id.* While on parole for her manslaughter conviction, Gariti applied for and was rejected from the position of a provisional eligibility specialist. *See id.* The Department of Personnel ("DOP") claimed that she failed to "satisfactorily complete her investigation." *See id.* The court held that if the DOP had properly considered the eight factors listed in the Correction Law section 753, the DOP would have concluded that her convictions had no direct relationship to the position nor would she create an unreasonable risk of harm to the public. *See id.* at 633.

[154] *See id.*

[155] *See* HAW. REV. STAT. § 378-2.5 (1998).

[156] *See* N.Y. CORRECT. LAW § 752 (1999).

Hawai'i courts may still prohibit employer discrimination if the applicant with a conviction can show that he or she has been rehabilitated.[157]

2. Minnesota

Similar to New York, Minnesota also mandates a "direct relationship" test when inquiring whether an employer may lawfully discriminate against persons with criminal convictions.[158] However, unlike New York, Minnesota prohibits discrimination if the person with the conviction can supply prove of rehabilitation.[159] A sampling of cases illustrates how Minnesota courts apply this test. In *Peterson v. Minneapolis City Council*,[160] the Minnesota Supreme Court applied the Minnesota direct relationship test and found that the conviction for attempted theft by trick was directly related to the operation of a massage parlor.[161] The court reasoned that Peterson's conviction involved dishonesty and deception, characteristics that directly related to one reason for regulating massage parlors: prevention of prostitution.[162] In *In re Proposed Discharge of Shelton*,[163] the Court of Appeals of Minnesota held that the school district properly terminated a teacher who was convicted of embezzlement because the crime directly related to fitness to teach.[164] In *In re Medical License of Friedenson*,[165] the Court of Appeals of Minnesota held the medical board's inquiry into a gynecologist's arrests for solicitation of prostitution, in light of the pending patient complaints, directly related to his job as a doctor.[166]

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[157] *See* discussion *infra* section III.B.2.

[158] *See* MINN. STAT. § 364.03 (1998).

[159] *See id. See also* discussion *supra* in section III.A.6.

[160] 274 N.W.2d 918 (Minn. 1979).

[161] *See id.* at 921. Peterson operated massage parlors. *See id.* at 919. Before he submitted his application to renew his license, he was convicted of attempted theft by trick. *See id.* The court upheld the denial of his license. *See id.* at 921.

[162] *See id.*

[163] 408 N.W.2d 594 (Minn. Ct. App. 1987).

[164] *See id.* at 599. Shelton taught at the same high school for over 20 years. *See id.* at 595. In 1986, he plead guilty to one count of theft. *See id.* Although Shelton exhibited efforts at rehabilitation by repaying over $40,000 in damages, the school board discharged him. *See id.*

[165] 574 N.W.2d 463 (Minn. Ct. App. 1998).

[166] *See id.* at 464-67. In 1976, Friedenson received his license to practice medicine in Minnesota, specializing in obstetrics and gynecology. *See id.* at 465. In 1994, several patients complained about Friedenson improperly performing breast and pelvic exams without using gloves. *See id.* A little over a year later, in 1995, the police arrested him for solicitation of prostitution. *See id.* Consequently, the Minnesota Board of medical practice revoked his medical license. *See id.* The court upheld the revocation of Friedenson's medical license because "[t]he relevance of such behavior by a physician practicing in the area of obstetrics and gynecology is obvious." *Id.* at 466. The court noted that without the patients' complaints,

If Hawai'i courts interpret its rational relationship test to include a rehabilitation clause like the one in Minnesota's FEPA, then persons with convictions will gain a second chance at attaining employment. This interpretation will make it more difficult for employers to illustrate a rational relationship between the conviction and the job because employers would have to overcome the fact that an applicant has been rehabilitated.

3. Wisconsin

An analysis of Wisconsin's "substantial relationship" test may also be beneficial to Hawai'i attorneys. In Wisconsin, the substantial relationship test balances "society's interest in rehabilitating a criminal against its interest in protecting its citizens from an unreasonable risk that the convicted person will commit a similar offense if he or she is placed in an employment situation offering temptations or opportunities for criminal activity similar to that for which he or she was convicted."[167] The Wisconsin Supreme Court explicitly rejected interpreting the test as "a detailed inquiry into the facts of the offense and the job."[168] Instead, the court looked to the circumstances fostering criminal activity as essential evaluative criteria, such as having the opportunity for criminal behavior.[169] In addition, Wisconsin courts hold post-conviction behavior to be unrelated to the substantial-relationship test.[170] Thus, instead of focusing on events after the conviction, employers must consider the circumstances surrounding the conviction itself and the employment position.[171]

In applying this test, in *County of Milwaukee v. Labor & Industry Review Commission*, the Court of Appeals of Wisconsin held that multiple misdemeanor counts of patient neglect are substantially related to the position of a crisis intervention specialist at a hospital.[172] The court also held a criminal

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Friedenson's arrest for soliciting a prostitute alone may be insufficient to warrant board investigation into his actions. *See id.*

[167] *See* Halverson v. Labor & Indus. Review Comm'n, 431 N.W.2d 328 (Wis. Ct. App. 1988). *See also* County of Milwaukee v. Labor & Indus. Review Comm'n, 407 N.W.2d 908, 914-15 (Wis. Ct. App. 1987). For a more in depth analysis of the evolution of the substantial relation test in Wisconsin, see Myers, *supra* note 95 at 898-909.

[168] *County of Milwaukee*, 407 N.W.2d at 916.

[169] *See id.*

[170] *See, e.g.*, Collins v. Labor & Indus. Review Comm'n, 498 N.W.2d 912, 1992 Wisc. App. LEXIS 904, *12 (Wis. Ct. App. 1992) (unpublished).

[171] *See id.* Collins was not eligible to work as a juvenile correctional officer because of his previous conviction of armed robbery. *See id.* at *1.

[172] *See County of Milwaukee*, 407 N.W.2d at 917-19. When the Milwaukee County Mental Hospital hired Serebin, he was facing felony and multiple misdemeanor charges arising out of his previous employment as an administrator of a nursing home. *See id.* at 910. The trial court found the defendant guilty of the felony and misdemeanor charges. *See* State v. Serebin, 350

record of shoplifting to be substantially related to work involving the need to enter residential and commercial premises when customers may not be present.[173]

Wisconsin courts have drawn relationships between drug convictions and employment.[174] In one case, a prior conviction for involvement in a drug deal can be interpreted as substantially related to a job involving considerable amounts of unsupervised time and the duty of handling money.[175] In another case, the Court of Appeals of Wisconsin held that a conviction of misdemeanor possession of marijuana does not substantially relate to a "stocker" position at a retail store involving a highly regimented and structured workday.[176]

If Hawai'i courts adopt Wisconsin's view of refusing to look at behavior after convictions, then whether or not potential employees were rehabilitated would be irrelevant. This kind of interpretation would make it difficult for persons with convictions, who have actually been rehabilitated, to find gainful employment. Unlike New York[177] and Minnesota[178], Wisconsin's FEPA does not set forth specific factors to consider when determining if a conviction is "substantially related" to a job.[179] Therefore, Hawai'i employers can only use Wisconsin's courts' interpretation of this employment anti-discrimination act

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N.W.2d 65 (Wis. 1984). The Wisconsin Court of Appeals held Serebin guilty of the misdemeanor charges, but reversed the felony charges. *See* State v. Serebin, 338 N.W.2d 855 (Wis. Ct. App. 1983), *aff'd. in part, rev'd. in part*, 350 N.W.2d 65 (Wis. 1984). When the administrators of the Milwaukee County Health Complex discovered the trial court's conviction, they discharged him. *See County of Milwaukee*, 407 N.W.2d at 910.

[173] *See* Halverson v. Labor Indus. Review Comm'n., 431 N.W.2d 328, 328 (Wis. Ct. App. 1988). Halverson was initially convicted of shoplifting in 1982. *See id.* Subsequently, in 1982, he was convicted again of shoplifting from one of his employer's customers. *See id.* His employer, Northern State Power consequently terminated him. *See id.*

[174] *See, e.g.*, Knight v. Labor & Indus. Review Comm'n, 582 N.W.2d 448 (Wis. Ct. App. 1998); Wal-Mart Stores v Labor & Indus. Review Comm'n, 583 N.W.2d 674, 1998 Wisc. App. LEXIS 1529, (Wis. Ct. App. 1998) (unpublished).

[175] *See Knight*, 582 N.W.2d at 456. Prudential Insurance Company of America denied Knight employment as a district agent because his felony conviction statutorily disqualified him from registration with the National Association of Securities Dealers (NASD). *See id.* at 451. Prudential's company policy required all district agents to be registered with NASD. *See id.* at 451-52.

[176] *See Wal-Mart Stores*, 1998 Wisc. App. LEXIS 1529, at *7-9. Wal-Mart employed Herdahl as a "stocker." *See id.* at *2-3 Wal-Mart suspended Herdahl when it discovered pending felony drug charges existed against her. *See id.* Subsequently, Herdahl was convicted of misdemeanor possession of marijuana and Wal-Mart terminated her employment. *See id.* The Court of Appeals of Wisconsin ordered Wal-Mart to reinstate Herdahl and pay back wages. *See id.* at *7-8.

[177] *See* N.Y. CORRECT. LAW § 753 (1999). *See also* discussion *supra* in section III.A.3.

[178] *See* MINN. STAT. § 364.03, subd. 2 (1998). *See also* discussion *supra* in section III.A.6.

[179] *See* WIS. STAT. § 111.335(b) (1998).

helpful in determining Hawai'i's rational relationship test on a case-by-case analysis.

IV. CONCLUSION

HRS section 378-2.5 balances two community needs. On one side, it seeks to protect persons with arrest and court records by providing an increased opportunity for employment through increased privacy. On the other side, the statute seeks to safeguard the public from unnecessary harm. Currently, the law as passed appears to weigh more heavily towards for the former consideration.

There is little guidance in interpreting HRS section 378-2.5. HCRC has yet to promulgate rules and regulations and only one case has gone to the courts for a decision regarding this issue. Thus, a closer look at other jurisdictions' approach helps practitioners in interpreting the Hawai'i legislation. In lieu of the lack of local guidance, a better understanding of New York's "direct relationship" and "unreasonable risk" tests, Minnesota's "direct relationship" test, and Wisconsin's "substantial relation" test provide valuable insight into the way Hawai'i courts will possibly interpret HRS section 378-2.5 and its "rational relationship" test. Until Hawai'i courts further interpret this statute, HCRC promulgates regulations regarding this statute, or the Hawai'i Legislature passes additional legislation clarifying interpretation of this statute, attorneys in Hawai'i can only guess how cases dealing with discrimination because of arrest and court records will be handled.

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[180] Class of 2001, William S. Richardson School of Law, University of Hawai'i at Manoa. This paper is a result of the efforts of many people. I'd like to express my gratitude to Bill Jarret, who helped me develop the idea for this paper. I am also grateful to the *University of Hawai'i Law Review* editors, especially Regan Iwao and Jules Worsham who both gave excellent guidance in research and improvements of writing style. Lastly, I am thankful for the continuous support and encouragement from my parents and John Clark.

What Does "Lawfully Entitled To Be Present And Employed" Mean To You?: Undocumented Workers & Make-Whole Remedies Under the NLRA

I. INTRODUCTION

Philip is an alien who lacks documentation to work in the United States. The manager of Acme Industries knows that Philip is undocumented, but hires him anyway. Two years later, Philip's employment is terminated; the National Labor Relations Board ("the Board" or "NLRB") determines that he was illegally fired because of his support for a union organizing drive.[1] The usual remedy for this sort of discriminatory discharge is reinstatement of the employee to his job, coupled with backpay for the employee.[2] Should Philip's status as an undocumented worker prevent him from receiving this remedy?[3] When the United States Supreme Court decided *Sure-Tan v. NLRB*[4] in 1984, it indicated that illegally dismissed undocumented workers such as Philip might not be eligible for reinstatement and backpay under the National Labor Relations Act[5] ("NLRA" or "the Act").[6] Since that time the impact of *Sure-Tan* on the remedies available to undocumented workers has been interpreted in different ways by the various U.S. Courts of Appeals.[7] The 1986 passage

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[1] An employer who fires an employee because of that employee's union activities violates section 8(a)(1) of the National Labor Relations Act. *See* 29 U.S.C. § 159(1) (1999).

[2] *See* Leonard R. Page, NLRB Remedies: Where are They Going?, Address Before the University of Richmond School of Law (Apr. 10, 2000), *available at* <http://www.nlrb.gov/press/r2388.html>. In the leading United States Supreme Court case discussing the appropriateness of reinstatement and backpay, the Court upheld a Board order which compelled an employer who had illegally terminated employees (based on their protected union activity) to reinstate the employees and pay them for the period in between their firing and reinstatement. *See* Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 187-90 (1941).

[3] The term "undocumented workers" is used to refer to workers who lack the proper documentation to be legally employed in the United States. *See* Linda S. Bosniak, *Exclusion And Membership: The Dual Identity Of The Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955, 956 (1988). Undocumented workers may be illegal aliens, legal aliens present in the United States on non-working visas, or legal aliens allowed to work but temporarily without proof of their status. For the purposes of this article, "undocumented discriminatees" are undocumented workers who have been discriminated against because of their concerted union activity.

[4] 467 U.S. 883 (1984).

[5] 29 U.S.C. §§ 151-169 (1999).

[6] *See Sure-Tan*, 467 U.S. at 901-02.

[7] *See* discussion *infra* section IV.

of the Immigration Reform and Control Act[8] ("IRCA") further obscured the holding of *Sure-Tan* by criminalizing the employment of undocumented workers.[9] In the last two years, however, the NLRB has clearly adopted a construction of *Sure-Tan* which generally permits the conditional awarding of backpay and reinstatement to undocumented discriminatees.[10] The Board's position, while based on a rather broad reading of *Sure-Tan*, better effectuates national industrial policy than an interpretation which denies the remedies to undocumented workers.

Part II of this recent development outlines the law developed in *Sure-Tan* and its progeny. Part III discusses the background cases in more depth. Part IV of the article analyses the recent developments in the law – the opinions by the Seventh and Second Circuits which created a split in the law, the subsequent Board decisions that temporarily appeared to settle the issue, and the recent, potentially explosive, developments in the District of Columbia Circuit. Part V explains why the Board's application of reinstatement and backpay remedies to cases involving undocumented discriminatees should be affirmed by reviewing federal courts.

II. OVERVIEW OF THE LAW

The *Sure-Tan* opinion confirmed a conclusion that the National Labor Relations Board and several U.S. Courts of Appeals had already reached:[11] undocumented workers were "employees" for the purposes of the National Labor Relations Act, and as such were entitled to many of the protections of the Act.[12] Yet the Court also deemed the rights and remedies available to these employees to be at least partially restricted[13] by the Immigration and Naturalization Act ("INA").[14] More specifically, the *Sure-Tan* decision placed conditions on the remedies available to undocumented workers terminated in violation of sections 8(a)(1) and 8(a)(3)[15] of the Act.[16] When an employer fires

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[8] 8 U.S.C. § 1324(a) (1999).

[9] *See* discussion *infra* section III.C.2.

[10] *See* discussion *infra* sections III and IV.

[11] *See generally* Apollo Tire Co., 236 N.L.R.B. 1627 (1978), *enforced*, 604 F.2d 1180 (9th Cir. 1979); Amay's Bakery & Noodle Co., 227 N.L.R.B. 214 (1976); Sure-Tan, Inc., 231 N.L.R.B. 138 (1977), *enforced*, 583 F.2d 355 (7th Cir. 1978)).

[12] *See* Sure-Tan v. NLRB, 467 U.S. 883, 891-92, 901-02 (1984).

[13] *See id.* at 902-03.

[14] 8 U.S.C. §§ 1101-1525 (1984), *amended by* 8 U.S.C. § 1324(a) (1986).

[15] Section 8(a)(1) of the Act states: "[it shall be an unfair labor practice for an employer] to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." 29 U.S.C. § 159(1) (1999). Section 8(a)(3) states: "[it shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights

an employee because of the employee's concerted union activity, the Board will commonly order that the employee be reinstated to her previous position; furthermore, the employee often is entitled to backpay for the period during which she was unlawfully denied her job.[17] In *Sure-Tan*, the Court decided that these remedies, which are authorized by section 10(c)[18] of the NLRA, would be available only to those undocumented workers who could demonstrate their "availability"[19] to work during any period following their illegal termination.[20] Although the Court reasoned that application of the NLRA to undocumented workers would further the policy goals embodied in the NLRA[21] (since the extension of labor laws to such workers would lower the incentive to hire them), the opinion denied such an extension to workers forced by the Immigration and Naturalization Service ("INS") to leave the country.[22]

Despite the contradictions in *Sure-Tan*'s reasoning, the decision represented a large step toward resolving the potential conflict between the NLRA and the INA. While there remained some disagreement over the impact of *Sure-Tan* on the remedies available to undocumented workers,[23] the case provided a

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guaranteed in section 7] by discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 159(3) (1999).

[16] *See Sure-Tan*, 467 U.S. at 902. *See also* 8 U.S.C. § 160(c) (1999).

[17] *See* Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 189 (1941).

[18] 8 U.S.C. § 160(c) (1999).

[19] *See Sure-Tan*, 467 U.S. at 903. The Court held that the undocumented workers in *Sure-Tan* would probably not be able to receive backpay; by leaving the United States, they could no longer be considered "available" for work. In imposing the availability condition, the Court rejected the approach of the Seventh Circuit, which had ordered that the workers receive an unconditional backpay award. *See id.* at 905. Instead, the Court chose to limit backpay awards to those employees who were "lawfully entitled to be present and employed in the United States." *Id.* at 904. Although it is clear from *Sure-Tan* that undocumented workers who have left the country are not entitled to backpay, the Court did not directly address whether undocumented workers remaining in the United States after their illegal termination may collect on a backpay order. The controlling language ("lawfully entitled to be present and employed") is vague, and has been interpreted differently by both the Board and United States Courts of Appeals. *See generally* Local 512, Warehouse and Office Workers' Union v. NLRB (Felbro), 795 F.2d 705, 716-17 (9th Cir. 1986) (holding that *Sure-Tan* only prohibits backpay to undocumented workers who have left the United States); Del Rey Tortilleria, Inc. v. NLRB, 976 F.2d 1115, 1119-21 (7th Cir. 1992) (holding that workers lacking proper documentation may not, under *Sure-Tan*, collect back pay); Hoffman Plastic Compounds, Inc., 326 N.L.R.B. No. 86 (Sept. 23, 1998) (endorsing the *Felbro* rationale). *See infra* section IV. It is this ambiguity in *Sure-Tan* which inspired much of the controversy discussed later in this article.

[20] In allowing undocumented workers to potentially receive backpay as a remedy for their unjust termination, the Court first explicitly stated that the INA in no way interfered with the NLRA definition of "employee." *See Sure-Tan*, 467 U.S. at 892.

[21] *See id.* at 892-94.

[22] *See id.* at 903.

[23] *See supra* note 19.

basic framework for lower jurisdictional bodies in interpreting the interaction between the NLRA and the INA.[24]

Sure-Tan's validity, however, was soon thrown into question. In 1986, only two years after *Sure-Tan* was decided, Congress passed the Immigration Reform and Control Act ("IRCA").[25] This amendment to the INA criminalized employment of undocumented workers.[26] Commentators were divided on how this new law would affect the *Sure-Tan* paradigm; some believed that the IRCA's impact on the rights of undocumented workers would be minimal,[27] but others felt that the new law might upset the rationales of *Sure-Tan* and *Felbro*.[28] Surprisingly, neither the Board nor the federal courts immediately examined the interplay between the new statute and the venerable NLRA. The NLRB did not even tangentially discuss the issue until 1989, when it decided *Breakfast Productions*,[29] yet the decision in that case only marginally addressed the nascent conflict between the IRCA and the NLRA.[30]

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[24] *See generally* Felbro, Inc., 274 N.L.R.B. 1268 (1985), *rev'd*, 795 F.2d 705 (9th Cir. 1986) (deferring decision on whether to enforce a backpay order until a compliance hearing); Ethnic Produce, 275 N.L.R.B. 205 (1985) (holding that reinstatement order is conditioned upon proof of lawful presence in the United States). *Cf.* Local 512, Warehouse and Office Workers' Union v. NLRB (Felbro), 795 F.2d 705, 716-17 (9th Cir. 1986) (holding that *Sure-Tan* only prohibits backpay to undocumented workers who have left the United States). Although the holdings of the former cases differ sharply from that of the latter, both lines relied on *Sure-Tan* in order to reach their conclusions.

[25] 8 U.S.C. § 1324(a) (1999).

[26] *See id.* The IRCA states in relevant part: "It is unlawful for a person or other entity to hire, or to recruit for a fee, in the United States – an alien knowing that the alien is . . . unauthorized . . . with respect to such employment . . . ." *Id.*

[27] *See* Myrna A. Mylius Shuster, Note, *Undocumented Does Not Equal Unprotected: The Status of Undocumented Aliens Under the NLRA Since the Passage of the IRCA*, 39 CASE W. RES. L. REV. 609 (1989) (predicting [since in 1989 the IRCA's impact on the NLRA had not yet really been tested] that the new legislation would not change the law relating to undocumented workers). *Cf.* Daniel R. Fjelstad, Comment, *The National Labor Relations Act and Undocumented Workers:* Local 512 v. NLRB *After the Immigration Reform and Control Act of 1986*, 62 WASH L. REV. 595 (1987) (reasoning that the narrow, administrative jurisdiction of the NLRB should preclude the Board from broadly interpreting the IRCA).

[28] *See* Richard E. Blum, Note, *Labor Standards Enforcement and the Realities of Labor Migration: Protecting Undocumented Workers After* Sure-Tan, *the IRCA, and* Patel, 63 N.Y.U. L. REV. 1342 (1988) (discussing possible impact of IRCA on remedies).

[29] 293 N.L.R.B. 607 (1989).

[30] *See id.* at 612. The *Breakfast Productions* employer raised the IRCA as a secondary defense to his alleged illegal termination of two undocumented workers. *See id.* He claimed that undocumented workers could not be considered "employees" under the new law. The Board rejected this argument, stating that "it is clear that [the workers in question] were employees protected by the Act and that nothing in IRCA changed that." *Id.* at 613. The Board declined, however, to address the manner in which IRCA might affect the remedies available to illegally fired undocumented workers, since the Board found no such discrimination in the case at bar. *See id.* The few remaining cases concerned with the issue of remedies for

It was not until the Seventh Circuit handed down its 1992 decision in *Del Rey Tortilleria, Inc. v. NLRB*,[31] that the influence of the IRCA on NLRA remedies for undocumented workers was examined with an eye to the future. The Seventh Circuit relied upon *Sure-Tan* to support its holding that undocumented workers remaining in the United States after their termination could not receive backpay until they secured proper documentation.[32] After *Del Rey*, the law did not develop very much until December 1997. At that time, the Second Circuit decided *NLRB v. A.P.R.A. Fuel Oil Buyers Group*,[33] and in doing so created a split in the circuits. The court chose to ignore *Del Rey*, and instead followed *Felbro* as the proper interpretation of *Sure-Tan*.[34] Notwithstanding *Del Rey*, the *A.P.R.A.* panel also held that the IRCA was not intended to infringe upon the NLRA rights of undocumented workers.[35]

In the months since *A.P.R.A.* was decided, five more opinions that address the influence of the IRCA on labor law have been issued.[36] One of these, *NLRB v. Kolkka*,[37] saw the Ninth Circuit uphold a Board order which allowed an undocumented worker to vote in an NLRB-run election.[38] Although the

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undocumented workers which were decided in between the passage of the IRCA and the Seventh Circuit's opinion in *Del Rey Tortilleria*, discussed *infra* section IV, did not address the impact of the IRCA. *See* Tubari Ltd., Inc., 303 N.L.R.B. 529, 532 (1991), *rev'd on other grounds*, 959 F.2d 451 (3d Cir. 1992) (following *Felbro*, with no discussion of IRCA); Rios v. Local 638, 860 F.2d 1168 (2d Cir. 1988) (concerning backpay remedies under Title VII, the Second Circuit followed *Felbro* with no discussion of the IRCA).

[31] 976 F.2d 1115 (7th Cir. 1992).

[32] *See Del Rey*, 976 F.2d at 1121-22. The court was primarily concerned with interpreting and applying the *Sure-Tan* decision, and only briefly discussed the impact of IRCA on NLRA remedies. *See id.* at 1122. The implication derived from *Del Rey* is that the IRCA was not a significant change from the INA; the court held that to the extent that the IRCA affected labor law, its primary effect was to codify a literal interpretation of *Sure-Tan*'s "lawfully entitled to be present and employed in the United States" language. *See id.*

[33] 134 F.3d 50 (2d Cir. 1997). The *A.P.R.A.* decision contradicted *Del Rey* by allowing undocumented discriminatees to conditionally obtain backpay. *See id.* at 58.

[34] *See id.* The court also relied heavily on its own opinion in *Rios*, despite the fact that *Rios* did not address the influence of the IRCA on labor law remedies. *See id.* at 55. *See also* Rios v. Local 638, 860 F.2d 1168, 1173 (2d Cir. 1988).

[35] *See A.P.R.A. Fuel Oil Buyers Group*, 134 F.3d at 56-59. This determination was based largely on the court's analysis of the legislative history of the IRCA.

[36] *See* Hoffman Plastic Compounds, Inc., 326 N.L.R.B. No. 86, (Sept. 23, 1999), *aff'd*, Hoffman Plastic Compounds, Inc. v. NLRB, 208 F.3d 229 (2000), *vacated, reh'g en banc granted*, 164 L.R.R.M. 2814 (2000); NLRB v. Kolkka, 170 F.3d 937, 939 (9th Cir. 1999); County Window Cleaning Co., 328 N.L.R.B. No. 26 (Apr. 30, 1999); Regal Recycling, Inc., 329 N.L.R.B. No. 38 (1999).

[37] 170 F.3d 937 (9th Cir. 1999).

[38] *See id.* at 939.

case did not specifically address the manner in which the IRCA affects remedies, the court did endorse the *A.P.R.A.* viewpoint.[39]

In April 1999, the Board decided a case that directly related to the question of remedies. While the NLRB had considered the issue once before in the seven years since *Del Rey*,[40] *County Window Cleaning Company*[41] was the Board's first real attempt to explain its preference for *A.P.R.A.* over *Del Rey*.[42] The Board's majority endorsement of *A.P.R.A.* in *Regal Recycling*[43] confirmed the Board's inclination toward affording undocumented workers full "employee" status under the NLRA.

It is only now, well over a decade since IRCA became law, that some sort of consensus regarding the rights and remedies available to undocumented workers under the NLRA has clearly emerged. From its recent decisions, it is evident that the Board has chosen to apply the *A.P.R.A.* interpretation of *Sure-Tan* and the IRCA rather than that of *Del Rey*. Although the Board may not have chosen the course which best respected the intent of the Supreme Court in *Sure-Tan*, the reasoning of *A.P.R.A.* better serves the policy goals embodied in both the NLRA and IRCA than does *Del Rey*. The Board's harmonization of the law with statutorily voiced principles of industrial democracy is a more proper foundation for administration of the issue than would be an approach which relies on a more direct reading of *Sure-Tan*; yet the Board's awards of backpay and reinstatement to undocumented discriminatees may soon come under fire. The recent decision of the D.C. Circuit to rehear en banc its affirmation of the Board's *Hoffman* decision threatens the continued viability of the *A.P.R.A.* regime and promises to exacerbate the split between the circuits.

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[39] *See id.* at 942. The court adopted an interpretation of *Sure-Tan* very similar to that seen in *A.P.R.A.*, holding that the Supreme Court intended its *Sure-Tan* opinion to be applied very narrowly. *See id.* at 941-42.

[40] *See* Hoffman Plastic Compounds, 326 N.L.R.B. No. 86 (Sept. 23, 1998). The Board followed its own decision in *A.P.R.A. Fuel Oil Buyers Group*, 320 N.L.R.B. 408, *aff'd.*, 134 F.3d 50 (2d Cir. 1997), in ordering backpay for an undocumented worker. Although *Hoffman* justifies the approach adopted in *A.P.R.A.*, the decision is not as instructive as *County Window Cleaning*, *see infra* notes 155, 156, 160 and accompanying text, as *Hoffman* does not discuss *Del Rey* in any detail. *See Hoffman*, 326 N.L.R.B. No. 86. *County Window Cleaning* analyses both *A.P.R.A.* and *Del Rey*, and is published with a strong dissent that endorses the *Del Rey* interpretation. *See* discussion *infra* section IV.E.

[41] 328 N.L.R.B. No. 26 (Apr. 30, 1999).

[42] The majority decision is actually quite short; it largely endorses the Administrative Law Judge's ("ALJ's") decision; the ALJ however, discusses both *A.P.R.A.* and *Del Rey* in some depth. *See County Window Cleaning*, 328 N.L.R.B. No. 26 at 9-10.

[43] *See* Regal Recycling, Inc., 329 N.L.R.B. No. 38 at 3 (Sept. 30, 1999). *See* discussion *infra* section IV.

III. *SURE-TAN* AND ITS PREDECESSORS

A. Before Sure-Tan

Although *Sure-Tan* was not decided until 1984, the Board and a few Courts of Appeals had already created a framework for understanding the rights and remedies available to undocumented workers under the NLRA. In *NLRB v. Apollo Tire Co., Inc.*,[44] the Ninth Circuit enforced a Board order that held that the INA did not in any way affect the employee status[45] of undocumented workers under the NLRA.[46] In doing so, it rejected two older cases[47] that suggested that the Act should be assumed to apply only to U.S. nationals.[48]

The Seventh Circuit also held that the INA did not inhibit the Board's ability to apply the NLRA to undocumented workers.[49] In *NLRB v. Sure-Tan*,[50] the court held that since the INA did not explicitly forbid an employment relationship between an undocumented worker and an employer, the NLRA should apply in full to such a worker.[51] The NLRB found this line of reasoning persuasive in *Amay's Bakery & Noodle Co.*,[52] in which the Board

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[44] 604 F.2d 1180 (9th Cir. 1979).

[45] Section 2(3) of the Act defines "employee" as:

> any employee . . . but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by . . . any other person who is not an employer as defined herein.

29 U.S.C. § 152(3) (1999).

[46] *See* Apollo Tire Co., Inc., 604 F.2d at 1183. The court held that the INA did not conflict with the construction of the NLRA that deemed undocumented workers to be "employees." Because the INA specifically stated that employment of an illegal alien did not constitute a violation of the law, the court deferred to the NLRB's definition of "employee" – one which included aliens. The court also noted that policy considerations supported the NLRB's interpretation; the application of make-whole remedies to undocumented discriminatees would tend to lessen the incentive for employers to hire illegal aliens. *See id.*

[47] *See id.* at 1196 n.6. (discussing Benz v. Compania Naviera Hidalgo, 353 U.S. 138 (1957); McCulloch v. Sociedad Nacional, 372 U.S. 10 (1963)). The Ninth Circuit distinguished the cases as not referring specifically to the definition of "employee" under the NLRA. *See Apollo Tire*, 604 F.2d at 1183 n.6.

[48] *See id.*

[49] *See* NLRB v. Sure-Tan, 583 F.2d 355, 359 (7th Cir. 1978).

[50] 583 F.2d 355 (7th Cir. 1978). This case should be distinguished from the later U.S. Supreme Court *Sure-Tan v. NLRB*; for this reason, the Seventh Circuit's case will hereinafter be referred to as "*Sure-Tan I*."

[51] *See Sure-Tan*, 583 F.2d at 359-61.

[52] 227 N.L.R.B 214 (1976).

ordered that undocumented workers discharged for their union activities be reinstated.[53]

Prior to *Sure-Tan*, then, a body of law existed which held that undocumented workers were entitled to the full protection of the NLRA. While *Sure-Tan* would give the Supreme Court's imprimatur to the notion that undocumented workers were "employees" under the Act, it would also restrict in a subtle fashion the remedies available to illegally terminated undocumented workers.

B. Sure-Tan

The *Sure-Tan* decision set the stage for the more recent developments regarding the NLRA remedies available to undocumented workers. Despite the existence of older cases like *Apollo Tire* and *Amay's Bakery, Sure-Tan* can be considered the first case in the line analyzed in this article.[54] Every case decided subsequent to *Sure-Tan* has shown the 1984 case a great deal of deference, and even those cases decided after the passage of the IRCA appear to place more importance on the impact and language used by the majority opinion of *Sure-Tan* than on the influence and stated goals of the IRCA.[55]

Sure-Tan's origins lie in an NLRB representation election held in a leather shop in Chicago.[56] Shortly after it became apparent that the union had won the election, the president of the shop berated a group of employees for voting for the union, and asked them if they had valid immigration documents.[57] Many employees indicated that they lacked valid working papers; the employer soon thereafter filed a challenge to the election, arguing that the majority of the bargaining unit were undocumented aliens.[58] The NLRB region overruled the objections. Soon thereafter the employer asked the INS to investigate the

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[53] *See id.* at 214-15. The Board not only needed to consider the influence of the INA on the NLRA, but also that of a California statute that (like the IRCA) specifically made employment of undocumented workers illegal. The Board reasoned that by ordering reinstatement, it "would not place the Respondent in clear violation of a valid state statute. Rather, it would return [the employer] to a position in which it had placed itself earlier, and, but for the illegal discharges, in which it would still be." *Id.* at 215. This policy reasoning is also applicable today, in light of the IRCA; variations on it can be seen in Justice Brennan's dissent in *Sure-Tan*. *See infra* notes 77-78 and accompanying text; *A.P.R.A.*, 134 F.3d at 57.

[54] While *Apollo Tire* and *Amay's Bakery* have continued to provide the courts with guidance in the years since *Sure-Tan*, the Supreme Court's decision in *Sure-Tan* serves as a definitive starting point for courts considering this issue. The analysis of the Court in *Sure-Tan* differs significantly from that of *Apollo Tire* and *Amay's Bakery*. *See infra* section III.B.

[55] *See, e.g.*, Fjelstad, *supra* note 27.

[56] *See* Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 886 (1984).

[57] *See id.*

[58] *See id.*

immigration status of the undocumented workers.[59] After INS agents arrested the employees, all voluntarily left the country "as a substitute for deportation."[60]

The Board's Regional Director issued complaints alleging that the employees had been constructively discharged for their protected union activities.[61] The Board upheld the complaint, and ordered the employer to cease and desist from committing unfair labor practices, including the reporting of undocumented workers to the INS.[62] The Seventh Circuit modified the Board order. It held that while reinstatement would be proper only when the employees were legally allowed to work in the U.S., the reinstatement offers should be left open for four years.[63] Furthermore, while the court agreed with the Board that workers are not eligible for backpay unless "lawfully entitled to be present and available for work in the United States," it adopted the Administrative Law Judge's ("ALJ's") suggestion that a minimum amount of backpay be awarded, as it would "better effectuate the policies of the Act . . . because it was [the employer's] discriminatory act which caused these employees to lose their jobs."[64] The Board accepted and endorsed the remedy proposed by the court, and the case was appealed to the United States Supreme Court.[65] The Court granted certiorari.

The majority[66] began its analysis by confirming that undocumented workers are employees for the purposes of the Act.[67] Applying somewhat the same

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[59] *See id.* at 887.

[60] *Id.*

[61] *See id.* at 887-88.

[62] *See id.* at 888. In issuing this order, the Board rejected the ALJ's proposed order, which would have compelled the employer to offer the workers reinstatement, and which would have also issued "a minimum 4-week period" of backpay to the workers. *Id.* at 889. The backpay order would have been intended to compensate for the fact that the Board could not award backpay for "those periods in which employees are not available for employment." *Id.* The Board described the suggested remedy as "unnecessarily speculative." *Id.*

[63] *See id.* at 890.

[64] NLRB v. Sure-Tan Inc., 672 F.2d 592, 606 (7th Cir. 1982). The court ruled that six months backpay would be the minimum amount appropriate under the circumstances.

[65] *See Sure-Tan*, 467 U.S. at 890.

[66] Justice Sandra O'Connor wrote for a five-justice majority. The opinion was divided into four parts; O'Connor was joined in full by Justice Byron White and Chief Justice Warren Burger. Justices William Brennan, Thurgood Marshall, Harry Blackmun and John Paul Stevens joined in Parts I, II, and III of the opinion (holding that undocumented workers are employees for the purposes of the Act, and that an employer who reports undocumented workers to the INS in retaliation for union activities violates the Act). Justice Lewis Powell was joined by Justice William Rehnquist in dissenting from Parts I, II, and III (they felt that it was improper to term undocumented workers "employees"), but both Justices concurred in section IV, which found that the backpay remedy recommended by the Board was improper. Marshall, Blackmun and Stevens joined in Brennan's dissent from Part IV.

[67] *See Sure-Tan*, 467 U.S. at 891.

reasoning that the Ninth Circuit used in *Apollo Tire*,[68] the Court ruled that the INA did not conflict with the application of the NLRA to undocumented workers, as the INA did not prohibit employment of undocumented workers.[69] The Court also held that extending NLRA protection to undocumented workers supported the public policy underlying the INA.[70] Because the INA was partially intended to dissuade employers from hiring undocumented workers (in an effort to avoid paying higher wages to American workers), application of the NLRA to undocumented workers would make the hiring of such workers less attractive, as it would ensure that undocumented workers could raise their wages via unionism.[71]

Although the Court agreed with the Seventh Circuit and the earlier cases in regard to the employee status of undocumented workers, it created a new standard for the remedies available to such workers under the Act. While the Court admitted that the Board is usually owed deference and allowed "broad discretion" in fashioning remedies,[72] it held that in this case, the Board had not "duly considered" the relief ordered; instead, it had been "effectively compelled" by the Seventh Circuit to adopt a remedy which exceeded the Board's powers.[73]

The Court approved of the Board's original position that a minimum backpay award would be "unnecessarily speculative."[74] Instead of a minimum award, the Court ruled that undocumented workers should only receive backpay for the period following their termination during which they were "legally present and permitted by law to be employed in the United States."[75] In the instant case, the Court effectively denied the workers any backpay, as

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[68] *See supra* note 46 and accompanying text.

[69] *See Sure-Tan*, 467 U.S. at 892.

[70] *See id.*

[71] *See id.* at 893.

[72] *Id.* at 898 (citing, *inter alia*, Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941)).

[73] *Id.* at 900. The Court paints a picture of a Board with its hands tied by an unusually activist Seventh Circuit opinion. The deference accorded the Board, reasoned the Court, derives from the Board's "special competence" in the area of labor law. Although the Board had "acquiesced" to the Court of Appeals' remedy, the fact that the remedy was not fashioned by the "special[ly] competent" Board meant that it was not entitled to the regular deference.

[74] *Id.* at 901.

[75] *Id.* at 903. The phrase "legally present and permitted by law to be employed in the United States" is not exactly adopted from the Seventh Circuit's opinion below; the Seventh Circuit phrased the test as whether an employee was "*lawfully*" present. Two sentences earlier, however, the Court defined "unavailability to work" (and hence, the condition under which a discriminatee may be denied backpay) as "any period [during which a discriminatee is] . . . not *lawfully entitled to be present and employed in the United States*." *Id.* (emphasis added). The two phrasings ("legally" and "lawfully") appear to be synonymous, and have been used interchangeably by later courts. *See, e.g.*, Hoffman Plastic Compounds, 326 N.L.R.B. No. 86 (Sept. 23, 1998) (using both terms).

they had never been legally present in the U.S. following their termination.

In a strongly worded dissent to Part IV of the majority opinion,[76] Justice Brennan[77] argued that the majority created confusion by first stating that the Board should have broad discretion in devising remedies, and then overturning the Board's remedy in the instant case.[78] In a portion of the dissent which is perhaps more germane, Justice Brennan also contended that the majority contradicted itself by extending the NLRA to undocumented workers for public policy reasons while at the same time denying the Board the power to order an effective remedy.[79] Justice Brennan's strongest argument in dissent was that this policy choice of the Court was sure to undermine the effectiveness of the NLRA as a deterrent to the hiring of undocumented workers. Although not directly acknowledged, Justice Brennan's dissent to Part IV clearly influenced the Ninth Circuit in its decision in *Felbro*.[80]

C. Sure-Tan's *Impact and the IRCA*

1. Felbro

The only major case[81] which addressed undocumented workers' rights under the NLRA in the two years in between *Sure-Tan* and the passage of the IRCA

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[76] *See id. See also supra* note 58.

[77] Brennan's opinion was joined by Justices Marshall, Blackmun, and Stevens.

[78] *See Sure-Tan*, 467 U.S. at 908 (Brennan, J., concurring in part). Brennan cited to *NLRB v. Seven-Up Bottling*, 344 U.S. 344 (1953), to support the assertion that the Board has the discretion to fashion any remedy which is intended to "effectuate the purposes of the Act." In addition, Brennan noted that there is no reason not to view the Board's endorsement of the Seventh Circuit's proposed remedy as tantamount to a situation where the Board had developed the remedy itself. *See Sure-Tan*, 467 U.S. at 908 (Brennan, J., concurring in part).

[79] *See Sure-Tan*, 467 U.S. at 911-12 (Brennan, J., concurring in part). Brennan writes:

> Once employers . . . realize that they may violate the NLRA with respect to their undocumented alien employees without fear of having to recompense those workers for lost backpay, their "incentive to hire such illegal aliens" will not decline, it will increase. And the purposes of both the NLRA and the . . . INA that are supposedly served by today's decision will unquestionably be undermined.

Id. at 912 (Brennan, J., concurring in part).

[80] *See* Local 512, Warehouse and Office Workers' Union v. NLRB (Felbro), 795 F.2d 705 (9th Cir. 1986).

[81] In *Ethnic Produce*, 275 N.L.R.B. 205 (1985), the Board indicated that it interpreted *Sure-Tan*'s "legally present and permitted by law to be employed in the United States" clause to require that undocumented workers seeking backpay be legally permitted to work in the United States, not just present in the United States and available for work. *See Ethnic Produce*, 275 N.L.R.B. at 205. The Board's logic in the opinion was soon superseded by that of the Ninth Circuit's *Felbro* decision. *See generally* Local 512, Warehouse and Office Workers' Union v. NLRB (Felbro), 795 F.2d 705 (9th Cir. 1986).

was *Local 512, Warehouse and Office Workers' Union v. NLRB (Felbro).*[82] Like *Sure-Tan*, *Felbro* arose in the wake of an NLRB representation election. The employer laid off a number of undocumented workers because of their concerted union activity.[83] The NLRB region issued charges, and the employer reinstated the discharged employees before the ALJ's hearing.[84] The ALJ suggested that the workers be given backpay for the period during which they were unfairly discharged, but the Board (in the wake of *Sure-Tan*) held that the workers in question were "unavailable for work" during the discharge period, despite the fact that they were physically in the United States. [85]

Upon review, the court overturned the Board's ordered remedy. By narrowly interpreting *Sure-Tan* to apply only to fact patterns where the undocumented workers had left the country,[86] the *Felbro* court was able to avoid the "legally present and permitted by law to be employed in the United States" language which appeared to bar any backpay for undocumented workers.[87] As the court writes, "*Sure-Tan* does not address the question whether [sic] an undocumented worker who *remains* in the United States, and who has *not* been the subject of any INS deportation proceedings, is barred from receiving backpay to remedy an NLRA violation."[88] The panel went on to assert that the Court's opinion in *Sure-Tan* was primarily intended to undo the speculative nature of the Board's/Seventh Circuit's remedy.[89]

Having established that *Sure-Tan* was not applicable to the situation in *Felbro*, the court looked to its own *Apollo Tire* decision and to *Amay's Bakery* to justify it decision to award backpay to the undocumented workers.[90] The court held that because the NLRA applies to undocumented workers, they

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[82] 795 F.2d 705 (9th Cir. 1986).

[83] *See id.* at 709-10, n.1.

[84] *See id.* at 709.

[85] *See* Felbro, Inc., 274 N.L.R.B. 1268, 1269 (1985). As in *Ethnic Produce*, *supra* note 81, the Board appeared to tie "availability" to the legal ability to secure a job in full compliance with immigration law.

[86] The court distinguished *Sure-Tan* by claiming that "the Court gave no indication that it was addressing any backpay issue wider than the six-month minimum backpay award made to the five *Sure-Tan* discriminatees who had left the United States." *Felbro*, 795 F.2d at 716. It interpreted *Sure-Tan* to prohibit only: a) backpay awards to undocumented workers who had left the country; b) speculative awards such as the six-month award in *Sure-Tan*. *See id.* By reading *Sure-Tan* to be fact-specific, the court opened the door to an interpretation of the NLRA which allowed effective remedies for undocumented discriminatees.

[87] *See id.* at 716-17.

[88] *Id.* at 717 (emphasis in original).

[89] *See id. See also supra* note 72.

[90] *See Felbro*, 795 F.2d at 718.

should be eligible for backpay; in addition, the court argued that a backpay order would further the public policy of both the NLRA and the INA.[91]

A dissenting opinion held that *Sure-Tan* "clearly indicates that individual remedies for labor law violations are to be limited to those aliens who can establish legal immigration status . . . the back pay period is to be tolled unless the alien is 'lawfully entitled to be present and employed in the United States.'"[92] The dissent, then, appears to adopt the view of the majority in *Sure-Tan*, while the *Felbro* majority – although it engages in the pretense of showing deference to *Sure-Tan* – is heavily influenced by the logic of Justice Brennan's *Sure-Tan* dissent. *Felbro*'s apparent detour from the holding of *Sure-Tan* was not to be directly tested; later in the same year Congress passed the IRCA, which introduced a new variable into the issue.

2. *The IRCA*

The IRCA[93] certainly appeared to change the face of employment and labor law as it pertained to undocumented workers. By expressly outlawing the employment of such workers,[94] the law served as a disincentive to that sort of employment, but also threatened the delicate framework of rights established for undocumented workers.[95] The Board was largely quiet, though, about the impact of the IRCA on the NLRA over the course of the next six years. While *Breakfast Productions*[96] affirmed the "employee" status of undocumented workers, it did not address the manner in which IRCA might affect the remedies available to those workers.[97] Courts discussed the interplay of the

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[91] *See id.* at 718-19. In regard to public policy, the court wrote:

> If employers know that they will incur no backpay liability, they will have less incentive to obey the NLRA. The victims of the Board's conditional remedy would be not only undocumented workers, but also American and documented alien workers. Unscrupulous employers would be encouraged to hire undocumented workers for the competitive advantage that an environment relatively free of labor safeguards may offer.

Id. at 719.

[92] *Id.* at 724 (Beezer, J., dissenting) (quoting Sure-Tan v. NLRB, 467 U.S. 883, 903 (1984)).

[93] 8 U.S.C. § 1324(a) (1999)

[94] *See* 8 U.S.C. § 1324 (1999).

[95] As noted by the Board, courts, and commentators, the legislative history of the IRCA demonstrates no intent on the part of Congress to limit the rights and remedies available to undocumented workers under the NLRA. *See generally* NLRB v. A.P.R.A. Fuel Oil Buyers Group, Inc. 134 F.3d 50, 57 (2d Cir. 1997); Fjelstad, *supra* note 27.

[96] 293 N.L.R.B. 607 (1989).

[97] *See supra* note 22. Although the Board asserted that the IRCA did not affect the "employee" status of undocumented workers, the facts of the case rendered the question of how the IRCA impacted remedies moot. *See Breakfast Productions*, 293 N.L.R.B. at 613.

IRCA on the Fair Labor Standards Act ("FLSA"),[98] but it was not until the Seventh Circuit issued its decision in *Del Rey* that the issue of remedies under the NLRA was raised again.

IV. A Split In The Circuits and the Board's Resolution

A. Del Rey Tortilleria v. NLRB[99]

During a union organizing campaign in 1986, Del Rey Tortilleria discharged two undocumented employees.[100] The NLRB issued a complaint alleging that the workers were terminated in violation of the Act.[101] The Board, employer, and the union soon reached a settlement in which the company agreed to reinstate the workers and make them whole.[102] Yet soon thereafter, the employer challenged the workers' eligibility for reinstatement and backpay, arguing that the INA forbade such remedies to undocumented workers.[103] An ALJ held that the workers were in fact entitled to the remedies in question, and in support cited *Felbro*. The ALJ's suggested order decreed that the workers should receive "reinstatement and backpay unless the employer could prove their illegal presence by means of a final INS deportation order."[104] The Board adopted the ALJ's order.[105]

The *Del Rey* majority[106] looked first to *Sure-Tan* in constructing its decision. The "lawfully entitled to be present and employed in the United States" phrase was emphasized in the decision; the court held that the language "required . . . employees to show that they [are] lawfully available for employment during the backpay period."[107] The literal interpretation of *Sure-Tan*'s majority opinion was used by the *Del Rey* majority to attack *Felbro*. Citing the Beezer dissent from *Felbro*, the majority argued that undocumented workers cannot

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[98] *See* Patel v. Quality Inn South, 846 F.2d 700 (11th Cir. 1988). The Eleventh Circuit held that because the IRCA sought to discourage employers from hiring undocumented workers, IRCA policy considerations dictated that backpay remedies be extended to undocumented workers. The remedies would serve as a disincentive to the hiring of undocumented workers. *See id.* at 708.

[99] For an extremely partisan critique of the *Del Rey* decision, see John F. Barmon, Casenote, *The Seventh Circuit Explains Why There is No Harm in Exploiting Undocumented Workers:* Del Rey Tortilleria, Inc. v. NLRB, *976 F.2d 1115 (7th Cir. 1992)*, 24 U. Miami Inter-Am. L. Rev. 567 (1993).

[100] *See* Del Rey Tortilleria, Inc. v. NLRB, 976 F.2d 1115, 1116 (7th Cir. 1992).

[101] *See id.*

[102] *See id.*

[103] *See id.* at 1117.

[104] *Id.* (citing Del Rey Tortilleria, Inc., 302 N.L.R.B. 216, 220 (1991)).

[105] *See id.*

[106] The Seventh Circuit panel was split 2-1. *See id.* at 1115.

[107] *Id.* at 1119-20 (citing Sure-Tan v. NLRB, 467 U.S. 883, 903 (1984)).

be legally harmed by illegal termination, since they have no right to be in the U.S. in the first place.[108] From there, the court pointed out the similarities between *Felbro* and the Brennan concurrence in *Sure-Tan*; by linking the two opinions, the court was able to assert that the *Sure-Tan* majority prospectively rejected *Felbro*.[109] The majority next rejected the policy arguments found in *Felbro*, choosing instead to heed the plain language of the *Sure-Tan* decision.[110]

Because the alleged unfair labor practices in *Del Rey* occurred prior to the passage of the IRCA, the court held that the IRCA need not be applied to the case.[111] Instead of deferring any discussion on IRCA until such a time that the court faced a case involving IRCA, however, the Seventh Circuit made a preemptive pronouncement: "Section 274A of IRCA makes it unlawful for an employer to hire an undocumented alien; and thus, clearly bars the Board from awarding backpay to undocumented aliens wrongfully discharged after IRCA's enactment."[112]

In a well-crafted dissent, Judge Cudahy attacked the "plain language" approach of the majority. He began by noting that *he* originally coined the phrase "lawfully entitled to be present and employed in the United States" in the Seventh Circuit's overruled opinion in *Sure-Tan*.[113] He then indicated that the original meaning behind those words was specifically intended to apply only to a *Sure-Tan*-style situation, where the "aliens in question were not only undocumented, they were not in the country."[114] The dissent then attacked the

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[108] *See id.* at 1119.

[109] *See id.* at 1120-21.

[110] *See id.* at 1121. The "plain language" in question was the *Sure-Tan* majority's "lawfully entitled to be present and available for work in the *United States*." *Sure-Tan*, 467 U.S. at 903 (emphasis added). The majority did not attempt to give voice to any competing policy considerations, but instead simply chose to note that the *Sure-Tan* majority had already rejected the *Felbro*/Brennan policy argument. *See Del Rey*, 976 F.2d at 1121. The Court's unwillingness to discuss the policy implications of its decision may have contributed to the Board's decision not to follow *Del Rey*.

[111] *See Del Rey*, 976 F.2d at 1121.

[112] *Id.* At the same time, the court also implied that the IRCA was written to codify its interpretation of *Sure-Tan*. *See id.*

[113] *See id.* at 1123 (Cudahy, J., dissenting).

[114] *Id.* (Cudahy, J., dissenting). Cudahy did not clearly explain why he chose to use the words "lawfully entitled to be present." He did note that there are significant legal differences between a *Sure-Tan* fact pattern (where the discriminatees were out of the country at the time that the order was issued) and a *Del Rey/Felbro* fact pattern (where, as Cudahy writes, the employees "did not have to commit crimes in order to be physically available for work"). *Id.* This logic does not, however, fully explain his choice of words. If he had intended for the opinion to apply only to a *Sure-Tan* fact pattern, he should have made a distinction between *legal* presence in the United States and *physical* presence. It is not difficult to believe that the Supreme Court and *Del Rey* majority could read "lawfully entitled to be present" to mean "legally in the United States." But Cudahy specifically disavows that interpretation, and his

majority opinion on the policy grounds enunciated by the Brennan concurrence in *Sure-Tan* and by the majority opinion in *Felbro*, arguing that the majority's holding serves only to thwart the intent behind both the NLRA and the IRCA.[115]

B. NLRB v. A.P.R.A. Fuel Oil Buyers Group

In August 1990, A.P.R.A. Fuel Oil hired "Victor Benevides," fully aware that his real name was Jose Ciudad and that Ciudad was not eligible for employment in the U.S.[116] In late 1990, Teamsters Local 533 began an organizing campaign at the A.P.R.A. plant, and solicited the support of Benevides and "Alberto Guzman," another undocumented worker employed under an assumed name.[117] Both men signed union authorization cards, and soon thereafter both were approached by a supervisor who threatened termination unless they retracted their cards.[118] The employees did as they were told, but were eventually discharged anyway.[119] A three-to-one majority[120] of the Board[121] found that they were discharged for their union activities, and that they were entitled to backpay from the date of termination until they: a) were reinstated; or b) failed, after a reasonable time, to produce

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impassioned dissent makes clear his firm belief that backpay remedies should be available to undocumented discriminatees. *See id.* It seems likely that Cudahy had been inadvertently imprecise in his initial crafting of the controversial phrase, and that his *Del Rey* dissent was an attempt to remedy an error which had allowed the Supreme Court to twist the fundamental meaning of his *Sure-Tan* opinion.

[115] *See id.* at 1123-26 (Cudahy, J., dissenting). Not only did Cudahy reopen the argument that national labor policy demands a strong deterrent to unfair labor practices (and therefore necessitates that backpay be available to undocumented discriminatees), he also engaged in fiery criticism of the majority's interpretation of IRCA:

> I think the majority's holding is bad immigration policy. Illegal aliens do not come to this country in order to gain the protection of our labor laws. They come here for jobs. They can find jobs because they are often willing to work hard in rotten conditions for little money.... When we deny backpay to illegal aliens, we tell employers to hire more of them; for aliens who cannot claim monetary damages for unfair labor practices are less expensive to hire and less trouble than their native counterparts.

Id. at 1125 (Cudahy, J., dissenting).

[116] *See* NLRB v. A.P.R.A. Fuel Oil Buyers Group, 134 F.3d 50, 52 (2d Cir. 1997).

[117] *See id.*

[118] *See id.*

[119] *See id.* at 53.

[120] Members Browning and Cohen actually both dissented, but Browning supported the remedies in question, thereby creating a 3-1 split on the issue at hand. *See infra* note 122.

[121] The Board's decision in this matter will hereafter be referred to as *"A.P.R.A. Fuel Oil,"* to differentiate it from the Second Circuit's decision (to be referred to as *"A.P.R.A."*).

proper documentation.[122] In approving of the Board's order, the court first discussed *Sure-Tan*.

Although the IRCA did not exist at the time of *Sure-Tan*, the Second Circuit held that *Sure-Tan* was still controlling.[123] The court interpreted *Sure-Tan's* prohibition on backpay for employees "legally unavailable for work" to apply only to workers who left the country and to workers who failed to prove legal work status *after a reasonable time*.[124] The difference between this interpretation and the Seventh Circuit's is key. The Seventh Circuit would deny backpay until proper papers are presented, while the *A.P.R.A.* decision allows workers to collect before showing documentation.[125] The court pointed

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[122] *See A.P.R.A.*, 134 F.2d at 53. The Board's opinion was actually quite comprehensive, and the Second Circuit largely adopted the Board's reasoning in its own opinion. It weighed the *Felbro* interpretation of *Sure-Tan* against that of *Del Rey*, and also considered the impact of the IRCA on the issue. In following *Felbro*, the Board relied primarily on policy considerations. Because *Felbro* better served the policy of industrial stability which the NLRA was enacted to ensure, the Board chose its rationale over that of *Del Rey*. Although *Felbro* was decided before the passage of the IRCA, the NLRB still found the case to be valid authority; the Board looked to the legislative history of the IRCA, and found that Congress had no intent to alter "in any way labor protections in existing law." A.P.R.A. Fuel Oil Buyer's Group, 320 N.L.R.B. 408, 413 (1995). Therefore, *Felbro* was not rendered obsolete by the passage of the IRCA. The Board also exhibited admiration for Judge Cudahy's dissent in *Del Rey*. *See id.* at 412-16. In fact, Member Browning dissented in part, arguing that the Board's remedy was not comprehensive enough, since it failed to address the harm done to the Union by the firings. *See id.* (Browning suggested that it was unlikely that the workers, lacking documentation, would ever be reinstated – and that the Union had therefore suffered irreparable damage.) *See id.* at 417-18 (Browning, Member, dissenting). Member Cohen's dissent could not have been more different from Browning's. Cohen accepted the *Del Rey* interpretation of *Sure-Tan*, and maintained that "it is immaterial whether the discriminatees had left the country . . . the result was the same, i.e., no backpay for periods when the discriminatees were not lawfully entitled to work." *Id.* at 419 (Cohen, Member, dissenting). Cohen argued that the majority's policy argument was rendered moot by the fact that the law was contrary to their position. *See id.* (Cohen, Member, dissenting). Furthermore, he pointed out a major inconsistency in the majority's argument; why, Cohen asked, does the majority allow discriminatees to claim backpay during periods in which they were undocumented, but at the same time limit reinstatement to only those discriminatees who can show proper documentation? *See id.* (Cohen, Member, dissenting). Cohen's dissent provides the most cogent argument against the *A.P.R.A.* interpretation of the law, and has been cited to by opponents of *A.P.R.A.* as often as the Seventh Circuit's *Del Rey* opinion.

[123] *See A.P.R.A.*, 134 F.3d at 54. In doing so, the Second Circuit followed the Board's logic: since the IRCA was not intended to alter the remedies and rights provided by the NLRA, pre-IRCA caselaw should still be considered valid. *See supra* note 122. *See also A.P.R.A.*, 134 F.3d at 54, 58. This premise was rejected by Judge Jacobs' dissent. *See infra* note 133.

[124] *See A.P.R.A.*, 134 F.3d at 54, 58.

[125] *See id.* at 55. In essence, the difference between the two approaches is one of timing; the Seventh Circuit would immediately place the burden to prove the right to work on the discriminatees, while the Second Circuit would allow the discriminatees time to demonstrate their legal status. If after a reasonable time the workers cannot produce proof of their legal

to both *Felbro* and its own decision in *Rios v. Local 638*[126] to support its interpretation of *Sure-Tan*.[127]

The court next examined the impact of the IRCA on NLRA remedies. The majority ruled, much like Brennan, *Felbro*, and the Cudahy dissent in *Del Rey*, that the policy concerns which prompted the passage of IRCA (primarily the impulse to protect American jobs from perceived immigrant hordes) would be contradicted by a decision which held that undocumented workers unjustly terminated for union activity could not collect backpay.[128] The court reasoned that if undocumented workers were provided the same protection under the NLRA as other employees, "unscrupulous employers" would have no incentive to hire undocumented workers.[129] In addition, the court found in the legislative history of IRCA no intention to alter *Sure-Tan*.[130] The court flatly criticized *Del Rey*'s contrary interpretation as a blatant misreading of the law.[131] The court held that *Del Rey* both misinterpreted *Sure-Tan* and the Congressional intent in enacting IRCA.[132]

The dissent understood *Sure-Tan* to prohibit backpay to anyone who was not eligible to work in the U.S.[133] Ignoring Judge Cudahy's explanation of the *Sure-Tan* language,[134] Judge Jacobs adhered to the "plain language" interpretation of *Sure-Tan*.[135] In addition, he agreed with the *Del Rey* majority

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status, their backpay will be terminated. But the fact that such workers are guaranteed *some* backpay ensures that there will be less incentive for employers to hire (and then discriminate against) undocumented workers. This approach comports well with the policy argument advanced not just here, but by both the *Sure-Tan* majority and dissent – that backpay remedies serve as a disincentive to: a) firing employees for their protected section 7 activities; and b) hiring undocumented workers.

[126] 860 F.2d 1168 (2d Cir. 1988) (applying the Ninth Circuit's holding in *Felbro* without any discussion of the IRCA's impact on the problem).

[127] *See A.P.R.A.*, 134 F.3d at 56.

[128] *See id.* at 57.

[129] *See id.* at 57-58.

[130] *See id.* at 56.

[131] *See id.* at 57-58. The court pointed to the legislative history to debunk the Seventh Circuit's implied claim that the IRCA was intended to invalidate *Felbro* and codify a *Del Rey* interpretation of *Sure-Tan*:

> The Seventh Circuit . . . discuss[ed] IRCA with the assumption that Congress understood *Sure-Tan* as it did and endorsed that understanding when it passed IRCA. Nothing in the statute or its legislative history suggesting that Congress preferred either the Seventh or Ninth Circuit's understanding of *Sure-Tan* has been called to our attention.

Id. at 58.

[132] *See id.*

[133] *See id.* at 61 (Jacobs, J., dissenting).

[134] *See supra* note 114.

[135] *See A.P.R.A.*, 134 F.3d at 61 (Jacobs, J., dissenting).

that the IRCA prohibits backpay to undocumented workers;[136] but because he realized the negative policy implications necessarily associated with denying backpay to a broad class of discriminatees, he grudgingly would have allowed undocumented workers to obtain backpay once they had obtained documentation.[137] This scheme represents no real change from the position of the *Sure-Tan* majority, and poses the same troubling policy consequences.

C. Hoffman Plastics Compounds, Inc.

Hoffman Plastics Compounds, Inc.[138] was the first case decided by the Board in the wake of the split between the Second and Seventh Circuits. While it provided a clear indication of the direction in which the NLRB was going to proceed in regards to cases involving the remedies of undocumented workers, it failed to explain the reasons that the Board was taking that course.

In deciding a case where an undocumented worker was terminated for his union activities the Board relied extensively on the recently decided *A.P.R.A.*[139] Although the worker in *Hoffman* was not eligible for reinstatement, he did receive backpay under the structure described in *A.P.R.A.*[140] The Board did not even mention *Del Rey* in coming to a decision in the case.[141] While this is somewhat instructive, as it indicates the Board's preference for the *A.P.R.A.* regime, it does not explicitly explain to the public *why* the NLRB prefers *A.P.R.A.*[142] For this reason, *Kolkka* and especially

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[136] Jacobs claimed that the IRCA "altered the premise that underlay the Ninth Circuit's decision in *Felbro*," but failed to explain exactly how the IRCA accomplished this. *Id.* (Jacobs, J., dissenting). He did not address the majority's contention that the IRCA had no effect whatsoever on the issue of remedies for undocumented discriminatees.

[137] *See id.* at 62 (Jacobs, J., dissenting).

[138] Hoffman Plastic Compounds, Inc., 326 N.L.R.B. No. 86 (Sept. 23, 1998).

[139] *See id.* at *2. The Board stated that the scheme outlined in *A.P.R.A.* was "the most appropriate way to harmonize the statutes [the IRCA and NLRA]." *Id.*

[140] *See id.* The Board clarified the method in which backpay is to be administered: "[B]ackpay should be tolled either as of the date the discriminatees are reinstated subject to compliance with the respondent employer's obligations under IRCA or when, after a reasonable period of time, they fail to produce the documents required by IRCA." *Id.*

[141] The ALJ briefly mentioned *Del Rey* in his decision, but ruled it to be inapplicable because the discriminatees involved in the case were hired prior to the passage of the IRCA. *See id.* at *27.

[142] The preference for *A.P.R.A.* can be inferred, however, from the Board's discussion of the policy benefits extending from the *A.P.R.A.* holding. The terseness of the majority is echoed in the extremely brief dissent offered by Member Hurtgen. In the dissent, Hurtgen simply states that *Sure-Tan* is controlling, that *Sure-Tan* prohibits backpay "during any period in which [employees] were not lawfully entitled to be present and employed in the United States," and that backpay to undocumented discriminatees is therefore inappropriate. *See Hoffman*, 326 N.L.R.B. at 3-4 (Hurtgen, Member, dissenting). Hurtgen's later dissent in *County Window Cleaning*, *infra* section III.E, is slightly more fleshed out.

County Window Cleaning are more useful for study;[143] neither case, however, provides a detailed comparison of *Del Rey* and *A.P.R.A.* The Board's rationale for favoring *A.P.R.A.* must therefore to a large degree be inferred from the Board's view on the policy considerations surrounding the issue.

D. NLRB v. Kolkka

Coming on the heels of *Hoffman*, which confirmed the Board's preference for the *A.P.R.A.* holding over that of *Del Rey*, *Kolkka* continued the recent trend in favor of protecting undocumented workers' NLRA rights. Although the case does not discuss remedies for unfair discharge, it is further evidence of support for the Second Circuit's *A.P.R.A.* framework of the *Del Rey* rationale. Unfortunately, like *Hoffman*, *Kolkka* does not discuss in any detail the court's reasons for disagreeing with *Del Rey*.

John Kolkka, sole proprietor of a California sauna manufacturer, discharged several undocumented employees in a supposed attempt to comply with IRCA.[144] The terminated employees were all supporters of a union campaign, and Kolkka reinstated the workers after the union filed unfair labor practice ("ULP") charges, but then challenged the NLRB representation election (which the union won) based on his doubt that the workers had the right to work in the U.S. under the IRCA.[145] The Board held that the challenged ballots were valid, despite the fact that the employees were undocumented.[146] In affirming the Board's order upholding the challenged ballots, the Ninth Circuit relied on the same foundations as did the majority in *A.P.R.A.* and the dissent in *Del Rey*: the public policy goals of IRCA and the NLRA and the narrow interpretation of *Sure-Tan*.[147] In fact, the decision explicitly endorses the *A.P.R.A.* interpretation of *Sure-Tan* in asserting that undocumented workers are still "employees" in the wake of the IRCA.[148] In addition, the court considered public policy by preventing unscrupulous employers from knowingly violating the IRCA and exploiting undocumented workers, while

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[143] While the *Hoffman* decision fails to explain the rationale behind the Board's approach to cases involving undocumented discriminatees, the D.C. Circuit's opinion affirming the decision and the court's subsequent decision to vacate its affirmation are extraordinarily important. *See infra* section IV.G.

[144] *See* NLRB v. Kolkka, 170 F.3d 937, 939 (9th Cir. 1999).

[145] *See id.* at 939.

[146] *See id.*

[147] *See id.* While not rejecting *Del Rey* by name, the court noted that the denial of backpay and reinstatement remedies would reward employers "for violating the IRCA through the hiring and continued employment of unauthorized aliens." *Id.* at 941.

[148] *See id.* at 940-42.

all the while planning to hide behind the IRCA should they wish to fire union-supporting employees.[149]

E. County Window Cleaning Company

In 1992, an undocumented worker was hired by the employer.[150] The employer was aware that the worker did not have the proper working papers at the time that he was hired.[151] Two years later, it became even more apparent that the worker was employed under a false Social Security number, but the employer chose to allow the worker to continue his employment.[152] In early 1996, however, the employer terminated the worker after the worker chose to support a union. The pretextual reason for the firing was the worker's undocumented status.[153]

An ALJ ordered backpay and reinstatement for the worker pursuant to *A.P.R.A.*[154] He rejected *Del Rey* as incompatible with *A.P.R.A.*, which "is determinative of [the] decision."[155] *A.P.R.A.*, writes the ALJ, balances the interests of Congress embodied in both the IRCA and the NLRA.[156] The ALJ rejected the employer's argument that backpay is illegal where the initial employment relationship is illegal.[157] The Board upheld the award, again relying on *A.P.R.A.*[158] A dissent by Member Hurtgen, similar to his earlier dissent in *Hoffman*, challenged the backpay award under the plain language test of *Del Rey*.[159]

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[149] *See id.* at 942.

[150] *See* County Window Cleaning Co., 328 N.L.R.B. No. 26 (Apr. 30, 1999).

[151] *See id.* at 4.

[152] *See id.* at 5.

[153] *See id.*

[154] *See id.*

[155] *Id.* at 5-6.

[156] *See id.* at 8.

[157] *See id.* at 10. To support his argument, the employer had cited to an EEOC policy statement that recommended the elimination of backpay awards to undocumented workers. The ALJ rejected the cross-agency application of the policy statement, and held that *A.P.R.A.* was in fact more representative of Board policy goals than was the EEOC statement. *See id.*

[158] In endorsing the ALJ's decision and order, the Board made it clear that the *A.P.R.A.* court had correctly interpreted the meaning of *Sure-Tan*'s "lawfully entitled to be present and employed in the United States." *Id.* at 1 n.2.

[159] *See id.* at 2-3 (Hurtgen, Member, dissenting). He dismissed *A.P.R.A.* as simply "less persuasive" than *Del Rey*. *Id.* (Hurtgen, Member, dissenting). Hurtgen also cited to Member Cohen's more elaborate dissent in the Board decision of *A.P.R.A.* *See id.* (Hurtgen, Member, dissenting). *See also supra* note 142.

F. Regal Recycling, Inc.

In *Regal Recycling Inc.*, the trend of two-to-one NLRB decisions in undocumented discriminatee cases continued.[160] The majority endorsed an ALJ order that made seven discriminatees whole, relying on *A.P.R.A*; the dissent pointed to *Del Rey* and the "plain-language" interpretation of *Sure-Tan*.

Regal Recycling had a collective bargaining agreement with Laborers Local 445, but as the ALJ later found, the employees had no idea that they were represented by Local 445.[161] Consequently, in the summer of 1992 the employees began an organizing drive for Teamsters Local 813.[162] Local 813 obtained authorization cards from a majority of the employees, but one of the two owners of Regal refused to recognize Local 813 (due to their existing agreement with the Laborers' local).[163] After a few unproductive meetings with the employees, the owners threatened to close the plant if the employees continued the organizing drive for Local 813, and informed the employees that they would be required to show documentation of their legal status the next day.[164] The next day, seven employees (all Local 813 supporters) were told that they could not return to work until they had shown proof of their eligibility for work.[165]

The Board affirmed the ALJ's finding that the employees were discriminated against based on their union activity. Following *A.P.R.A.*, the Board held that undocumented discriminatees are "employees" like any others and therefore are entitled to the make-whole remedies of backpay and reinstatement, subject to the restrictions placed on them by *A.P.R.A.*[166]

Member Brame dissented, relying primarily on Member Cohen's dissent in *A.P.R.A. Fuel Oil*.[167] Brame termed the prospect of backpay for undocumented

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[160] *See* Regal Recycling, Inc., 329 N.L.R.B. No. 38 (Sept. 30, 1999).

[161] *See id.* at *1. Local 445 had also entered into a union security agreement with the employer, a provision of which the employees were of course ignorant. It appears from these facts that Local 445 and Regal were participants in a "sweetheart deal" of the variety prohibited by section 8(a)(2) of the Act. *See id.*

[162] *See Regal Recycling*, 329 N.L.R.B. at *1 n.6.

[163] *See id.*

[164] *See id.* at *2.

[165] *See id.*

[166] *See Regal Recycling*, 329 N.L.R.B. at *2-3. The ALJ, curiously enough, based his proposed remedy on the overruled Board opinion in *Del Rey Tortilleria*, 302 N.L.R.B. 216 (1991). The Board modified it (in accordance with *A.P.R.A.*) to provide that the reinstatement be conditioned upon proof of eligibility to work, and that backpay be issued for the period beginning with the employee's unlawful termination, and ending when the employee is either reinstated or has exhausted the "reasonable time" allotted to prove eligibility. *See id.*

[167] *See id.* at *6-7 (Brame, Member, dissenting) (citing A.P.R.A. Fuel Oil Buyer's Group, 320 N.L.R.B. 408, 419-20 (1995)).

discriminatees as "a windfall to the individual who has entered the country and worked illegally, as well as an incentive to others to follow the same path."[168]

G. Hoffman Plastic Compounds, Inc. v. NLRB

Two years after the NLRB issued its opinion in *Hoffman*,[169] the D.C. Circuit affirmed the Board's application of the *A.P.R.A.* remedial structure.[170] In a two-to-one decision written by Judge Tatel,[171] the court engaged in a detailed analysis of the rights and remedies available to undocumented discriminatees under the NLRA.

The *Hoffman Plastic Compounds, Inc.* majority opinion is remarkably comprehensive. Rather than simply deferring to the Board, the court conducted a substantial analysis of the caselaw pertaining to undocumented discriminatees. The opinion first sought to demonstrate that the *A.P.R.A.* analysis was in fact based in a correct reading of the Supreme Court's decision in *Sure-Tan*. Taking the offensive, the court posited that *Sure-Tan* could be read to prohibit all backpay to undocumented discriminatees only if one sentence was from the opinion was read out of context: "In computing backpay, the employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present and employed in the United States."[172] The majority held that this single sentence was at odds with the remainder of *Sure-Tan*'s discussion regarding the appropriateness of backpay, and therefore could not be viewed as a bright-line rule eliminating backpay awards to undocumented workers.[173] In fact, the court argued, the Supreme Court intended to ensure that most undocumented discriminatees *would* receive backpay; this narrow reading of *Sure-Tan* holds that the *Sure-Tan* discriminatees were exempted from backpay only due to the fact that they had physically left the United States after their termination.[174]

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[168] *Id.* at *7 (Brame, Member, dissenting). Member Brame did not rebut Judge Cudahy's assertion that "[i]llegal aliens do not come to this country to gain the protection of our labor laws. They come here for jobs." Del Rey Tortilleria, Inc. v. NLRB, 976 F.2d 1115, 1125 (7th Cir. 1992) (Cudahy, J., dissenting).

[169] *See supra* section IV.C.

[170] *See* Hoffman Plastic Compounds, Inc. v. NLRB, 208 F.3d 229 (D.C. Cir. 2000).

[171] Judge Tatel was joined by Judge Rogers. Judge Sentelle dissented. *See id.* at 229.

[172] *Id.* at 234 (citing Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 903 (1985)).

[173] *See id.*

[174] *See id.* at 236. The court detailed multiple instances where the *Sure-Tan* opinion approved of the practice of awarding backpay to undocumented discriminatees. *See id.* For example, according to the D.C. Circuit, the Supreme Court wrote that it "generally approves the Board's original course of action in this case by which it ordered the conventional remedy of backpay." *Id.* (citing *Sure-Tan*, 467 U.S. at 902). Other phrases that the *Hoffman Plastic*

After concluding that *Sure-Tan* supports awards of backpay for undocumented discriminatees, the *Hoffman Plastic Compounds, Inc.* majority briefly analyzed the relevant circuit court decisions. The court noted that the majority of circuits that had addressed the question agreed that undocumented discriminatees were entitled to backpay; *Del Rey* was dismissed as an anomaly.[175]

The majority concluded its opinion by discussing the impact of the IRCA on the rights of undocumented discriminatees. In holding that any such impact was minimal, the court noted that Congress appeared to have intended not to affect the administration of the NLRA.[176] The majority also pointed to the decision of the Second Circuit in *A.P.R.A.* and to multiple NLRB decisions to support its argument that the IRCA serves to supplement, not contradict, the NLRA.[177] Finally, those same cases (and others) were cited to bolster the court's contention that policy considerations mandate an interpretation of the IRCA that allows backpay awards to undocumented discriminatees.[178]

Judge Sentelle's dissent challenges the majority's assertion that *Sure-Tan* permits awards of backpay to undocumented workers.[179] Sentelle argues that "[r]ead in context, read out of context, or read both ways and compared, the majority is left with no way of dealing with the High Court's plain statement [that employees are legally 'unavailable' when not 'lawfully entitled to be present and employed in the United States']."[180] He dismisses the majority's detailed analysis of the rest of the *Sure-Tan* opinion as a "rewriting" of the

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Compounds, Inc. majority claimed indicated the Court's willingness to allow backpay awards to undocumented discriminatees include: discussion of "the proper minimum backpay award;" and "the period of time these particular employees might have continued working before apprehension by the INS." *Id.* These qualifying statements, argued the court, demonstrated that the Supreme Court believed it often appropriate to award backpay to undocumented workers who had been terminated in violation of the NLRA. *See id.* at 236-37.

[175] *See id.* at 237-38.

[176] *See id.* at 239-40. The reports of the House Judiciary and Education & Labor Committees do appear to indicate that the IRCA was crafted to avoid any effect on the powers of the NLRB vis-à-vis undocumented discriminatees. *See id.* "In particular, the employer sanctions provisions [of the IRCA] are not intended to limit in anyway the scope of the term 'employee' in [s]ection 2(3) of the NLRA . . . or of the rights and protections stated in Section 7 and 8 of that Act." *Id.* at 239 (citing H.R. Rep. 99-682(I) at 58 (1986)).

[177] *See id.* at 241.

[178] *See id.* at 241-42. The majority's policy argument closely mirrors the reasoning of Judge Cudahy's dissent in *Del Rey* and the majority rationale in *A.P.R.A.*; to wit, the availabily of a backpay remedy for undocumented discriminatees decreases the incentive to hire undocumented workers. *See id.* at 242. *See also Del Rey*, 976 F.2d at 1126 (Cudahy, J., dissenting); *A.P.R.A.*, 134 F.3d at 57.

[179] *See Hoffman Plastic Compounds, Inc.*, 208 F.3d at 253-54 (Sentelle, J., dissenting).

[180] *Id.* at 254 (Sentelle, J., dissenting).

Supreme Court's opinion.[181] Sentelle neither advances nor counters any policy arguments, choosing instead to concentrate solely on an attempt to debunk the *A.P.R.A./Felbro/Hoffman Plastic Compounds, Inc.* interpretation of *Sure-Tan.*[182]

Although Sentelle was unsuccessful in convincing the other members of the panel to agree with his interpretation of *Sure-Tan*, he appears to have had more luck with the other judges of the D.C. Circuit; almost three months after the *Hoffman Plastic Compounds, Inc.* decision was rendered, the D.C. Circuit chose to vacate the judgment and rehear the case en banc.[183] The remedies available to undocumented discriminatees under the NLRA will be greatly affected by the court's en banc decision.

V. ANALYSIS AND CONCLUSION

It is evident that a majority of the Board's members[184] have rejected *Del Rey*'s broad interpretation of *Sure-Tan* in favor of the more narrow approach typified by *A.P.R.A.* In one sense, this is surprising. A "plain reading" of *Sure-Tan* does indicate that backpay shall not be offered to any worker who is not "lawfully entitled to be present and employed in the United States."[185]

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[181] *Id.* (Sentelle, J., dissenting).

[182] *See id.* (Sentelle, J., dissenting).

[183] *See* Hoffman Plastic Compounds, Inc. v. NLRB, 164 L.R.R.M. 2814 (2000).

[184] Of the current Board, three members (Chairman Truesdale, Fox, and Liebman) have endorsed *A.P.R.A.*'s construction of the appropriate remedies available to undocumented discriminatees. Two members (Hurtgen (in both *Hoffman* and *County Window Cleaning*) and Brame (in *Regal Recycling*)) have explicitly rejected *A.P.R.A.*, and supported the interpretation of the law found in Member Cohen's dissent in *A.P.R.A.* Thus far, every Board panel that has considered the issue since *A.P.R.A.* has consisted of a majority of pro-*A.P.R.A.* members; this does not mean, however, that a case involving this issue could not be assigned to a three-member panel including both Brame and Hurtgen. The Executive Secretary of the NLRB assigns cases at random to three-member panels, meaning that at some point Brame and Hurtgen are likely to sit together on an undocumented discriminatee case. *See* Donald L. Dotson, *Processing Cases at the NLRB*, 35 LAB. L. J. 3, 4 (1984). If they decide the case in a manner contrary to *A.P.R.A.*, it would almost certainly be appealed – perhaps leading eventually to a Supreme Court resolution of the semi-dormant split between the Circuits. (It is important to note, however, that any Board member may sit on any case – the delegation of Board authority to the three-member panel is not compulsory. It is certainly possible that should Brame and Hurtgen be assigned to such a panel, the other members might also sit so as to prevent a Board decision contrary to *A.P.R.A.* and its progeny.) *See id.* The likeliness of this occurrence is lessened by the fact that Brame's appointment to the Board expires on August 27, 2000. *See* J. Robert Brame, (Nov. 20, 2000) <http://www.nlrb.gov/brame.html>.

[185] The meaning of this phrase, of course, is unclear. The phrase could possibly be read to allow an undocumented worker who is *legally* in the United States (on a student visa, perhaps), to receive backpay, since she is legally present. Still, by tying "availability" to lawful presence

Since the IRCA specifically outlaws employment relationships between employers and undocumented workers, there appears to be only stretched interpretations of the plain language of *Sure-Tan* which would allow backpay to be ordered in union discrimination cases involving undocumented workers. Yet the Board and Courts of Appeals have done just that on multiple occasions, while claiming to continue to defer to the *Sure-Tan* majority opinion as the authority on the issue. How is this possible? Is it positive?

One possible answer lies in Judge Cudahy's *Del Rey* dissent. By demonstrating that the true intent of the controlling language in *Sure-Tan* was to prevent undocumented workers outside of the country from receiving backpay, Cudahy made it difficult for any judge to find that *Sure-Tan* should be read as broadly as it appears at first light. Cudahy's explanation of the language is admittedly muddled.[186] Although he does state that he had no intent of essentially barring backpay and reinstatement to undocumented workers, he cannot explain his motives for choosing words which can be read to do just that. It is not difficult to understand how the Court and subsequent jurists could read the phrase to strictly prohibit any extension of the remedies to undocumented workers. The Board, however, accepted Cudahy's explanation at face value in its decision in *A.P.R.A.*[187] Cudahy's dissent is only a secondary argument for following *A.P.R.A.*, however; the policy considerations are likely more important.

Courts and the Board most likely have favored *A.P.R.A.* due to its well-reasoned policy argument. Unlike the *Del Rey* court, the *A.P.R.A.* majority realized that only by allowing effective remedies for termination of undocumented workers could the intent of the IRCA – preventing the hiring of undocumented workers – truly be effectuated. At the same time, the extension of remedies to undocumented workers helps shore up the NLRA's guiding purpose of guaranteeing industrial peace. Under *A.P.R.A.*, employers are dissuaded not only from hiring undocumented workers, but from exploiting those workers by firing them once they attempt to form unions. This also serves as a disincentive to the employer who prefers undocumented employees; under *A.P.R.A.*, such workers can no longer be fired with impunity.

The key policy question when deciding which remedies should be available to undocumented discriminatees is as follows: Who is more likely to abuse the system? Employers, in a system where there is no backpay remedy available to the illegally fired undocumented worker; or employees, in a system where undocumented workers may collect backpay for a reasonable time following

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in the country, the Court made it difficult to conceive of a manner in which undocumented workers could benefit from remedies.

[186] *See supra* note 114.

[187] *See* A.P.R.A. Fuel Oil Buyers Group, 320 N.L.R.B. 408, 413, 416 (1995).

anti-union discrimination? As Judge Cudahy writes in his *Del Rey* dissent:

> Illegal aliens do not come to this country to gain the protection of our labor laws. They come here for jobs. They can find jobs because they are often willing to work hard in rotten conditions for little money. . . . When we deny backpay to illegal aliens, we tell employers to hire more of them; for aliens who cannot claim monetary damages for unfair labor practices are less expensive to hire and less trouble than their native counterparts.[188]

The only reason to hire undocumented workers instead of U.S. citizens is because the foreigners are perceived as being docile in the face of employer wrongdoing. Once the protections that American workers enjoy are extended to undocumented workers, the incentive to hire such employees disappears. While *A.P.R.A.* may not appear to follow *Sure-Tan* to the letter, and while it may on the surface appear to contradict the goals of the IRCA, the case best addresses the real world policy concerns of both labor and immigration law. This was a truth recognized by the majority in *Hoffman Plastic Compounds, Inc.*, but one that will soon be questioned by the entire D.C. Circuit. Should that court choose to reverse the Board's *Hoffman* decision, the Supreme Court may be called upon to reconcile the split in the circuits. Perhaps it is only then that the meaning of "lawfully entitled to be present and employed" will finally be divined.

John R. McIntyre[189]

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[188] Del Rey Tortilleria, Inc. v. N.L.R.B., 976 F.2d 1115, 1125 (7th Cir. 1992) (Cudahy, J., dissenting).

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